

PANORAMIC **REAL ESTATE**

Austria



LEXOLOGY

Real Estate

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GENERAL

Legal system

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

The Democratic Republic of Austria, a member of the European Union since 1995, is a federal state according to Article 2(1) its constitution. It is composed of nine autonomous states (*Länder*), which have limited legislative powers and some executive powers, but no separate judicial systems.

The constitutional law regulates the division of powers between the national, federal and local governments in the respective legal matters. National or regional laws must be consistent with constitutional law and the law of the European Union.

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

Austria belongs to 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 contrast to the common law system, case law is not formally binding.

Judges are independent and not bound by instructions. Only the law binds them in their decisions. Appeals are available to review the lawfulness of statutory provisions and administrative and judicial decisions. Therefore, there are three Supreme Courts in Austria:

- The Constitution itself establishes a Supreme Court as the highest court 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 courts can be appealed; and
- the Constitutional Court is the court of judicial review. For example, it reviews the constitutionality of laws and the constitutionality of decisions of certain other courts. It is the oldest functioning constitutional court in the world.

In terms of judicial procedures, the parole evidence rule does not apply in the civil law system. Various forms of injunctive relief are available.

Real estate law is a cross-cutting subject that is governed by many different laws. Important provisions can be found, for example, in the Civil Code, the Landlord and Tenant Act, the Condominium Act and the Land Registry Act. However, real estate transactions may also be affected by other legal provisions (eg tax and fiscal law, antitrust law or labour law). For foreign investors in real estate (and agricultural land), the relevant regulations are those of the federal states governing the purchase of land by foreign nationals.

Each state has different building regulations, which are set out in the respective building code. Regional planning, development and zoning are characterised by a large number of different authorities and a highly hierarchical structure.

Law stated - 2 October 2024

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 (*Grundbuch*) is a public register maintained by the district courts. It consists of the main register (*Hauptbuch*) and the collection of documents (*Urkundensammlung*). All properties in Austria and the rights in rem to the same are recorded in the land register. The purpose of the land register is to provide reliable information on ownership and other real rights, such as easements or mortgages, relating to land. The register is kept as an electronic database, to which everyone may have access. Thus, everyone has the right to inspect the land register and obtain extracts and transcripts.

With very few exceptions, rights in rem in real estate can only be acquired by registration in the land register. The information contained in the land register is presumed to be correct and complete in relation to a person who relies on it in good faith.

Only certain rights can be registered in the land register, primarily rights in rem, such as right of ownership, building rights, liens, easements and mortgages. Certain rights to claim may also be registered and thus become rights in rem. These include rights of repurchase, rights of first refusal and the prohibitions on encumbrance or sale, and leaseholds for a fixed term. Leases do not have to be registered in the land register to be enforceable.

The land register operates on a 'first come, first served' basis. The rank or priority depends on the time at which the application for the registration of a right is received by the land registry court.

Law stated - 2 October 2024

Registration and recording

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

It is mandatory that applications and required documents are submitted electronically to the competent land registry court by attorneys-at-law or public notaries. In order to acquire a right in rem by registration, the following documents are usually required:

- An appropriate document evidencing the acquisition of the right (eg, purchase contract). Note that, unlike public documents, private documents must meet special prerequisites for registration in the land register, in particular, notarisation is obligatory;
- an explicit statement of consent by the person whose right is to be restricted, encumbered, cancelled or transferred to another person (*Aufsandungserklärung*);
- a confirmation regarding the payment of the relevant taxes (real estate transfer tax and land registry fees);
- proof of citizenship of the parties to the contract; and
- if applicable, a permit for the purchase of real estate by foreigners.

To register a new mortgage, the following documents must be submitted:

- 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 costs of the registration fee is usually paid by the purchaser of the property.

Law stated - 2 October 2024

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 countries that regulate the purchase of the real estate by foreign citizens. Natural persons and legal entities from the member states of the European Union or the signatory states of the Agreement on the European Economic Area have the same status as domestic natural persons and legal entities.

The transfer of property rights to foreign investors may be subject to approval under the respective law. Each state in Austria has its own provisions and regulations. Therefore, the restrictions approval procedures for the acquisition of real estate by foreign investors may vary depending on the location of the real estate. Without the required approval, the application for transfer of ownership will be dismissed by the competent court.

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

Law stated - 2 October 2024

Exchange control

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

Regulations regarding measures to prevent money laundering and terrorist financing are very strict. The banks involved in the transaction are demanding and will examine documents to ensure that they prove the origin of the funds. Under 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 the confiscation of funds in cases of suspected money laundering or terrorist financing.

Under certain circumstances, certain real estate transactions exceeding a value of €100,000 must be reported to the Austrian National Bank for trade statistics purposes.

Law stated - 2 October 2024

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 for two types of liability. On the one hand, liability can arise from wrongful acts or omissions (tort liability) and, on the other hand, liability can arise from breach of contract (contractual liability).

According to article 1294 of the Austrian Civil Code (ABGB), fault (*Verschulden*) presupposes unlawfulness (*Rechtswidrigkeit*). In contract law, the burden of proof of fault is generally shifted to the damaging party (article 1298 ABGB – reversal of burden proof, *Beweislastumkehr*). Article 1313a ABGB provides for extensive vicarious liability for auxiliary persons – including independent entrepreneurs – assisting in the performance of contractual or other obligations (*Erfüllungsgehilfen*). The principal is the one, who is liable for the fault of the vicarious agent as for his own.

In relation to 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 fall of a dangerously hung or placed object (in the apartment or on the window sill) as well as for damage caused by the throwing or pouring of 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 in a broad sense. 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 by analogue to cases where water damage in neighbouring flats is caused by water leaking from one's own flat, for example, due to an overflowing sink.

If parts (eg, roof tiles, but also roof avalanches) come loose from a building or if the building collapses, the owner of the building is liable if they did not take the necessary precautions to prevent the event according to article 1319 ABGB. The same applies to owners of 'works listed on a plot of land'. A 'work' can be, for example, a scaffolding or a fence. Contrary to the above provision, the owner of a building is not liable regardless of fault.

Moreover, the person who bears the costs of constructing and maintaining 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, planting or railings. If the path is not in a proper condition, the owner is only liable if they have acted intentionally or with gross negligence. At the same time, they are also responsible for 'helpers' who maintain the path – but only in cases of gross negligence.

Of course, maintenance and repair work can also be outsourced by the owner to independent third parties (eg, snow removal companies). In this case, the duty of care for each individual

task is also transferred to the contracted company and the road owner is only liable for negligence in selection and supervision.

If damage is caused by unauthorised or improper use of the track, the track owner is not liable if the prohibition has been made clear by barriers or signs. In cases such as the purchase of a motorway toll sticker, a contract is concluded in advance with the road owner (motorway operator) and their duty of care arises from the fulfilment of their 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.

In addition to liability for damages, Austrian law provides for a warranty for defects in any non-gratuitous contract for the delivery of goods. Article 922 ABGB defines the term 'defect' as a lack of conformity of the goods with the contract existing at the time of delivery. A lack of conformity includes defects of title (legal defects, **Rechtsmängel**), if the debtor is unable to transfer the promised right, and defects of quality and quantity (material defects, **Sachmängel**), if expressly stipulated or assumed qualities or quantities are lacking.

Unless the contracting parties have agreed otherwise, the real estate must comply with the characteristics that are usually assumed and with the characteristics that are expressly and conclusively agreed upon. The real estate shall also comply with the statements made by the seller in public statements or in advertising, for example, on real estate platforms.

For example, when buying or selling a 'building plot', the seller must in principle guarantee that the land is not contaminated, in addition to the zoning or building permission.

In the case of the purchase of an existing building, according to the Austrian Supreme Court, the buyer may assume that a building permit and a use permit exist or that it is possible to obtain such a permit; otherwise there is a defect in title which entitles the buyer to assert warranty claims.

Only those defects and signs of age that are to be expected with a certain probability according to the type of construction and/or age of a house or apartment must be accepted by the buyer. If a new house or apartment is bought or sold, the buyer can assume that it is as good as new.

The seller is also not liable for obvious defects. These are defects that are obvious during an inspection before or at the time of the contract, or that can be found in public records, such as the land register. Consensual or non-consensual conditions of a building are not to be understood as such, since a layperson cannot be accused of ignorance of building regulations.

Only if repair or replacement is impossible or disproportionate (ie, involves unreasonable costs), or if the debtor fails to fulfil their obligations, can the creditor demand a reduction in price (**Preisminderung**) or rescind the contract (**Wandlung**).

If a defect appears within six months of 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 asserted within two years of delivery of goods (or discovery of the defect in title) in the case of movable property, and within three years in the case of immovable property (real estate).

Protection against liability

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

In order to better protect the buyer from potential liability, it is strongly recommended that a due diligence be carried out prior to the purchase of a property. The due diligence on a property should focus on legal, economic, tax and technical issues 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. In addition, all contracts relating to the property should be analysed.

It is also advisable to take out appropriate liability insurance (eg, building insurance or environmental liability insurance).

In order to limit personal liability, it is possible to set up a legal entity with limited liability such as a limited liability company (*Gesellschaft mit beschränkter Haftung*), a stock corporation (*Aktiengesellschaft*) or a flexible capital company (*Flexible Kapitalgesellschaft, FlexCo*).

Law stated - 2 October 2024

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 general, the parties may choose the law applicable to the real estate transaction. This does not apply to the respective rights in rem for real estate located in Austria. These rights are always governed by Austrian law. If the parties have not contractually agreed on the applicable law, Austrian law is generally applicable to transactions concerning real estate located in Austria.

Law stated - 2 October 2024

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 have jurisdiction. In 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 have jurisdiction as courts of first instance. However, tenancy law cases exceeding the value limit are also heard by district courts. The district courts also have jurisdiction, in particular, in disputes relating to immovable property (disputes arising from tenancy or lease agreements, eg, actions for rent, actions for eviction or termination by court order, disputes relating to unlawful redemption payments).

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

Law stated - 2 October 2024

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, whether commercial or residential, is governed by the provisions of the Austrian Civil Code.

Austrian tenancy law is governed by the Austrian Civil Code and the Tenancy Act. In the case of both residential and commercial real estate, it is therefore relevant 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 contains mandatory provisions.

Law stated - 2 October 2024

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 prepared by the competent authorities. These plans are strategic in nature and set the direction of urban and regional development.

The construction of real estate is subject to local building regulations, such as zoning and building codes. These vary from state to state. As a result, 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 particularly protected under the Monument Protection Act.

Law stated - 2 October 2024

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.

Foreclosure of a property may also be authorised only if certain conditions are met. Foreclosure is a long-term process aimed at satisfying the obligee's claims from the proceeds of the auction.

Law stated - 2 October 2024

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?

Property may be seized under certain conditions laid down in law (eg, to prevent illegal activities, in particular terrorist activities).

Law stated - 2 October 2024

Bankruptcy and insolvency

Briefly describe the bankruptcy and insolvency system in your jurisdiction.

The Austrian Insolvency Code (*Insolvenzordnung*) provides a system for the orderly liquidation of financial relations in the event of the economic failure of a company (including a natural person who does not run a company). In order for insolvency proceedings to be initiated, the debtor must be materially insolvent. The aim of insolvency proceedings is to ensure that the (unsecured) creditors are equally satisfied.

Another important purpose of these proceedings is to restructure a company in order to facilitate its survival. In the course of insolvency proceedings, restructuring may be carried out by means of a restructuring plan. In the restructuring process, the debtor may also opt for self-administration under certain conditions.

If the petition for opening insolvency proceedings is filed without a restructuring plan, the insolvency proceedings are called bankruptcy proceedings. However, the debtor may request the adoption of a restructuring plan until the end of the proceedings.

The public announcement of the opening of insolvency proceedings must explicitly state whether the proceedings are based on bankruptcy or on a restructuring attempt.

Law stated - 2 October 2024

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 types of companies regulated by Austrian law. A basic distinction is made between partnerships (*Personengesellschaften*) and corporations (*Kapitalgesellschaften*).

Partnerships may be formed by at least two persons, either as a general partnership (*Offene Gesellschaft*) or as a limited partnership (*Kommanditgesellschaft*). All partners in a general partnership are personally and unlimitedly liable (ie, with their entire private assets) for the company's liabilities. In a limited partnership, the liability of at least one partner is limited.

The limited liability company can be set up by one or more natural or legal persons, who are generally not personally liable for the company's liabilities. The limited liability company is the most popular form of company in Austria, particularly 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.

The Company Law Amendment Act 2023, which entered into force on 1 January 2024, introduced a new Austrian corporate form (the flexible capital company, *FlexCo*), that is intended to provide advantages, especially for innovative start-ups and founders in the early stages.

In addition to corporate law, there are also tax aspects to consider when choosing the legal form of a company. For example, the costs of incorporation resulting from mandatory legal requirements as well as the operating costs of the chosen company must be considered when choosing the legal form.

Law stated - 2 October 2024

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, particularly for foreign investors.

Law stated - 2 October 2024

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 registration in the commercial register. Both can be formed by one or more natural or legal persons.

The minimum share capital required for a stock corporation is €70,000. A supervisory board is also mandatory. Therefore, the ongoing costs of a stock corporation are higher due to its legal structure than 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 at the beginning. In 2014, the option to limit the share capital to €10,000 for up to 10 years was introduced. At least €5,000 of this limited share capital must be contributed (*Gründungsprivilegierung* – ‘foundation’ or ‘incorporation privilege’). Since January 2018, it has also been easier to set up a standard one-person limited liability company (ie, without the obligatory use of a notary (a simplified establishment (*vereinfachte GmbH-Gründung*)). The Company Law Amendment Act 2023, which entered into force on 1 January 2024, introduced a new Austrian corporate form (*FlexCo*) and lowered the minimum share capital for a limited liability company (*GmbH*) to €10,000. The flexible capital company (*FlexCo*) builds on international examples and is intended to offer an internationally competitive option, particularly for innovative start-ups and founders in the early stages.

Originally, profits from limited liability companies and stock corporations were taxed at a rate of 25 per cent (corporate income tax), but in 2023 corporate income tax was reduced from 25 per cent to 24 per cent. This was followed by a further reduction to 23 per cent in 2024. Capital gains tax is 27.5 per cent. Individuals (such as shareholders of a general partnership or a limited partnership) are taxed at the personal level according to a progressive tax system. The maximum tax rate is 55 per cent.

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. Rather, it must be assessed on a case-by-case basis.

Both corporations and partnerships without a natural person as a partner with unlimited liability are required to file an annual financial statement. The commercial court imposes a fine for late filing.

Law stated - 2 October 2024

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.

The following rights in rem are recognised in Austria:

- freehold (*Eigentumsrecht*);
- condominium ownership (*Wohnungseigentum*);
- building rights (*Baurechte*);
- liens (mortgages) (*Hypotheken*);
- easements (*Dienstbarkeit*);
- servitudes (*Grunddienstbarkeit*); and
- land charges (*Reallasten*).

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 the right to build a structure on or under the surface of land owned by a third party. The building right is limited in time and can be established for a minimum of 10 years and a maximum of 100 years.

A structure that has been established on land owned by a third party and is not intended 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 on an object if an obligation is not fulfilled when 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 - 2 October 2024

Pre-contract

What are the typical pre-contractual steps?

Often a buyer will provide the seller with a non-binding letter of intent or a term sheet outlining the key terms of the transaction. The letter of intent will form the basis of the transaction process and should therefore be properly negotiated.

In order to better protect the buyer from potential liability cases, it is strongly recommended that a due diligence be carried out before entering into a real estate transaction. The due diligence process should analyse economic, tax, legal and technical issues, as well as potential liability risks. Hiring and relying on specialists in each field, as well as obtaining good legal advice, is essential to the success of the due diligence.

Preliminary agreements are less common. A preliminary agreement is used to outline certain terms that two parties have agreed upon before the execution of the formal contract. In order to be binding, a preliminary agreement must contain all of the essential terms 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 may bring an action for the conclusion of the main contract.

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

Law stated - 2 October 2024

Contract of sale

What are typical provisions in a contract of sale?

The acquisition process is concluded with a contract of sale. This is usually drafted by a lawyer in order to protect his client as much as possible. If the sale 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 is necessary.

Sale and purchase agreements typically contain the following provisions for the 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), if any;
- an escrow mechanism;
- conditions precedent to the closing of the transaction;
- representations and warranties;
- the remedies and penalties available in the event of a breach; and
- declaration of entitlement.

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. There are usually no special formal requirements. In the case of real estate transactions, however, specific formal requirements must be met in order to be entered in the land register and thus to transfer ownership.

Law stated - 2 October 2024

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 various forms. The form of chosen assurance is mainly a matter of negotiation.

Law stated - 2 October 2024

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 in place;
- 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 common for the seller to assure that there are no rent arrears and that there are no pending arbitration or court proceedings relating to the leases. It is also common for the vendor to provide the buyer with a list of tenants and the security deposit paid by the tenants.

Typically, the buyer enters into the leases. If the existing leases are to be terminated before the buyer takes possession of the property and the buyer is interested in a property free of leases, it is advisable for the buyer to obtain a contractual assurance from the seller to that effect or even a right to rescind the agreement.

Law stated - 2 October 2024

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 Austrian Civil Code, a buyer also takes over the existing tenancy agreements when purchasing a property if the tenancy agreement is subject to the Tenancy Act. If this is not the case, the parties have an extraordinary right of termination, unless the tenancy agreement was registered in the land register.

It is therefore important to know whether the Tenancy Act or the Austrian Civil Code applies to a lease agreement.

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

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

In the event of the sale of the business operated by the 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 the notification of the sale of the business,

to increase the rent to the amount permitted which he or she could earn by re-renting the property at the time of the sale of the business.

Law stated - 2 October 2024

Delivery of security deposits

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

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

The Tenancy Act contains specific 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 it in an interest-bearing account (eg, a savings account). At the end of the tenancy, the landlord must return the deposit, including any interest, without delay. The landlord may only withhold or claim the deposit if certain conditions are met.

In the case of lease agreements outside the scope of the Tenancy Act, landlords and tenants may 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 - 2 October 2024

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, it is highly recommended to analyse all economic, technical and legal aspects of the target property and, in particular, to examine potential liability risks in the form of due diligence. The main focus of the legal due diligence carried out prior to the purchase of a property must be the analysis of the information on the property contained in the land register. The information recorded in the land register is presumed to be correct. As a result, a bona fide purchaser will acquire ownership of a piece of real estate even if the seller is wrongfully registered in the land register.

The due diligence process should include a review of existing deeds in the land register, the building file, and the register of contaminated sites and the register of suspected contaminated sites.

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

Law stated - 2 October 2024

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. As part of this due diligence, it is important to obtain information on the quality of the land plot and the building.

If the results of the technical due diligence reveal any risks, it is customary to obtain representations or an indemnities.

Environmental insurance is also available. 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 - 2 October 2024

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?

In order to gather all relevant information for the purchaser, the lease agreements are usually reviewed by lawyers and tax advisors. 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;
- contractual 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;
- where 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 key issues and define red flags.

Asking the right questions and requesting the right documents during the due diligence process is crucial.

Law stated - 2 October 2024

Other agreements

What other agreements does a lawyer customarily review?

Typically, the following documents are reviewed by a lawyer:

- any title documentation relating to the proposed real estate transactions;
- any documentation relating to the financial aspects;
- easement agreements;
- material contracts;
- building permits;
- insurance agreements;
- brokerage agreements (if any); and
- escrow agreements (if applicable).

Law stated - 2 October 2024

Closing preparations

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

Especially in 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 timeframe, the lawyer is often tasked with drawing up a precise timetable for the fulfilment of all closing conditions. Before closing, the lawyers need to check:

- whether all required documents have been provided;
- whether all conditions have been fulfilled;
- whether all deliverables have been met;
- whether all existing mortgages have been or can be released;
- agreements between condominium owners; and
- agreements with neighbours.

Law stated - 2 October 2024

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?

All parties are usually present in person at the closing. However, it is possible to be represented by a representative with a valid special power of attorney. 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 with regard to the closing of a sale and purchase agreement. In the latter, a closing is not common, but there is an escrow solution.

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 acts as a trustee. The lawyer receives and pays out the purchase price, but only when both the seller's rights and the buyer's rights have been secured.

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

Law stated - 2 October 2024

Contract breach

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

Sales contracts usually contain provisions regarding possible breaches of contract and their legal consequences (including penalties).

Law stated - 2 October 2024

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 on which a landlord may terminate a lease. One example is non-payment of rent by the tenant, although not every instance of

non-payment by 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 their 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 - 2 October 2024

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 registered in the land register as collateral for property 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 - 2 October 2024

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. Hence differences cannot be illustrated.

However, there are also possibilities with regard to 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 - 2 October 2024

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 must enter into a mortgage agreement in writing. The signatures of the parties to the mortgage agreement must be notarised in order for the mortgage to be recorded in the land register.

Law stated - 2 October 2024

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 specialists require special education in order to obtain their licence. When searching for such a specialist, the relevant court registry can be a helpful resource, as many specialists are usually registered as court-appointed experts.

Most banks require a real estate valuation before granting a loan. The valuation of the real estate may be carried out by the bank itself or, alternatively, the services of valuation professionals may be used. Valuation professionals may be appointed by the pledgee or by the bank.

Law stated - 2 October 2024

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 may grant loans under the same conditions as Austrian lenders. However, such lenders must hold a banking licence recognised in the European Union. Loans from foreign lenders can also be secured by Austrian real estate collateral.

In order register a lien in the land register, a notarised deed of lien is required in Austria. The fee for an electronic application to register a lien in the land register is €47. There is also a registration fee of 1.2 per cent of the value of the right. From 1 April 2024, new rules will temporarily apply to the purchase of residential property and the related registration fee for the registration of the title and the registration of a related lien.

Law stated - 2 October 2024

Loan interest rates

How are interest rates on commercial and high-value property loans commonly set? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

Interest rates are generally based on EURIBOR (Euro Interbank Offered Rate). The legally permissible interest rates must always be determined on a case-by-case basis, taking into account the circumstances under which the loan is granted. The calculation of the legal interest rates does not take into account fees and costs of the lender.

In Austria, loan or credit interest rates are subject to the limits of immorality and usury 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 - 2 October 2024

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. The existence of real estate that is suitable for satisfaction considerably increases the immediate chances of success in debt collection. In court, the creditor has the opportunity to obtain an enforceable title. With an enforceable title, a lien on the debtor's property or a share in the property can be established at the operating creditor's request. It is particularly important to act quickly, as the land register operates on a 'first come, first served' basis.

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

Law stated - 2 October 2024

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 sale and any outstanding credit balance remains an outstanding obligation. This obligation can, in principle, be enforced immediately because the enforceable title already exists.

Law stated - 2 October 2024

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 pledge agreement which must meet certain conditions. Austrian law also requires certain acts of publicity (eg, registration, etc).

Law stated - 2 October 2024

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, the debtor cannot register a pledge in the land register for the duration of the proceedings.

Law stated - 2 October 2024

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 - 2 October 2024

Credit enhancements

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

Other common forms of credit enhancement are personal guarantees, comfort letters and cumulative assumption of debt.

Law stated - 2 October 2024

Loan covenants

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

The covenants in a loan agreement depend on the respective project and other related factors, such as the results of the due diligence conducted.

It is common for loan agreements to include a change of control clause to protect the lender in the event that the company comes under new ownership. Such clauses may stipulate that the lender can demand repayment in full if the clause is triggered. If a bank is unsure of the creditworthiness of the new owner, it may prefer to demand immediate repayment of the entire loan amount and terminate the loan.

Law stated - 2 October 2024

Financial covenants

What are typical financial covenants required by lenders?

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

Law stated - 2 October 2024

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. Austrian law also requires certain acts of publicity (eg, registration, notification of third-party debtors, etc).

Law stated - 2 October 2024

Single purpose entity (SPE)

Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an

independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

SPEs are very common in property transactions. There are no special rules for setting up an SPE.

Law stated - 2 October 2024

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?

The latest developments in Austrian real estate law deal, among other things, with the following topics:

On 20 March 2024, the National Council passed the measures of the 'Housing and Construction Package'. The aim is to stimulate the economy and encourage long-term investment in real estate. From 1 April 2024, the purchase of residential property will be temporarily subject to new rules. The new provisions of the Court Fees Act (- *Gerichtsgebührengesetz*, GGG) provide for an exemption from registration fees for the registration of ownership rights and related liens when purchasing a home under certain conditions.

The most recent comprehensive amendment to the Vienna Building Code (*Bauordnung für Wien*) contains, among other things, regulations that more strictly regulate the use of residential space for short-term rentals (eg, Airbnb). One of the new provisions is that from 1 July 2024, an application for an exemption permit will be required if private individuals wish to offer short-term rentals of more than 90 days per calendar year.

In August 2022, the legislator enacted stricter regulations for the granting of loans (KIM Regulation). According to these rules, loans must have an equity ratio of at least 20 per cent. In addition, housing loans may not exceed 35 years and the repayment rate may not exceed 40 per cent of the household's net disposable income. In addition, banks have a number of exemption ratios within which they can, at their discretion and based on their risk assessment, lend to borrowers who do not meet all the strict KIM requirements. Minor relaxations of the KIM regulation have already been introduced on 1 April 2023. In 2024, the KIM regulation will be amended again. The new regulation will be legally binding from 1 July 2024 and will apply to newly agreed private residential property financing. The current amendment combines the previous four ratio-specific exemption rates into a single institution-specific exemption rate of 20 per cent of the new loan volume.

In addition, climate policy regulations also play a role, which affect the real estate sector as well as many other areas of daily life.

Law stated - 2 October 2024