

## A practical insight to cross-border Real Estate work



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# Austria

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## 1 Real Estate Law

- 1.1 Please briefly describe the main laws that govern real estate in your country. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 11.1**

Real Estate in Austria is governed by numerous different laws, the most important of which are: the Austrian Civil Code (ABGB, *Allgemeines Bürgerliches Gesetzbuch*); the Austrian Tenancy Act (MRG, *Mietrechtsgesetz*); the Law of Condominiums (WEG, *Wohnungseigentumsgesetz*); the federal Building Codes (*Bauordnungen*); the Code for Builders and Developers (BTVG, *Bauträgervertragsgesetz*); and the Land Registry Act (GBG, *Grundbuchgesetz*).

- 1.2 What is the impact (if any) on real estate of local common law in your country?**

Each province has enacted its own Building Code and, based on the Land Use Act, municipal provisions provide zoning and building plans (see question 11.1). In addition, jurisdiction by the Austrian Supreme Court (OGH, *Oberster Gerichtshof*) is important and provides a guide to the interpretation of these statutes.

- 1.3 Are international laws relevant to real estate in your country? Please ignore EU legislation enacted locally in EU countries.**

The fundamental principles of the European Union do, of course, also apply to real estate. For example, the principle of non-discrimination is reflected in the Austrian Land Transfer Acts (*Grundverkehrsgesetze*; one for each of the nine federal provinces).

## 2 Ownership

- 2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

The possibility to acquire real estate is limited by the Land Transfer Acts regulating the transfer of agricultural and forestry land and the acquisition of real estate by foreigners. EU/EEA citizens are treated equally to Austrian citizens (see question 1.3). For others the acquisition is subject to approval by the local land transfer authority, which is by law a suspensive condition for the purchase agreement.

## 3 Real Estate Rights

- 3.1 What are the types of rights over land recognised in your country. Are any of them purely contractual between the parties?**

Austrian real estate law provides for a wide range of rights over land, the most important are: ownership (sole-, co- or condominium ownership), lease and leasehold, building rights, mortgages, real and personal servitudes, rights of pre-emption, repurchase and resale.

In general, any registered rights are binding also for possible successors of the real property. Personal servitudes, however, are terminated upon death of the beneficiary (unless agreed differently).

## 4 System of Registration

- 4.1 Is all land in your country required to be registered? What land (or rights) are unregistered?**

In Austria all land is registered in the land registry. As long as a legal transaction involving real estate is not registered, it is not effective vis-à-vis third parties. The contract creating the right is referred to as title which is completed by the registration, the so-called *mode*, after which the purchaser becomes legal owner of the property.

- 4.2 Is there a state guarantee of title? What does it guarantee?**

No, there is no formal state guarantee of title. However, according to the principle of good faith, entries into the land registry can be relied on as accurate and valid.

- 4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

Registration is not compulsory but rather a *conditio sine qua non* in order to obtain and constitute full legal protection (see question 4.1). As long as a transfer of title is not registered, the party to the contract has only a contractual claim for performance against the other contracting party but has not yet become legal owner of the property.

**4.4 What rights in land are not required to be registered?**

All rights *in rem* can be (and reasonably should be) registered, namely: ownership (sole ownership, co-ownership, condominium); building rights; mortgages; restraints on sale and encumbrances of real estate; easements; leases; pre-emptive rights; rights of repurchase and resale. (See question 4.1 and 4.3.)

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

Such different classes or qualities of title on first registration are unknown within the Austrian legal system.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

Ownership is transferred upon registration in the relevant land registry (see question 4.1).

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

According to the principle of priority, in the case of two persons applying for entry into the land registry with regard to one and the same real property, the application first filed to the competent district court overrides the later one.

**5 The Registry / Registries****5.1 How many real estate registries operate in your country? If more than one please specify their differing rules and requirements.**

There is one national real estate registry containing all real properties. It is operated and administered by the Austrian district courts (depending on the location of the real property).

**5.2 Can information on real estate ownership be accessed from the registry on line (electronically)?**

Yes. (See question 5.4.)

**5.3 Can compensation be claimed from the registry/registries if it/they makes a mistake?**

Yes, in the case of a mistake causing damage to a party special proceedings against the responsible authority can be initiated under the terms of the State Liability Act (*Amtshaftungsgesetz*).

**5.4 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate?**

Maintained by each Austrian district court, the land registry is available to the public except for certain privileged (personal) data

only to be inspected after proving a legitimate interest. Documents can be inspected and copied at the relevant court.

**6 Real Estate Market****6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your country? Please briefly describe their roles and/or duties.****a) Selling and purchasing agents (or realtors)**

An agent can either act only for one party (seller or purchaser) or be involved by both parties. When acting on the seller's side, the agent collects and puts together all relevant data (location, size, condition, price etc.) in order to adequately describe the real property to prospective purchasers. When engaged by the purchaser, it is the agent's duty to search the market for properties matching the needs of the purchaser and advise the purchaser in making an offer.

**b) Lawyers**

Basically, the function of lawyers is to "accompany" the buyer/seller throughout the entire acquisition process, starting with the conduct of a possible legal due diligence, followed by the drafting and negotiating of the purchase agreement and finally by filing the necessary application for entry in the land registry. Furthermore, lawyers might be engaged by the contracting parties as trustee for the proceeds of the sale.

**c) Notaries**

The title deed (in most cases a purchase agreement) has to be signed in front of a notary public. Also any further documents filed to the land registry need to be original documents.

**d) Others**

Depending on the nature and size of a transaction, buyer and/or seller would involve their tax advisors, technical experts, environmental experts and property appraisers.

**6.2 How and on what basis are these persons remunerated?**

Whereas real estate agents typically receive a success fee of up to 3%, lawyers are paid depending on the individual agreement either on hourly rates or paid on commission depending on the nature and size of the project or for lack of agreement according to the statutory lawyers tariff and the public notary tariff. The remuneration of notaries, if not otherwise agreed, is regulated in detail in the public notary tariff.

**7 Liabilities of Buyers and Sellers in Real Estate Transactions****7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

The title deed need to contain the object of sale and the purchase price. Furthermore, as registration in the land registry is a requirement to obtain valid title of a real property, a so-called *Aufsandungserklärung*, (i.e. a provision in the purchase agreement or in a separate document containing the seller's express consent to the registration of the purchaser as new owner of the property) is

necessary, and signatures have to be certified by notary public.

## 7.2 Is the seller under a duty of disclosure? What matters must be disclosed?

Austrian real estate law does not provide for a duty of disclosure for the seller and there is no need to stipulate such a duty as the land registry, which contains considerable information regarding the seller and the real property, is available to the public. Furthermore, the purchaser might conduct a due diligence and request all relevant information to be disclosed.

## 7.3 Can the seller be liable to the buyer for misrepresentation?

Yes. However, according to sec 928 ABGB, the seller shall not be liable for any encumbrances shown in the land registry (*public encumbrances*) or otherwise disclosed to the purchaser unless expressly provided for in the purchase agreement.

## 7.4 Do sellers usually give contractual warranties to the buyer? What would be the scope of these? What is the function of warranties (e.g. to apportion risk, to give information)? Are warranties a substitute for the buyer carrying out his own diligence?

The contractual warranties depend on size and nature of the real estate transfer. They range from very few warranties (unrestricted ownership, taxes, no litigation pending) to a long list of warranties covering any and all eventualities. Especially in the case of a share deal the list of warranties is usually rather long as not only real estate issues need to be covered, but also company related matters. Due diligence is in any case essential, most notably regarding the land registry and *public encumbrances* (see question. 7.3) and other public available information.

## 7.5 Does the seller warrant its ownership in any way? Please give details.

Yes, unless otherwise agreed the seller is obliged to provide for ownership to vest in the purchaser even if not set out in the transfer agreement.

## 7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?

The buyer has mainly paying obligations. He is liable to transfer the purchase price in due time and commonly by agreement is also liable for any further costs in connection with the transfer (transfer tax, fee for the registration with the land registry, etc.)

# 8 Finance and Banking

## 8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?

There are no specific regulations concerning real estate financing and, apart from consumer protection laws, the law does not differentiate between individual persons and corporate entities. Usually the bank and the borrower enter into a loan agreement,

which triggers stamp duty if agreed in writing.

## 8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?

In the majority of cases, the lender will protect himself from default by stipulating detailed rights and duties in the loan agreement, and in particular by registering a mortgage on the property. Apart from ordinary mortgages, Austrian law also provides for so-called 'maximum amount mortgages' (*Höchstbetragshypotheken*). Registering mortgages triggers stamp duty of 1.2%, which is commonly borne by the borrower. Furthermore, the lender might request the assignment of claims under the insurance policy of the real property and possible rent payments.

## 8.3 What minimum formalities are required for real estate lending?

There are no legal requirements as to the form of loan agreements. However, any document to be registered in the land registry needs to include an *Aufsandungserklärung* (see question. 7.1) and its signatures need to be notarised.

## 8.4 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

The lender is best protected from claims by other creditors, if his mortgage is registered in the land registry. In this case, he is able to prevent other creditors from requesting a judicial pledge with a higher rank. However, his claims are subordinated to those of any creditors with higher ranking mortgages.

If a creditor is not secured by a registered mortgage, he has to pursue the borrower in order to achieve a final and binding title. He may then request a judicial pledge of the real estate only in the rank as of the time of application for enforcement.

# 9 Tax

## 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

The transfer of ownership in real properties triggers Land Transfer Tax (*Grunderwerbssteuer*) in the amount of 3.5% (2% for a transfer to certain family members). Furthermore, a registration fee of 1% for the registration in the land registry accrues. The consideration for the real property (purchase price) serves as tax base. Both the seller and the purchaser are jointly and severally liable towards the tax and revenue office for payment of the transfer tax and the registration fee, irrespective of what is stated in the transfer agreement (which commonly provides for the purchaser to bear any transfer taxes and fees).

If the transfer occurs by inheritance or gift, the transaction is taxable pursuant to the Inheritance and Gift Tax Act (*Erbschafts- und Schenkungssteuergesetz*). In this case, the tax rate depends on the relationship between transferor and transferee and the value of the property; tax base is the triple tax value (*Einheitswert*), which is commonly far below market value.

## 9.2 When is the transfer tax paid?

The tax return has to be filed by the 15th of the second month



following the execution of the purchase contract unless the contract includes suspensive conditions.

### 9.3 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

Real estate transactions are in principle not subject to VAT. However, the parties have an option (section 6 VAT Act) to charge VAT in the amount of 20% for any transfer of real estate; this is usually done for Input VAT reasons when the seller had claimed substantial Input VAT amounts relating to the property in the years preceding the sale.

### 9.4 What tax or taxes (if any) are payable by the seller on the disposal of a property?

The seller being a private person has to comply with a “retention period” of ten years subsequent to his own purchase. If the real property is transferred earlier, the profit of this transfer is subject to income tax. In the case of a business property, gains from the sale are subject to income tax (natural persons) or corporate tax (business entities).

### 9.5 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

As regards Land Transfer Tax, the indirect sale of a property (i.e., the transfer of the shares in the company owning the real property) triggers land transfer tax if by such sale all shares are united in the hands of one transferee. That is why in practice there is a nominee shareholder holding one share in trust for the transferee. No registration fee accrues as there is no change of the registered owner of the property.

In the event of corporate restructurings by which the shares in land-rich companies are transferred, tax base is the double standard value of the real property concerned.

## 10 Leases of Business Premises

### 10.1 Please briefly describe the main laws that regulate leases of business premises.

In principle, lease agreements for both residential and business purposes are governed by the MRG - which depending on the type of premises is applicable in full, partly (e.g. for business parks) or not at all - and by the ABGB. If the MRG is not applicable, only the respective provisions of the ABGB apply. The MRG is highly restrictive and mainly intends to protect the tenant's interests. Thus, most of its provisions (e.g. restrictions on early termination, maximum rent) are mandatory and cannot be waived or modified to the tenant's disadvantage.

### 10.2 What types of business lease exist?

Austrian lease agreements may be qualified as either lease agreements (*Mietverträge*) or leasehold agreements (*Pachtverträge*). The qualification as lease, or leasehold respectively, determines the legal regime applicable to the particular agreement which is of particular importance regarding the maximum amount of rent, reimbursement of operating costs, maintenance obligations as well as restrictions on terms and termination.

### 10.3 What are the typical provisions for leases of business premises in your country regarding: a) length of term; b) rent increases; c) tenant's right to sell or sub-lease; d) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and e) repairs?

#### a) Length of term

Lease agreements can be concluded either for an indefinite or for a definite term. As lease agreements under the MRG for an indefinite term can only be terminated by the landlord for specific important reasons, there is a tendency to conclude lease agreements for a definite term.

#### b) Rent increases

Most lease agreements provide for an index, usually in accordance with CPI. Furthermore, within the full scope of the MRG the landlord of business premises is entitled to increase the rent to the market price in cases of substantial changes in the tenant's enterprise or ownership structure.

#### c) Tenant's right to sell or sub-lease

In general, the tenant is entitled to sublet or assign; in practice this right is contractually restricted. However, within the full scope of the MRG, only the sub-letting of the entire premises may be prohibited.

#### d) (i) Change of control of the tenant

Such change of control does not constitute an important reason entitling the landlord to early termination, but gives him the right to increase the rent (see question 10.3b).

(ii) Transfer of lease as a result of a corporate restructuring (e.g. merger)

If the shares of the tenant are transferred, the lease agreement remains in force. In such case, only within the full scope of the MRG, the landlord may increase rent (see question 10.3b). If, however, the business of the tenant is transferred (and not the shares in the tenant company), the lease agreement, again only within the full scope of the MRG, is transferred to the legal successor entitling the landlord to a rent increase.

#### e) Repairs

Pursuant to the MRG, the tenant is obliged to provide and pay for any maintenance works and repairs except for maintenance/repair works that become necessary due to serious damages affecting the substance of the building.

Furthermore, unless agreed otherwise, section 1096 ABGB provides for the landlord to keep the leased premises in good condition. However, it is very common to exclude this obligation of the landlord or to limit it to structural damages.

### 10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?

A written agreement triggers stamp duty of 1% of the rent over the whole term of the lease (max 18 years) or the three year rent (lease for indefinite term). Rent is further subject to a VAT option (20% for lease to businesses and 10% for private leases).

**10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.). Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?**

The MRG restricts the termination by the landlord to important reasons only (default with rent, adverse use, inadmissible sub-letting, etc.). The tenant is entitled to terminate a lease without a reason. That is why there is a tendency to conclude lease agreements for a definite term. However, if tenant after expiry of the term refuses to vacate the leased property, the landlord must file an action for possession (*Räumungsklage*), otherwise the contract is renewed for another three years and then may turn into a lease for an indefinite term. In addition, tenants of residential premises may terminate even fixed term leases after expiry of a one year term.

If a lease is terminated early for important reasons, the defaulting party may be held liable for any damages due to early termination; some lease agreement provide for a penalty equal to monthly rent for the original term.

**10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non compliance?**

Under the full scope of the MRG, if the entire business is sold, the buyer enters into the lease. However, the original tenant remains liable for any obligations until the transfer becomes effective.

If the landlord decides to sell the leased premises, the buyer enters into existing leases assuming the landlord obligations vis-à-vis the tenant. The prior landlord however will remain liable towards the purchaser on the terms agreed in the sale agreement.

## 11 Zoning and Environmental Issues

**11.1 What are the main laws which govern zoning and related matters concerning the use and occupation of land and buildings? Please briefly describe them and include environmental laws.**

Each province has enacted its own Land Use Act (*Raumordnungsgesetz*) setting out the principles of rural development and further specific intentions of the respective province's planning legislation. Based thereon, municipalities issue the respective building regulations (*Bebauungsbestimmungen*) and zoning plans (*Flächenwidmungsplan*). Environmental regulations are contained in federal statutes (e.g. the Trade Code or the Water Rights Act) as well as in laws of the provinces.

**11.2 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

Generally, the building law competencies belong to the municipalities in the first instance and, in cases of an appeal against the decision issued by the first instance, to the municipal council or the municipal executive board. Buyers can obtain reliable information on these matters at the respective municipalities. In particular in building matters, they may issue on request official

notifications confirming the zoning and building regulations of the real estate in question.

**11.3 What main permits or licences are required for building works and/or the use of real estate?**

It is generally necessary (except for minor interior works in an existing building) to obtain a building permit (*Baubewilligung*) granting the right to carry out the building project underlying the application. Construction work may not be carried out before the permit has been granted.

Once construction work is terminated, the completion of the building project is to be notified to the municipal authority (*Fertigstellungsanzeige*), in certain cases to be followed by a permit to use the premises (*Benutzungsbewilligung*).

If the buyer intends to operate a business, he additionally needs to apply for an operating permit under the Trade Code (*Gewerbeordnung*) issued by the local trade authorities and appurtenant to the plant.

**11.4 Are building/use permits and licences commonly obtained in your country? Can implied permission be obtained in any way (eg by long use)?**

As described above in question 11.3, both building and use permits are commonly obtained, provided that the provisions of the above mentioned laws (see question 11.1) are met. A building permit may be valid for e.g. two years and is appurtenant to the real property (thus, also effective vis-à-vis the successive owner of the property). However, there is no possibility to obtain an implied permission in any way.

**11.5 What is the appropriate cost of building/use permits and the time involved in obtaining them?**

The costs and time frame varies considerably depending on nature and size of the building project; obtaining a permit may range from several weeks up to a year.

**11.6 In what circumstances (if any) is environmental clean up ever mandatory?**

If a certain level of contamination (so-called contamination classes) is exceeded or danger to e.g. health or ground water is imminent (based on various different federal and provincial regulations), a clean up will be mandatory.

## 12 General

**12.1 Are there any current proposals for significant reform of real estate law in your country - please give details.**

Currently, none. However, a change of the Tenancy Act and the Law of Condominiums was passed in 2006 (*Wohnrechtsnovelle 2006*).

**12.2 Date at which law is stated.**

March 2007.

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