

Real Estate 2021

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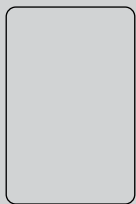
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Real Estate 2021

Contributing editors**Patrick Williams and Devina Rana****Fried, Frank, Harris, Shriver & Jacobson LLP**

Lexology Getting The Deal Through is delighted to publish the fourteenth edition of *Real Estate*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Finland, Indonesia, Ireland, Spain, United Arab Emirates and Vietnam.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Patrick Williams and Devina Rana of Fried, Frank, Harris, Shriver & Jacobson LLP, for their continued assistance with this volume.



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GENERAL

Legal system

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

Nine federal states form the democratic Republic of Austria, which has been a member of the European Union since 1995.

Constitutional law regulates the distribution of competences between the national, federal and local governments with regard to the respective legal matter. National or regional laws must be consistent with constitutional law and the law of the European Union.

Austria has a civil law system. Case law is not binding. The parol evidence rule is not applicable in the civil law system.

The Austrian legal system provides for several forms of injunctions to ensure temporary legal protection.

Judges are independent and not bound by instructions. In their decisions, they are only bound by the law and may not make arbitrary decisions. Legal protection institutions are available to verify the lawfulness of legal norms as well as official and judicial decisions.

Real estate law is a cross-sectional matter for which many different provisions are relevant. Important regulations can be found, for example, in the Austrian Civil Code (ABGB), the Tenancy Act (MRG), the Condominium Ownership Act and the Land Register Act. Real estate transactions, however, can further be affected by other legal provisions, such as the law on taxes and fiscal charges as well as antitrust or labour law. The relevant regulations for foreign real estate investors are those of the federal provinces governing land purchase by foreign nationals.

Each federal state has different building regulations, which are laid down in the respective building code. Regional planning, development and zoning are characterised by a multitude of different competencies and a highly hierarchical structure.

A contract is concluded by concurring declarations of intent of (at least) two persons. The declarations of intent can be explicit or conclusive. Contracts can also be concluded orally. Usually, no special formal requirements apply. In the case of real estate transactions, however, specific formal requirements must be met for entry in the land register.

Land records

2 | 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?

In Austria, the land register is a public register kept by the district courts. It consists of the main register and the collection of documents. All properties in Austria and the rights in rem to the same are recorded in the land register. Everyone has a right to inspect the land register and obtain excerpts and transcripts.

With very few exceptions, rights in rem to real property can only be acquired by way of registration in the land register. In principle, bona fide acquirers of properties may rely on the accuracy and completeness of the land register when it comes to registration of the legal transaction.

Only specific rights can be registered in the land register, primarily rights in rem, such as title, building rights, liens, easements and land charges. Certain rights to claim may also be registered, thus becoming rights in rem. These include repurchase rights, rights of first refusal and the prohibition to encumber or sell property, as well as tenancy rights for a definite term. Leases do not have to be registered in the land register to be enforced.

The land register follows the principle of 'first come, first served'. The rank or priority will depend on the time at which the application for the registration of a right is received by the land register court.

Registration and recording

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

Applications and required documents must be filed electronically with the competent land register court by attorneys-at-law or notaries. Acquiring a registered right by way of registration typically requires the following documents to be provided:

- an appropriate document evidencing the acquisition of the right. This may be a public or a private document. Private documents must meet the general prerequisites for registrations in the land register;
- an express statement by the person whose right is to be restricted, encumbered, cancelled or transferred to another person (Statement of consent to registration);
- a statement by which payment of the relevant taxes (real estate transfer tax and land register registration fees) is evidenced;
- proof of citizenship; and
- if applicable, a permit according to the law on the acquisition of real estate by foreigners.

To register a new mortgage in the land register, a notarised mortgage deed and a declaration from both parties accepting the registration is required. A separate registration fee must be paid.

Foreign owners and tenants

4 | 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?

The relevant regulations for real estate investors are those of the federal provinces governing land purchase by foreign nationals. Natural persons from and entities in member states of the European Union or

signatory states of the Agreement on the European Economic Area have the same status as domestic persons and entities.

The transfer of property rights to foreign investors may be subject to approval under the respective law on land acquisition by foreigners. Every federal province in Austria has its own provisions and regulations. Therefore, the restrictions in this regard and the approval procedure for the acquisition of land plots by foreign investors may vary depending on where the target property is situated. Without the required approval, a transfer of ownership cannot be registered in the land register. As the piece of real estate is usually only acquired by registration in the land register, such approval is mandatory. Natural persons from and entities registered in member states of the European Union or signatory states of the Agreement on the European Economic Area have the same status as domestic persons and entities.

The transfer to foreign investors of property rights concerning infrastructure possibly affecting public security or order requires the prior approval of the Austrian Federal Minister for Economic Affairs, Family and Youth.

Exchange control

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

In general, regulations regarding measures to prevent money laundering and terrorist financing have become stricter in recent years. The banks involved in the transaction are increasingly demanding and checking documents proving the origin of funds. As a real estate transaction is generally classified as 'money laundering-prone' under national regulations, the identity of the respective investors must also be established beyond doubt.

Where a foreign investor is involved in real estate and asset transfers exceed €100,000, these must be reported to the National Bank of Austria. Furthermore, there are exchange control regulations regarding confiscation in cases of money laundering and terrorist financing.

Legal liability

6 | 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?

The Austrian legal system provides for two types of liability: on the one hand, liability can arise from unauthorised actions (tort liability). On the other hand, liability can arise from breach of contract (contractual liability). Only unlawful and culpable behaviour leads to liability.

The injuring party is obliged to compensate the injured party for the damage suffered.

The owners of dangerous objects (which can also be buildings) have an increased duty of care. In fact, owners of real estate can also be held liable under the liability of the owner of the road.

Protection against liability

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

To protect the purchaser from potential liability cases, a due diligence check is strongly recommended before buying a property. The due diligence for a plot of land should focus on legal, economic and tax related questions as well as technical questions and on questions regarding the quality of the plot of land. The aim is to identify potential liability risks. From a legal perspective, it is important to check the land register, the register of contaminated sites and the register of suspected contaminated sites. Furthermore, all property-related contracts should be analysed.

In addition, it is advisable to take out appropriate liability insurance (eg, building insurance).

To limit personal liability, a legal entity with limited liability such as a limited liability company or a stock corporation may be established.

Choice of law

8 | 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?

In principle, the contracting parties can choose the law applicable to the respective real estate transaction themselves. This does not apply to the respective rights in rem for real estate located in Austria. These rights are always subject to Austrian law. If the parties have not contractually agreed on the applicable law, Austrian law is generally applicable to transactions concerning property located in Austria.

Jurisdiction

9 | 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?

Foreigners have legal capacity in Austria.

Statutory rules govern the jurisdiction of the courts: If a claim can be filed in Austria, it is clear beforehand which court and which judge has jurisdiction. Regarding civil law disputes, the amount in dispute generally determines the competent court. As a rule, the district courts or – if the value limit exceeds €15,000 – the provincial courts as courts of first instance have jurisdiction. However, tenancy law cases exceeding the value limit are also heard by district courts.

In addition, the regional court where the property is located may have exclusive jurisdiction.

Commercial versus residential property

10 | 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 regulated by the ABGB and the MRG. In the case of both residential and commercial real estate, it is thus relevant in the first place whether the contract is subject to the MRG or not. The few tenancy law provisions contained in the ABGB are largely non-binding and can be freely negotiated by the parties. The MRG aims to protect the tenant and therefore provides for mandatory provisions.

Planning and land use

11 | 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?

With regard to the strategic development of cities and regions, specialised concepts and urban development plans are elaborated by the responsible authorities. These have a strategic character and set the direction of urban and regional development.

The construction of real estate is subject to the respective building regulations, such as zoning plans and building codes. These vary from state to state. Therefore, the requirements for obtaining a building permit vary depending on the location of the property to be built.

Existing structures are protected in particular under the Monument Protection Act.

Government appropriation of real estate

12 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?

The right to inviolability of property is a fundamental right in Austria and is thus protected in particular. This constitutional right also applies to foreigners.

Therefore, expropriations may only be carried out if certain strict conditions are met. Compensation is to be paid to those affected.

The foreclosure of a property may also only be approved if certain conditions are met. The foreclosure is a long-term procedure that aims to satisfy the obligee's claims from the proceeds of the auction.

Forfeiture

13 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 seizure of real estate is possible if certain conditions regulated by law apply (eg, to prevent illegal activities, in particular terrorist activities).

Bankruptcy and insolvency

14 Briefly describe the bankruptcy and insolvency system in your jurisdiction.

The Austrian Insolvency Code provides for the orderly liquidation of financial relationships in the event of the economic failure of a company (or even of a natural person not operating a company). For insolvency proceedings to be opened, a material insolvency on the part of the debtor must exist. The aim of the insolvency proceedings is to ensure that the (unsecured) creditors are equally satisfied. Another essential purpose of these proceedings is the restructuring concept of insolvency law.

In the course of insolvency proceedings, a restructuring plan may be elaborated for the purpose of restructuring. In the restructuring process, the debtor may also opt for self-administration if certain conditions apply.

If the application for opening insolvency proceedings is filed without submitting the restructuring plan at the same time, the insolvency proceedings are referred to as bankruptcy proceedings. However, the debtor has the option to apply for the acceptance of a restructuring plan until the end of the proceedings.

When publicly announcing the opening of insolvency proceedings, it must be explicitly stated whether it is bankruptcy or restructuring proceedings.

INVESTMENT VEHICLES

Investment entities

15 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?

The law defines the legal forms that enterprises may take in Austria. A basic distinction is made between partnerships and corporations.

Partnerships may be established by at least two parties either as a general partnership (OG) or a limited partnership. All partners of an OG

are liable personally and without limitation (ie, with their entire private assets) for the company's liabilities, while in the case of a limited partnership, the liability of at least one partner is limited.

A limited liability company can be set up by one or more individuals as well as legal entities, which in general are not personally liable for the liabilities of the company. The limited liability company is the most popular legal entity form chosen in Austria, in particular for small and medium-sized companies, but many top Austrian companies are also run as limited liability companies.

The shareholders of a stock corporation are generally also not liable with their private assets for the company's liabilities once they have paid up their share. The only capital available to the creditors is the company's assets.

In addition to corporate law, tax law aspects must also be taken into account when choosing the legal form of a company. Likewise, the costs of the establishment resulting from the legal requirements and regulations as well as the running costs that the respective company form involves are to be considered when selecting the legal form.

Foreign investors

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

The limited liability company is the most popular legal entity form chosen in Austria, in particular for small and medium-sized companies, but many top Austrian companies are also run as limited liability companies. Fewer formalities need to be observed in the case of a limited liability company compared with a stock corporation. Both the limited liability company and the stock corporation can be established by one or more individuals as well as legal entities. The shareholders are generally not personally liable for the company's liabilities.

Organisational formalities

17 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?

Limited liability companies and stock corporations are formed by way of entry in the commercial register. Both can be established by one or more individuals as well as legal entities. The minimum share capital required to establish a stock corporation is €70,000. A supervisory board is mandatory for stock corporations. Therefore, the ongoing costs of a stock corporation are higher due to its legal structure compared with the ongoing costs resulting from the legal structure of a limited liability company.

In recent years, several efforts have been made to facilitate the establishment of a limited liability company. In general, the minimum share capital amount is €35,000, of which at least €17,500 must be contributed. In 2014, the option to limit the share capital to €10,000 for up to 10 years has been introduced. At least €5,000 of this limited share capital must be contributed (incorporation privilege). Moreover, from January 2018 until the end of 2020, a one-person company can also be established without a notary (simplified establishment).

With regard to taxation, a tax rate of 25 per cent applies to profits generated from limited liability companies and stock corporations (corporate income tax). The capital gains tax rate is 27.5 per cent. Individuals (such as shareholders of a general partnership or a limited partnership) are taxed on a personal level according to a progressive taxation system. The maximum tax rate is 55 per cent.

There is no general answer to the question of which structure should be chosen for a real estate transaction in terms of (tax) law; it must rather be assessed on a case-by-case basis.

Both corporations and partnerships with no individual as a partner with unlimited liability are obliged to file an annual financial statement. In the case of delayed filing of such a statement, the commercial court will impose a monetary penalty.

ACQUISITIONS AND LEASES

Ownership and occupancy

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

In Austria, the following rights in rem are recognised: freehold, fee simple, condominium ownership, building rights, liens (mortgages), easements, servitudes and land charges. Apart from these, rights to repurchase and rights of first refusal or pre-emption rights as well as tenancy rights may also be entered into the land register. Upon registration, these become rights in rem, which may then be enforced also vis-à-vis persons other than the contracting party.

Freehold or fee simple is a full right in rem allowing the holder to arbitrarily use the substance and the uses of an object and to exclude any other person therefrom.

Condominium ownership is the right in rem granted to the co-owner of a property to exclusively use and solely dispose of a separate condominium or other separate space (eg, parking space).

A building right is a right to have a structure on or below the surface of a plot of land owned by a third party. The building right is limited in time and may be established for not less than 10 and not more than 100 years.

A structure that has been established on a third-party's land and is not supposed to remain there forever constitutes a special right referred to as *Superädifikat*. The land plot and the structure may belong to different owners. The *Superädifikat* is originally acquired by way of construction.

Liens are rights in rem granted to a creditor to satisfy the creditor's claims from an object if an obligation is not fulfilled at the time it becomes due. In the case of an immovable object, this is called a mortgage.

Easements or servitudes are limited rights in rem to use a property. They require the owner of the property to tolerate something or to refrain from action. A distinction is made between real servitudes and personal servitudes. Personal servitudes are granted to a specific person. Real servitudes are bound to a specific property and enable the owner of a property to use a third-party property for a specific purpose.

Pre-contract

19 | What are the typical pre-contractual steps?

Frequently, a buyer will present the seller with a non-binding letter of intent (LOI) or a term sheet about the key terms of the transaction. The LOI will be the backbone of the transaction process and should thus be negotiated properly.

To protect the purchaser from potential liability cases, a due diligence check is strongly recommended before entering into a real estate transaction. In the course of the due diligence, economic, tax, legal and technical questions and potential liability risks should be analysed. Relying on specialists in every field as well as obtaining good legal advice is essential to the success of the due diligence.

Preliminary agreements are less common. To be binding, a preliminary agreement must contain all of the essential points of the subsequent main contract and the date on which the main contract will

be concluded. Within one year from the agreed closing date, either party can bring an action for the conclusion of the main contract.

Although oral contracts are also binding on the parties, a transaction document must be issued in accordance with the formal requirements to register an ownership transfer in the land register. The required declaration of conveyance is typically included in the sales contract, which is then executed in notarised form.

Contract of sale

20 | What are typical provisions in a contract of sale?

The acquisition process is concluded with a sales contract. Usually, the lawyer setting up the contract does this in such a way as to protect his client as much as possible. If the sales contract is set up by the seller's lawyer, it is vital that the buyer's lawyer knows how to negotiate the terms so that their client does not give more than necessary.

Sales contracts typically contain the following provisions for a transfer of ownership with regard to real estate or a land-holding entity:

- the parties and the structure of the transaction;
- the declaration of conveyance (in the case of an asset deal);
- the purchase price, including provisions on the payment of value added tax;
- an escrow mechanism;
- conditions precedent to the closing of the transaction;
- representations and warranties; and
- the remedies and penalties available in case of a breach.

Environmental clean-up

21 | 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?

The party causing the pollution is primarily liable for providing remediation and bears the associated costs. However, if the owner of a contaminated property has tolerated the contamination or even consented to it, the owner's legal successors may also be held liable.

Lease covenants and representation

22 | 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?

Typically, the seller of a property provides the following information in relation to existing rental agreements:

- information on the number of leases that have been concluded;
- proof of payment of all stamp fees;
- information about the effectiveness and enforceability of the contracts, as well as about their duration and the applicable termination options;
- information about any impending or already declared terminations of contracts;
- information about any renewal or extension options;
- information on the existence of contractually agreed bank guarantees or deposits;
- information about the amount of the agreed rent payments and operating cost payments;

- information about any payment arrears;
- information about any impending or ongoing legal disputes relating to rental agreements; and
- confirmation of the correctness of previous invoices.

Leases and real estate security instruments

23 | 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?

Leases are not subordinate to a security instrument.

According to the provisions of the Austrian Civil Code (ABGB), a buyer also takes over the existing tenancy agreements when purchasing a property. This provision, however, does not apply to tenancies that are subject to the Tenancy Act (MRG).

With regard to lease agreements, it is thus important to know whether the MRG or the ABGB is applicable.

In the case of a commercial lease, the MRG and its mandatory provisions aimed at protecting the tenant apply to the contract.

On the other hand, these mandatory protective provisions of the MRG do not apply to ground leases.

Delivery of security deposits

24 | 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?

In Austria, security deposits are very common. Usually, the deposit equals three to six months' rent.

The MRG contains special provisions regarding the rent security deposit and its repayment to the tenant. If the deposit is paid in cash, the landlord is usually obliged to invest the amount in an interest-bearing account (eg, a savings account). After termination of the rental agreement, the landlord must immediately repay the deposit, including the interest incurred. The landlord may only withhold or claim the deposit if certain conditions are met.

In case of lease agreements outside the scope of applicability of the MRG, landlords and tenants can agree on the conditions and the amount of the deposit at their own discretion. There is no legal limit to the amount of the rental deposit.

Due diligence

25 | What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? 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?

To protect the purchaser from potential liability claims, due diligence regarding the economic, tax, legal and technical aspects of the target property and the potential liability risks is strongly recommended. The main concern a legal due diligence conducted prior to purchasing a land plot must be the analysis of the information about the property contained in the land register. The information recorded in the land register is

deemed to be correct. As a consequence, a bona fide purchaser will acquire ownership of a piece of real estate even if the seller is wrongfully entered in the land register.

As part of the due diligence, the register of contaminated sites and the register of suspected contaminated sites should also be checked.

If necessary, zoning plans and the provisions of the relevant building code should be analysed as well.

Structural and environmental reviews

26 | 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?

To protect the purchaser from potential liability claims, technical due diligence is strongly recommended. Within the scope of such due diligence, it is relevant to gather information about the quality of the land plot and the building.

Review of leases

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

To gather all information relevant for the purchaser, lease agreements are typically reviewed by lawyers and tax consultants. The business part is usually reviewed by the client, a business consultant or both.

The legal analysis of lease agreements focuses on the following topics:

- general information about the quality of the data, about the information provided and about the answers given to the questions asked;
- applicability of Austrian tenancy law;
- effectiveness and enforceability of the individual contracts;
- duration of the lease agreements, and, if applicable: renewal or extension options;
- termination rights of the tenants;
- contractually agreed bank guarantees or deposits;
- the amount of the agreed rent payments and operating cost payments;
- payment of fees (eg, stamp fees);
- information concerning maintenance obligations;
- information concerning demolition obligations;
- if applicable: operating obligations vis-à-vis the tenants;
- right to rent increases; and
- change of control clauses.

Before starting the due diligence process, it is important to agree with the client on the most relevant topics and define red flags.

During the due diligence process, it is crucial to ask the right questions and request the right documents.

Other agreements

28 | What other agreements does a lawyer customarily review?

Typically, the following documents are reviewed by a lawyer:

- any title documentation concerning the planned real estate transactions;
- any documentation regarding the financial aspects;
- easement agreements;
- material contracts;
- building permits;
- insurance agreements;
- if applicable: brokerage agreements; and
- if applicable: escrow agreements.

Closing preparations

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

In particular, in the case of large transactions, it is very important to keep an eye on the big picture and to organise the entire closing process. To be able to close the deal within the given time frame, the lawyer is often tasked with preparing the exact timetable for the fulfilment of all closing conditions. Before closing, the lawyers check whether all required documents have been presented, whether all conditions have been fulfilled, whether all deliverables have been met, and whether all existing mortgages have been or can be released. More often than not, it is necessary to urge the completion of all required documents. The preparations to be made on the closing day can also take several hours, in particular, if the closing documentation is quite extensive and has to be printed out and checked beforehand.

Closing formalities

- 30 | 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?

At the closing, all parties are usually present in person. However, it is possible to be represented by a representative with a valid special power of attorney. The documents must be signed by hand and the signature must be certified by a notary. Usually, the closing process is prepared and accompanied by the parties' lawyers. Other than that, the presence of further participants is not required.

Contract breach

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

Sales contracts usually contain regulations about a possible breach of contract and the relevant legal consequences (eg, contractual penalties).

Breach of lease terms

- 32 | 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?

The MRG contains a limited number of grounds that entitle a landlord to terminate the lease. One example is the tenant's non-payment of the rent, although not every instance of payment arrears on the part of the tenant entitles the landlord to terminate the tenancy. However, outside the scope of application of the Tenancy Act, further grounds for termination can be agreed between the parties.

If the landlord does not meet his or her obligations (in particular, to provide the tenant with a rental object free from defects), the tenant may be entitled to reduce the rent.

For those rental contracts that are not subject to the MRG, the provisions of the ABGB apply.

FINANCING

Secured lending

- 33 | Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

Mortgages are usually entered in the land register as collateral for real estate financing. Most of the financing in Austria is provided by banks.

In addition to mortgages, the following security instruments exist:

- pledging of shares, accounts, or movable assets; and
- assignment of claims.

Leasehold financing

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

In Austria, it is not common to finance ground or head leases. Nevertheless, if this is a topic to be discussed, there are certainly some possibilities.

Form of security

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

To create a mortgage, the pledgor and the pledgee need to execute a mortgage agreement in writing. The signatures of the parties on the mortgage agreement must be notarised for the mortgage to be entered in the land register.

Valuation

- 36 | Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

Valuation professionals require a special education to get their licence. When searching for such a specialist, the relevant court register can serve as a helpful source, as many specialists are usually registered as court-appointed experts.

To grant a loan, most banks require a real estate valuation. The valuation of the real estate can be done by the bank itself; alternatively, the services of valuation professionals can be used. Valuation professionals can be appointed by the pledgee or by the bank.

Legal requirements

- 37 | 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?

In general, lenders from other jurisdictions can grant loans under the same conditions as Austrian lenders. The prerequisite is that such lenders must have a banking licence that is recognised in the European Union. Loans provided by foreign lenders can also be secured by Austrian real estate collateral.

Loan interest rates

- 38 | 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?

The interest rates are usually determined based on the EURIBOR. What interest rates are legally permissible must always be established on a case-by-case basis, taking into account the circumstances under which the loan is granted. When calculating the legally permissible interest rates, fees and lender costs are not taken into account.

Loan default and enforcement

- 39 | 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?

If a debt is not paid on time or in full, the creditor has the option of taking legal action against the debtor. Existing real estate that is suitable for satisfaction considerably increases the immediate chances of success in debt collection. In court, the creditor has the chance to get an enforceable title. With an enforceable title, a lien on a property of the obligated party or a property share belonging to it can be established at the request of the operating creditor. Acting quickly is particularly important in that matter because the land register follows the principle of 'first come, first served'.

With the foreclosure auction, the property is turned into money. Nevertheless, a much better economic result can often be achieved if the property is realised by way of a legal transaction (possibly in agreement with the operating creditor).

Loan deficiency claims

- 40 | 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?

The difference between the amount recovered in the foreclosure and any outstanding credit balance remains an outstanding obligation. This obligation can be enforced immediately because the enforceable title already exists.

Protection of collateral

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

The lender's collateral can be protected by a lien. This requires the conclusion of a lien agreement, which must meet certain conditions. Certain acts of publicity are also required under Austrian law (eg, book entry).

Recourse

- 42 | 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?

Recourse to the entire assets of the borrower is not provided for. The 'principle of speciality' applies. This means that only certain items can be accessed. Furthermore, the recourse is limited to collateral.

A lien acquired prior to insolvency even gives the creditor the right to separate the pledged property from the debtor's other assets.

If the insolvency proceedings are already pending, no lien can be entered in the land register for the duration of the proceedings.

Cash management and reserves

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

It is not typical in Austria to demand a cash management system. Similarly, lenders usually do not take reserves with regard to real estate financing.

Credit enhancements

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

Among other types of credit enhancement, personal securities, comfort letters and cumulative assumption of debts are common.

Loan covenants

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

It is not possible to give a general answer to this question. The covenants of a loan agreement depend on the respective project and other factors related thereto, such as the results of the due diligence conducted.

Financial covenants

- 46 | What are typical financial covenants required by lenders?

The financial covenants can vary depending on the loan amount. Another key factor is the loan-to-value ratio. For example, debt restrictions and restrictions on the borrower's purchase of new assets, change of control and use of the finance fund are common.

Secured movable (personal) property

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

The security interest in personal movable property can be protected by a lien.

A lien on movable property arises from a pledge agreement. Certain acts of publicity are also required under Austrian Law (eg, book entry, notification of third-party debtor).

Single purpose entity (SPE)

- 48 | 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?

In real estate transactions, SPEs are very common. There are no special regulations regarding the creation of an SPE.

UPDATE AND TRENDS

International and national regulation

- 49 | Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction? (eg, transition to a new alternative benchmark rate upon cessation of LIBOR as benchmark rate?)

Due to the covid-19 pandemic, the interpretation of the legal provisions contained in sections 1104 and 1105 of the Austrian Civil Code (ABGB) is currently being discussed. Based on these regulations, many tenants of bars and business premises suspended rent payments for as long as they had to keep their businesses closed (ie, during the lockdown). The legal discussion deals in particular with the question of whether – depending on the industry – and, if so, to what extent, the tenants are entitled to reduce their payment of rent.

Other current topics are the new legal provisions in the Land Register Act, which came into force on 1 October 2020, as well as the changes and innovations in the Condominium Ownership Act, which we will see in 2021. Other topics discussed were the regulations on short-term rents (Airbnb) and, especially in Vienna, the introduction of the new zoning category ‘subsidised housing’.

Coronavirus

- 50 | What emergency legislation, relief programmes and other initiatives specific to your practice area has been implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Due to the legal measures taken to combat the coronavirus, shops and restaurants had to remain closed for some time (lockdown). This caused great economic damage to the affected tenants.

With regard to real estate law, sections 1104 and 1105 of the ABGB have become the centre of attention during the crisis. These regulations stipulate that a tenant is exempt from the obligation to pay rent if the property cannot be used due to an extraordinary incident (such as fire, water or epidemic).

Many tenants of bars and business premises suspended their rent payments pursuant to these regulations for as long as they had to keep their businesses closed (ie, during the lockdown).

The fact that the property cannot be used does not per se result in the expiration of the lease agreement. However, pursuant to section 1117 of the ABGB, the tenant is entitled to terminate the lease agreement immediately if the property becomes unsuitable for the intended use for an unforeseeable period of time.

Of great relevance is that sections 1104, 1105 and 1117 of the ABGB are in principle dispositive, which means that contractual provisions which provide for other than legal provisions for the present extraordinary circumstances take precedence.



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Certain reliefs have also been created for tenants of apartments. In case of a financial crisis caused by the coronavirus, payments can currently be deferred.

The Austrian government has implemented various measures (eg, financial grants) to aid the companies affected.

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