

# REAL ESTATE

## Austria



# Real Estate

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Quick reference guide enabling side-by-side comparison of local insights, including an overview of the legal system; registration and recording; treatment of foreign owners and tenants and of commercial versus residential property; planning and land use; compulsory purchase or condemnation of real estate; bankruptcy and insolvency; use of investment vehicles; acquisitions and leases, including environmental considerations; financing; and recent trends.

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## GENERAL

### Legal system

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

The democratic Republic of Austria, which has been a member of the European Union since 1995, is a federal state according to article 2(1) of the Constitution. It is composed of nine autonomous countries ( Länder ), which have limited legislative powers and some executive powers, but no separate court systems.

The 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.

The countries cooperate in the legislative activity of the Federation by means of an institution akin to a second house of parliament, the Federal Council, and they participate in the administration of federal law through their own bureaucracies.

Austria is part of the civil law tradition. Therefore, Austrian Private Law is intellectualised within the framework of Roman law. The Codification took place more than 200 years ago, in 1811. In comparison to the Common Law System, Case law is not formally binding.

The judges are independent and not bound by instructions. In their decisions, only the law binds them. Legal remedies are available to verify the lawfulness of legal norms as well as official and judicial decisions. Therefore, in Austria three Supreme Courts exist:

- The Constitution itself establishes a Supreme Court as the highest tribunal in civil and criminal matters;
- The Supreme Administrative Court is the appellate court to which appeals may be made from the decisions of the country's 11 administrative trial courts; and
- The Constitutional Court is the tribunal responsible for judicial review. It verifies, for example, the constitutionality of statutes and the constitutionality of decisions of certain other courts. It is the oldest functioning constitutional court in the world.

Regarding court procedures, the parole evidence rule is not applicable in the civil law system. Several forms of injunctions to ensure temporary legal protections are also provided.

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, the Tenancy Act, the Condominium Ownership Act and the Land Register Act. Real estate transactions, however, can further be affected by other legal provisions (eg, the law on taxes and fiscal charges as well as antitrust or labour law). The relevant regulations for foreign real estate investors (and also agricultural land) are those of the federal states governing land purchases by foreign nationals.

Each country 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.

*Law stated - 15 December 2022*

### 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?

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.

Apart from very few exceptions, rights in rem to real property can only be acquired by way of registration in the land register. The register's information is considered correct and complete with respect to a person who relies on it in good faith.

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 in order 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.

*Law stated - 15 December 2022*

## Registration and recording

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 and/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, permit according to the law on the acquisition of real estate by foreigners.

To register a new mortgage in the land register the following documents must be provided:

- a notarised mortgage deed; and
- a unanimous declaration from both parties accepting the registration.

A separate registration fee must be paid not only for the registration of the right of ownership but also, for example, for the registration of liens. The registration fee is usually paid by the buyer of the property.

*Law stated - 15 December 2022*

## 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?

The relevant regulations for real estate investors are those of the federal states governing land purchases by foreign nationals. 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 of property rights to foreign investors may be subject to approval under the respective law. Every country in Austria has its own provisions and regulations. Hence, the restrictions in this regard and the approval procedure for the acquisition of land by foreign investors may vary depending on the location the property is situated. Without the required approval, the request regarding the transfer of ownership will be dismissed immediately by the competent court.

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.

*Law stated - 15 December 2022*

### **Exchange control**

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 very strict in recent years. The banks involved in the transaction are increasingly demanding and checking documents proving the origin of funds. According to Austrian law, a real estate transaction is generally classified as 'money laundering prone'. Hence, the identity of the respective investors and the source of funds must be verified accordingly. There are exchange control regulations regarding the freezing or even confiscation in cases of money laundering or terrorist financing.

Under certain circumstances, there are notification requirements to the Austrian National Bank for trade statistic purposes, if certain real estate transactions exceed a value of €100,000.

*Law stated - 15 December 2022*

### **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?

The Austrian legal system provides 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).

According to article 1294 ABGB, fault presupposes wrongfulness. In contract law, the burden of proof of fault is generally shifted to the damaging party (article 1298). Article 1313a provides for extensive vicarious liability for auxiliary persons – including independent entrepreneurs – assisting in the performance of contractual or other obligations. The principal is the one who is liable for the fault of the auxiliary person as for their own.

In conjunction with apartments, Austrian law provides for strict liability regardless of fault. According to article 1318

ABGB, the actual owner of an apartment is liable both for damage caused by the falling of a dangerously hung or placed object (in the apartment or on the window beam) and for damage caused by throwing or pouring an object out of the apartment. Persons who actually have the power of disposal over the apartment or room are qualified as apartment owners. The term 'apartment' is to be understood broadly. In addition to the dwelling in the sense of the private 'home', storage rooms, business premises or garages are also covered. According to case law, article 1318 ABGB is also applied analogously to cases in which water damage in neighboring apartments is caused by water that has leaked from one's own apartment, for example, due to an overflowing sink.

If parts (eg, roof tiles, but also roof avalanches) detach from a building or if it collapses, the owner of the building is liable if they have not counteracted this event by observing the necessary care according to article 1319 ABGB. The same applies to owners of 'works listed on a plot of land'. A 'work' can be, for example, scaffolding or a fence. The owner of the building is not liable regardless of fault, in contrast to the provision mentioned above.

Moreover, the person who bears the costs of the construction and maintenance of a road is considered to be the owner. A road is any area of land that is open to the general public or to a limited group of users for any or a specific purpose. This includes, for example, hiking trails, ski slopes, roads or even parking lots, with their associated walls, bridges, plantings or railings. If the path is not in proper condition, the owner is liable only if they have acted intentionally or with gross negligence. At the same time, they are also responsible for 'helpers' that maintain the path – however, this only applies in cases of gross negligence.

Maintenance and repair work can, of course, also be transferred by the owner to independent third parties (eg, snow removal companies). In this case, the duty of care with regard to the individual task is also transferred to the contracted company and the road owner is only liable for a selection and monitoring fault.

If damage occurs due to unauthorised or improper use of the path, the path owner is not liable if the prohibition was made clear by barriers or signs. In cases such as the purchase of a freeway vignette, a contract is concluded in advance with the road owner (freeway operator) and his duty of care arises from the performance of his part of the contract. If the condition of the road is then defective, the user can rely on a contractual liability, which takes precedence over article 1319a ABGB. Here, the road owner is liable for any kind of fault, even in the case of the use of assistants.

Apart from damages due to liabilities, in Austrian law, warranty against defects applies to any non-gratuitous contract for the delivery of goods. Article 922 ABGB defines the term 'defective' as a lack of conformity of the good with the contract which exists at the time of delivery. A lack of conformity comprises deficiencies of title (legal defects), when the debtor is unable to transfer the promised right, and deficiencies in quality and quantity (physical defects), when expressly stipulated or assumed qualities or quantities are absent.

Since 1 January 2022, it is necessary to differentiate between cases where the ABGB or the new Consumer Law (VGG) applies, since they contain different warranty provisions. The VGG will apply exclusively to B2C relations, such as agreements concluded between businesses and consumers, covering:

- contracts for the sale of goods (tangible movable items), including goods that are yet to be produced or manufactured (contracts for work and materials); and
- contracts for the supply of digital services (digital content and digital services, eg, antivirus software). The latter will still come under the scope of the VGG even if the relevant consideration is of a non-monetary nature and consists, in particular, in the provision of personal data.

Contracts for the sale of animals, as well as for financial, health and gaming services are exempted from the applicability of the VGG.

All other types of contracts, such as B2B contracts, C2C contracts, contracts for the acquisition of immovable property

(eg, houses, apartments), barter agreements or contracts for the provision of services, will still be subject to the warranty provisions of the ABGB.

The existence of a defect regarding the purchase of real estate is to be assessed in principle according to what is agreed in the purchase contract between the seller and the buyer and what is customarily expected. The contracting parties may consider an object that is objectively defective to be in conformity with the contract and therefore free of defects between them. A low purchase price can be an indication that certain negative characteristics of the object of purchase do not constitute a defect according to the conception of the contracting parties and therefore should not trigger any warranty claims

Only in the case in which repair or replacement are impossible or disproportionate (ie, involving unreasonable costs), or the debtor fails to perform their duties, may the creditor ask for a reduction of the price or cancel (rescind) the contract .

If a defect appears within six months after delivery, article 924 ABGB presumes that the defect existed at the time of delivery. The purchaser may claim primarily repair or replacement of the good.

Warranty claims must be enforced two years from delivery of goods (or recognition of the defect of title) regarding personal property (chattels), three years regarding real property (real estate).

*Law stated - 15 December 2022*

## **Protection against liability**

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

In order 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 or environmental liability insurance).

In order to limit personal liability, there is the option to establish a legal entity with limited liability such as a limited liability company (or a stock corporation).

*Law stated - 15 December 2022*

## **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?**

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.

*Law stated - 15 December 2022*

## 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?

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. District courts also have jurisdiction in particular over disputes concerning immovable property (disputes arising from tenancy or lease agreements, eg, action for rent, action for eviction or termination by court order, disputes over prohibited redemption payments).

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

*Law stated - 15 December 2022*

## 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?

The acquisition of property in Austria, including real estate, is subject to the provisions of the Austrian Civil Code, regardless of whether commercial or residential property is being acquired.

Austrian tenancy law is regulated by the Austrian Civil Code and the Tenancy Act. 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 Tenancy Act or not. The few tenancy law provisions contained in the Austrian Civil Code are largely non-binding and can be freely negotiated by the parties. The Tenancy Act aims to protect the tenant and therefore provides for mandatory provisions.

*Law stated - 15 December 2022*

## 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?

With regard to the strategic development of cities and regions, specialised concepts or 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.

Failure to comply with planning decisions or zoning requirements, or carrying out construction without a building permit

may result in an official order to demolish the building.

Historical monuments, especially old houses, are protected in particular under the Monument Protection Act.

*Law stated - 15 December 2022*

### **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?

The comprehensive protection of property is a fundamental right in Austria and also applies to foreigners. Hence, expropriations may only be carried out if certain strict conditions are fulfilled. If an expropriation takes place, the state must pay an adequate compensation 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.

*Law stated - 15 December 2022*

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

*Law stated - 15 December 2022*

### **Bankruptcy and insolvency**

Briefly describe the bankruptcy and insolvency system in your jurisdiction.

The Austrian Insolvency Code provides a system regarding the orderly liquidation of financial relationships in the event of the economic failure of a company (also of a natural person not operating a company). For insolvency proceedings to commence, a material insolvency on the part of the debtor must happen. The aim of the insolvency proceedings is to ensure that the (unsecured) creditors are satisfied equally.

Another essential purpose of these proceedings is the restructuring of a company in order to facilitate its survival. In the course of insolvency proceedings, restructuring can take place by way of a restructuring plan. 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.

*Law stated - 15 December 2022*

## INVESTMENT VEHICLES

### 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?

There are several forms of enterprises regulated by Austrian law. A basic distinction is made between partnerships and corporations.

Partnerships may be established by at least two persons either as a general partnership or a limited partnership. All partners of a general partnership are liable personally and without limitation (ie, with their entire private assets), for the company's liabilities. Regarding a limited partnership, in this form of enterprise, the liability of at least one partner is limited.

The 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 being 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. For example, the costs of the establishment resulting from the obligatory legal requirements as well as the running costs of the chosen company must be considered when selecting the legal form.

*Law stated - 15 December 2022*

### Foreign investors

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 foreign investors.

*Law stated - 15 December 2022*

### 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?

The limited liability company and the stock corporation are formed by way of entry in the commercial register. Both the limited liability company and the stock corporation 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 other companies.

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 ('foundation' or 'incorporation privilege'). Moreover, since January 2018 a standard one-man limited liability company can also be established without a notary (a 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). Capital gains tax 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. However, the corporate income tax will be reduced from the current 25 per cent to 24 per cent in 2023 and from 24 per cent to 23 per cent in 2024.

The question of which structure should be chosen for a real estate transaction in terms of (tax) law, cannot be answered without analysing the individual case. 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 statements, the commercial court will impose a monetary penalty.

*Law stated - 15 December 2022*

## ACQUISITIONS AND LEASES

### 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.

In Austria, the following rights in rem are recognised:

- freehold;
- 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.

A '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, a 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 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.

*Law stated - 15 December 2022*

## **Pre-contract**

### **What are the typical pre-contractual steps?**

Frequently, a buyer will present the seller with a non-binding letter of intent or a term sheet about the key terms of the transaction. The letter of intent 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. Hiring and 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. In order 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 of the agreed closing date, either party can bring an action for the conclusion of the main contract.

Although oral contracts are binding on the parties as well, 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.

*Law stated - 15 December 2022*

## **Contract of sale**

### **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 a way 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 (VAT);
- an escrow mechanism;
- conditions precedent to the closing of the transaction;
- representations and warranties;
- the remedies and penalties available in the case of a breach; and
- declaration of eligibility.

In general, 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 into the land register and, thus, for the transfer of ownership.

*Law stated - 15 December 2022*

### **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?

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, they and their legal successors may also be held liable.

Before purchasing a property, due diligence should also include checking whether the property is listed in the register of suspected contaminated sites or the contaminated site atlas. These two registers list all publicly known environmental contamination throughout Austria.

Contractual assurances that the property is not contaminated are also common. These assurances can take different forms. The form of these assurances is mainly a matter of negotiation.

*Law stated - 15 December 2022*

### **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?

Typically, the seller of a property provides the following information in relation to existing rental agreements before the purchase agreement is signed (mostly within a due diligence process):

- 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.

In the purchase agreement itself, the seller typically warrants that certain rental objects in the building are leased upright at the time of signing the agreement. It is also customary for the seller to assure that there are no rent arrears and that there are no pending proceedings before arbitration boards or courts with regard to the leases. Usually, the seller also hands over an interest list and the security deposit deposited by the tenants to the buyer.

Typically, the buyer enters into the leases. If the existing lease agreements are to be terminated before the buyer takes over the property and the buyer is interested in a property free of leases, it is advisable for the buyer to obtain a contractual assurance to this effect from the seller.

*Law stated - 15 December 2022*

### **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?

Leases are not subordinate to a security instrument.

According to the provisions of the Austrian Civil Code, 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.

With regard to lease agreements, it is thus important to know whether the Tenancy Act or the Austrian Civil Code are applicable.

According to section 12 of the Tenancy Act, the main tenant of an apartment who leaves the apartment may assign his or her main tenancy rights to the apartment to his or her spouse or relatives in the direct line, if they have lived in the apartment in the same household with the main tenant for at least the past two years.

In the case of a commercial lease, the Tenancy Act and its mandatory provisions regarding the protection of the tenant apply to the contract. However, these mandatory protective provisions of the Tenancy Act do not apply to ground leases.

In the event of the sale of the business operated by a main tenant in the rented business premises, article 12a of the Tenancy Act contains a provision according to which the lease agreement is transferred to the purchaser of the business without the landlord's consent being required.

As compensation for not being able to rent the business premises to a new tenant, the landlord has the option within six months of notification of the sale of the business to raise the rent to the amount permitted, which the landlord could earn by re-renting the property at the time of the sale of the business.

*Law stated - 15 December 2022*

### **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?

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

The Tenancy Act 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 the case of lease agreements outside the scope of applicability of the Tenancy Act, 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.

*Law stated - 15 December 2022*

### **Due diligence**

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?

In order to protect the purchaser from potential liability claims, due diligence regarding economic, tax, legal and technical aspects of the target property and regarding potential liability risks is strongly recommended. The main concern of legal due diligence conducted prior to purchasing a land plot has to 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 existing deeds in the land register, the building file, as well as 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.

*Law stated - 15 December 2022*

### **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?

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.

If the result of the technical due diligence shows any risks, it is customary to get representations or an indemnity.

Environmental insurance is available as well. Nevertheless, it is highly recommended to check the register of contaminated sites and the register of suspected contaminated sites as part of the due diligence.

*Law stated - 15 December 2022*

## 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?

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 or a business consultant.

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

- 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 within the Q&A process.

*Law stated - 15 December 2022*

## Other agreements

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;
- brokerage agreements (if applicable); and
- escrow agreements (if applicable).

*Law stated - 15 December 2022*

## Closing preparations

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 highly important to keep an eye on the big picture and to organise the entire closing process. In order to be able to close the deal within the given period, 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.

It is usually necessary to urge the completion of all required documents. The preparations regarding 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.

*Law stated - 15 December 2022*

## 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?

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 has to 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.

In general, in Austria there is a difference between a share deal and an asset deal regarding the closing process of a purchase contract. In the latter one, a closing is not common.

Regarding the transfer of a property in the form of an asset deal, in addition to the handover, entry in the land register is required. This is only possible once various requirements have been met, for example, the land transfer tax has been paid or declarations from pledgees have been received.

To secure the mutual rights and obligations of buyer and seller, the lawyer, therefore, offers himself as a trustee. He receives the purchase price and pays it out, however, only if on the one hand the rights of the seller, but also on the other hand the rights of the buyer are secured.

Contractual trusteeships regarding real estate are settled according to the statute of the trustee audit of the Austrian Bar Association. This is also the case if trustee deposit exceeds more than €40,000 pursuant to section 10a RAO.

*Law stated - 15 December 2022*

## Contract breach

## 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).

*Law stated - 15 December 2022*

### 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?

The Tenancy Act 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 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 Tenancy Act, the provisions of the Austrian Civil Code apply.

*Law stated - 15 December 2022*

## FINANCING

### Secured lending

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 into 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.

*Law stated - 15 December 2022*

### 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 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.

Nevertheless, there are also possibilities regarding real estate leasing in general. At the request of the lessee, the immovable investment object is acquired from the lessor (the leasing company). The leasing contract stipulates that the lessee is granted the use of the object by the lessor for an agreed period of time in return for payment. The usual lease terms for real estate leasing in Austria are between 10 and 25 years.

*Law stated - 15 December 2022*

### **Form of security**

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 have to be notarised in order for the mortgage to be entered in the land register.

*Law stated - 15 December 2022*

### **Valuation**

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 in order 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.

*Law stated - 15 December 2022*

### **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?

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.

In order to have a lien registered in the land register, a notarized deed of lien is required in Austria. The fee for an electronic application to register a lien in the land register is €47. In addition, a registration fee of 1.2 per cent of the value of the right is charged.

*Law stated - 15 December 2022*

### **Loan interest rates**

How are interest rates on commercial and high-value property loans commonly set (with reference to common benchmark interest rates (eg, SOFR, Ameribor), 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 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.

In Austria, loan or credit interest rates are subject to the limits of immorality under the Austrian Civil Code. Accordingly, an excessively high interest rate could be immoral, which would result in either the agreement on the interest rate contained in the loan agreement or the entire loan agreement being void.

*Law stated - 15 December 2022*

### **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?

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 the 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).

*Law stated - 15 December 2022*

### **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?

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

*Law stated - 15 December 2022*

## Protection of collateral

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, etc).

*Law stated - 15 December 2022*

## 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?

Recourse to the entire assets of the borrower is not provided for. The 'principle of speciality' (Spezialitätsprinzip) 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.

*Law stated - 15 December 2022*

## 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?

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.

*Law stated - 15 December 2022*

## Credit enhancements

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.

*Law stated - 15 December 2022*

## Loan covenants

## 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.

*Law stated - 15 December 2022*

## Financial covenants

### 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.

*Law stated - 15 December 2022*

## Secured movable (personal) property

### 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, etc).

*Law stated - 15 December 2022*

## 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?

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

*Law stated - 15 December 2022*

## UPDATE AND TRENDS

### International and national regulation

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?)

Current topics in Austrian real estate law include the amendment to the Condominium Ownership Act, which came into force on 1 January 2022.

Also, the introduction of the 'Bestellerprinzip' in real estate brokerage, meaning only the client of the real estate agent pays the real estate agent, has been under discussion for some time.

Moreover, the first court rulings on rent disputes between tenants and landlords triggered by the covid-19-related closures of business premises have also received considerable media attention. The background of these disputes is the question of whether covid-19-related closures of business premises actually entitles the tenant under section 1104 of the Austrian Civil Code to not pay rent and costs. Based on these regulations, many tenants of hotels, gastronomy 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. The Supreme Court has not yet ruled on this issue, and it remains to be seen whether the Supreme Court will follow the view of the lower courts.

*Law stated - 15 December 2022*

## Jurisdictions

	<b>Austria</b>	Fellner Wratzfeld & Partner
	<b>Bulgaria</b>	Gugushev & Partners Law Office
	<b>Dominican Republic</b>	Guzmán Ariza
	<b>Finland</b>	Waselius & Wist
	<b>Germany</b>	McDermott Will & Emery
	<b>India</b>	AZB & Partners
	<b>Ireland</b>	Mason Hayes & Curran LLP
	<b>Italy</b>	Gianni & Origoni
	<b>Japan</b>	Nagashima Ohno & Tsunematsu
	<b>Malaysia</b>	SKRINE
	<b>Malta</b>	WH Partners
	<b>Mexico</b>	M Shehoah S.C
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	<b>Portugal</b>	PLMJ
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	<b>Thailand</b>	Nagashima Ohno & Tsunematsu (Thailand)
	<b>Ukraine</b>	GOLAW
	<b>United Arab Emirates</b>	Afridi & Angell
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