

1. Legal aspects of sale and purchase of real estate

a) What are the titles and the formalities of the transfer of real properties?

The transfer of real properties in Austria is subject to a two-tier process: the contract creating the right (referred to as title) and the registration in the land registry (the so-called mode), after which the purchaser becomes legal owner of the property.

The title – in most cases a purchase agreement – needs to be certified by a notary public or a district court and must at least designate the contracting parties, the real property and the purchase price (or at least its method of calculation). It is common practice to also include the so-called Aufsandungserklärung, i.e. a provision containing the specification of the property and the seller's express consent to the registration of the purchaser as new owner of the property, in the purchase agreement. However, this is only a requirement for the registration and does not affect the validity of the purchase agreement itself.

b) Does the principle *superficies solo cedit* apply or is there a differentiation between ownership of buildings and ownership of land?

Unless agreed otherwise between the contracting parties, the principle *superficies solo cedit* does apply, i.e. the building is treated as inseparable part of the real property and thus 'follows' the real property in the case of transfer.

c) Is there, and if yes, what is the form and scope of competence of the land registry system?

In Austria all land is registered in the national real estate registry containing all real properties. This registry is operated and administered by the Austrian district courts

(depending on the location of the real property). It is available to the public (except for certain privileged data) and its information can be accessed online.

Only upon registration in the relevant land registry is ownership transferred to the buyer. As long as a legal transaction involving real estate is not registered, it is not effective vis-à-vis third parties. Hence, before registration 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 real property.

Furthermore, according to the principle of good faith, entries into the land registry can be relied on as accurate and valid.

d) What are the restrictions on the transfer of real property?

The possibility to transfer real property 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. For others, however, the acquisition of real property is subject to approval by the local land transfer authority, which is by law a suspensive condition for the purchase agreement.

e) How does a transfer of a real property affect current encumbrances?

Any real property can be encumbered with the right of a third person (whether a legal entity or a natural person), i.e. with mortgages, easements or pre-emptive rights. Such encumbrances can be created either by contract or by decision of a state authority (court).

If a pre-emptive right or a prohibition of sale is registered, this right has effect in rem. Thus, the registration of a new owner in the case of a transfer of a real property can be made only upon lodging the consent of the person entit-

led by the registered right (which, of course, can be substituted by a court decision if the party is unwilling to issue such consent, even though obliged to).

Other encumbrances – like mortgages and easements – do not prevent the real property from being transferred to a third party. However, also they remain valid and enforceable against the new owner of the real property.

f) Assessment of the possibility of restitution claims by third parties or ownership claims by the state or municipality.

In Austria, the possibility of restitution claims is still given. While the Austrian National Fund and the General

Settlement Fund were established to provide monetary compensation to victims of the National Socialism, there is also a possibility of in rem restitution of real estate. For the purposes of in rem restitution the term 'publicly-owned property' covers exclusively real estate and buildings (superstructures) which were exclusively and directly owned by the Federation or any legal person under public or private law wholly-owned, directly or indirectly, by the Federation on 17 January 2001, and which were taken from their previous owners between 12 March 1938 and 9 May 1945. Applications for in rem restitutions will be examined and decided by an Arbitration Panel. Applications to the Arbitration Panel were to be filed in writing by 31 January 2006, however, a prolongation of this term is currently being discussed.

2. Legal aspects of leases

a) What are the typical provisions for leases regarding:

- (i) length of term;**
- (ii) rent increases;**
- (iii) tenant's right to sublease;**
- (iv) transfer of the lease (e.g., sale of property, corporate restructuring of tenant);**
- (v) change of control of landlord/tenant;**
- (vi) repairs**

General: In principle, lease agreements for both residential and business purposes are governed by the Austrian Tenancy Act ('MRG', Mietrechtsgesetz) - which depending on the type of premises is applicable in full, partly (e.g. for business parks) or not at all - and by the Austrian Civil Code ('ABGB', Allgemeines Bürgerliches Gesetzbuch). 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.

(i) 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 preferably conclude lease agreements for a definite term.

(ii) 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.

(iii) In general, the tenant is entitled to sublet or assign; in practice this right is contractually restricted. However, wit-

hin the full scope of the MRG, only the subletting of the entire premises may be prohibited.

(iv) If the shares of the tenant are transferred, the lease agreement remains in force and only within the full scope of the MRG may the landlord increase the rent. If not the shares but the business of the tenant is transferred, the lease agreement, within the full scope of the MRG, is transferred to the legal successor entitling the landlord to a rent increase.

(v) Change of control of the tenant does not constitute an important reason entitling the landlord to early termination, but gives him the right to increase the rent.

(vi) 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 damage.

b) What are the restrictions on the termination of the lease? Are there any provisions allowing a party to renew the lease?

Indefinite lease agreements may only be terminated by the lessor for specific important reasons listed in the Austrian Tenancy Act (MRG), i.e. default of rent, adverse use, inadmissible sub-letting, etc. Any further reasons entitling the lessor to termination may only be agreed upon if they are comparable to the taxative list set out by the MRG. The lessee, on the other hand, may terminate the lease agreement at any time without specific reasons.

Due to this strict regulation of the termination possibilities of the lessor in cases of an indefinite lease agreement, the majority of lease agreements are concluded for a definite term. A minimum term of 3 years is required in

cases of a lease regarding an apartment (not in cases of business premises).

Within the MRG, definite lease agreements are automatically renewed for one further term of three years unless termination notice is given in due time and form. Thereinafter (if after these three years the lease again is not duly terminated) the respective lease agreement is automatically regarded as an indefinite lease agreement. However, the lessee of an apartment is – after one year – entitled to terminate the lease agreement at the end of each month following three months' written notice.

c) Are there any taxes (e.g., stamp duty, VAT) payable on rent and on conclusion of the rent agreement?

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

d) Must/should lease agreements be registered in the land registry, what are the legal consequences?

There is no obligation to register lease agreements; however it might be advisable to register the lease in the land registry because then the position of the lessee is considered as an 'absolute right' and is thus valid vis-à-vis third parties.

According to sec 1120 of the Austrian Civil Code (ABGB), when a property is sold, any lease agreements automatically go over to the purchaser who becomes the new lessor. However, the purchaser is not bound by the provisions regarding term and termination or by any unusual provisions (unless he knew or should have known them). Thus, the lease agreement runs the risk of being terminated earlier in the event of a sale, unless the lease agreement has been registered.

3. Duties and taxes relating to the acquisition of real estate

a) Is there any real estate transfer tax? What is the rate of such tax?

The transfer of ownership in real properties triggers Land Transfer Tax (Gründerwerbssteuer) 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 a 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.

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.

b) Are there any other stamp duties, registration fees, or other similar costs accruing on the occasion of a real property acquisition?

(cf above, 3.a)

c) Is the acquisition of a real property subject to VAT? In which cases is it possible to deduct VAT?

Basically, real estate transactions are not subject to VAT. However, pursuant to sec 6 VAT Act the parties have an option to charge VAT (20 %) for any transfer of real property (usually for Input VAT reasons when the Seller had claimed substantial Input VAT amounts relating to the property in the years preceding the sale).

4. Tax aspects of holding real estate located in the host country

a) What are the tax consequences if the investor is a (non-resident) individual?

Income (such as rental income) derived from real estate located in Austria is always subject to Austrian income

taxation regardless of whether the investor is an Austrian or non Austrian resident. The tax rate is progressive and goes up to 50 %.

b)

What are the tax consequences if the investor is a (non-resident) company?

Income (such as rental income) derived from real estate located in Austria is always subject to Austrian income taxation regardless of whether the investor is an Austrian or non Austrian resident. The tax rate for corporations is flat and amounts to 25 %.

c)

What are the possibilities of tax efficient financing in such a case (deductibility of financing costs)?

Debt financing is possible and interest is usually deductible. However, debt financing received from related parties has to comply with arms length terms with respect to thin capitalisation, security and interest rates etc.

d)

What are the relevant rules of withholding taxes?

There is a 25 % withholding tax on dividends and no withholding tax on interest.

e)

Are there any other taxes resulting from holding real estate?

There is an annual property tax based on the historically assessed value of the property; those historic values are far below the actual market value.

5. Tax aspects of selling real estate in host country

a)

What are the general rules on:
(i) corporate taxation;
(ii) personal income taxes;
(iii) taxes related to real property;
(iv) value added taxes;
(v) other taxes;
(vi) double taxation treaties;
(vii) non-resident investor and local taxes?

- (i) The sale of real estate by a corporate entity is always subject to corporate income tax at a rate of 25 %.
- (ii) The sale of real estate by an individual in its private assets sphere is not subject to capital gains tax if the real estate was held for at least ten years (shorter periods apply for residential real estate).
- (iii) There is a real estate transfer tax (3.5 %) and a land registration fee in the total (1 %).
- (iv) The sale of real estate is in principle exempt from VAT; however, an option may be chosen to make the transaction subject to VAT.
- (v) N/A.
- (vi) In the context of real estate, the tax treaties typically provide that the country in which the property is located may charge the capital gains tax.
- (vii) In the context of real estate, the tax treaties typically provide that the country in which the property is located may charge the capital gains tax.

b)

What are the tax aspects of direct investment in cases of:

- (i) Sale of real estate by a non-resident individual;**
- (ii) Sale of real estate by a non-resident company?**

- (i) The sale of Austrian real estate by a non resident individual is taxable in Austria under the general rules that would also apply to Austrian resident individuals.
- (ii) The sale of Austrian real estate by a non resident corporate entity is always subject to corporate income tax at a rate of 25 %.

c)

What are the tax aspects of selling real estate companies in cases of:

- (i) Sale of shares in real estate company / real estate partnership by a non-resident individual?**
- (ii) Sale of shares in real estate company / real estate partnership by a non-resident company, partnership, trust?**

- (i) The sale of an Austrian corporation and partnership is always taxable in Austria, unless the applicable tax treaty provides an exemption.
- (ii) The sale of an Austrian corporation and partnership is always taxable in Austria, unless the applicable tax treaty provides an exemption.

6. Asset deal vs. share deal: Particularities and pitfalls with regard to the sale or lease of real estate

Description of a typical acquisition structure and evaluation of the different possibilities to acquire real estate. Advantages and disadvantages of direct investment in real estate (asset deal vs. share deal)?

a)

Basically, there are two possible ways of acquiring real estate – (i) via a share deal structure or (ii) via an asset deal structure. The typical acquisition structure comprises the following steps: negotiation of the heads of terms, if necessary a legal (tax, technical, commercial, etc) due diligence; drafting and negotiating the contract, signing and closing of the transaction.

There is an appreciable difference between share deal and asset deal with regard to taxation issues as well as with regard to liability. Whereas the acquisition of real estate in the course of an asset deal is definitely liable to Land Transfer Tax in the amount of 3.5 % and a registration fee of 1 %, the acquisition via share deal may be used to avoid Land Transfer Tax. The share deal, however, may entail higher costs for the due diligence of the target company and a broader range of potential risks.

Please describe any particularities or pitfalls with regard to the sale or lease of real estate.

b)

Stamp duty issues can be a 'pitfall' for foreign investors as they may not be familiar with the peculiarities of the Austrian tax system. Written lease agreements, for example, trigger substantial stamp duties in the amount of 1 % of the rent over the whole lease term (cf above, 2.c); that is why some parties chose to enter into non-written agreements (e.g. by written offer of the tenant and factual acceptance by the landlord). However, one should be aware that a qualified reference to that agreement by either of the parties in the subsequent correspondence triggers stamp duty.