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Real Estate

Austria

Law and Practice

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Law and Practice

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1. GENERAL

1.1 Main Sources of Law

The main source of Austrian real estate law is the General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*). There are also various laws that regulate certain aspects of real estate, such as the Land Register Act (*Grundbuchsgesetz*), the Act on the Right to Build (*Baurechtsgesetz*), the Act on Development Contracts (*Bauträgervertragsgesetz*) and state legislation on zoning and construction.

1.2 Main Market Trends and Deals

According to the latest figures, the COVID-19 pandemic does not seem to have caused a noticeable growth drop in the housing market, but its negative impact on the commercial real estate market, particularly regarding office space and retail premises, was very significant. In addition to the multiple lockdowns imposed in 2020, the increased use of remote working options is seen as one of the driving forces behind this development. Due to the uncertainties caused by the first lockdown in early 2020, many projects and transactions were delayed during that time.

Nevertheless, persistently low interest rates and – in most regions – a high demand for new developments are attracting international developers and investors alike. Freehold apartments have moved more into focus of late, especially in Vienna, where the demand has grown and developers are bringing more housing space onto the market.

1.3 Impact of Disruptive Technologies

Although emerging technologies have not yet had a major impact on the Austrian real estate sector, the influence of such new technologies continues to grow. In particular, machine learning and artificial intelligence keep moving more into focus, as they are expected to significantly

increase the efficiency of traditional processes. For example, data-based predictive analytics might soon be able to make valid predictions as to which defects could arise in a building in the near future and thereby enable the owner or building administration to take the necessary precautions in due time.

Furthermore, in addition to existing software solutions for the networked planning, execution and management of buildings (Building Information Modelling), new digital solutions for urban planning, building design and management, as well as the maintenance of real estate, are increasingly being created.

1.4 Proposals for Reform

Currently there are no proposals for reform that would significantly impact real estate investment, ownership or development in Austria.

2. SALE AND PURCHASE

2.1 Categories of Property Rights

Austrian law provides for different types of real rights, with the most comprehensive one being ownership (*Eigentum*). Other forms of real rights include servitudes (*Dienstbarkeiten*), pledges (*Pfandrechte*) and the right to build on another's land (*Baurecht*).

Ownership of a certain piece of real estate essentially includes ownership of the buildings and other structures connected to it. Exceptions are possible in respect of buildings erected on another's land. Austrian law also provides for the possibility of co-ownership in real estate, which can be further divided into ordinary co-ownership, granting the right holders a non-material share in the real estate, and so-called flat-ownership, granting the right holders a non-material share in the real estate that is inextricably linked

to a specific unit (eg, flat, parking lot or basement compartment).

2.2 Laws Applicable to Transfer of Title

The transfer of ownership and other real rights is regulated by the Austrian General Civil Code, the Austrian Land Register Act and various specific federal laws on the transfer of real estate. No other laws apply to the transfer of different types of real estate.

2.3 Effecting Lawful and Proper Transfer of Title

The transfer of ownership requires a valid title (eg, notarised purchase agreement) as well as an act of transfer. Since all real estate in Austria is registered in the public Austrian Land Register (*Grundbuch*), the transfer of ownership and most other real rights requires the registration of such rights in the Austrian Land Register. The registration itself constitutes the necessary act of transfer referred to above.

Since the legal fate of a building generally follows the legal fate of the land on which it is erected, ownership of the two cannot usually be separated. However, in some exceptional cases, ownership of a building or structure on another's land (*Superädifikat; Baurecht*) is possible. The ownership of some of these structures (ie, *Superädifikat*) is transferred by depositing the title deed (eg, notarised purchase agreement) with the court within whose jurisdiction the real estate is situated.

Due to the existing registration system, title insurance is not a common instrument in real estate transactions in Austria.

2.4 Real Estate Due Diligence

The level of scrutiny involved in real estate due diligence processes can vary, depending on the real estate involved and the purpose of the respective transaction. Typically, one would first

access the Land Register and assess the rights and encumbrances registered in respect of the real estate. Certain environmental information – in particular whether the real estate is registered as a contaminated or possibly contaminated site – can also be accessed through the relevant public registers. In some transactions, potential purchasers commission experts to prepare a report on the real estate and the existence of possible contaminations, which usually includes on-site inspections and the taking of soil samples.

If buildings or other structures exist on the real estate, the building permits are assessed as to whether any applicable zoning prescripts or conditions have been violated by the current owner. Furthermore, it is of utmost importance to review all contracts relating to the real estate, in order to assess the full usage of it and identify any restrictions and/or encumbrances that are not registered in the Land Register.

As a result of the lockdowns in 2020, the risk of a lessee defaulting on his or her rent payments rose significantly in respect of certain types of commercial premises (eg, restaurants, hairdressers, etc). Potential buyers of commercial real estate have thus begun to pay greater attention to the type of business any existing lessees pursue.

2.5 Typical Representations and Warranties

The General Civil Code provides certain statutory warranty rights for purchasers, which are essentially intended to protect them against any deviation from the agreed features of the object of the sale. The statutory remedies for misrepresentations are warranty claims, which comprise the right to repair or replace the defective object (primary remedies) and the reduction of the purchase price or, in some instances, withdrawal from the contract (secondary remedies). A pur-

chaser may also claim any additional damages suffered if they were intentionally or negligently caused by the seller.

However, in practice, parties to real estate transactions typically deviate from the statutory warranty rules and agree on an exhaustive catalogue of assurances for which the seller will be liable. Depending on the strength of the respective parties' bargaining positions, these catalogues may vary greatly from one transaction to another.

The assurances to be found in almost any real estate transaction are that the real estate is free from both registered encumbrances and any encumbrances not registered in the Land Register, and that, at the time of handover, there are no outstanding payments with respect to all prescribed operating costs, contributions to the fund for repairs and maintenance, running public charges and any other costs related to the object. Furthermore, there should be assurances as to the non-existence of construction orders or any other orders concerning any unlawful constructions on the real estate, and that the seller has no positive knowledge of any kind of contamination.

2.6 Important Areas of Law for Investors

The different laws that should be considered by real estate investors largely depend on the type of investment that is contemplated. Typically, the most important laws are those concerning regional and local zoning, the acquisition of building permits and plant licences, and rental housing.

2.7 Soil Pollution or Environmental Contamination

Several Austrian laws, such as the Water Rights Act (*Wasserrechtsgesetz*) and the Waste Management Act (*Abfallwirtschaftsgesetz*), prescribe the statutory liability of real estate owners for soil

pollution or environmental contamination on or originating from their land. The owner's statutory liability to either remove such contamination or reimburse the public authorities for procuring the removal of such contamination is typically subordinate to the liability of the person or entity who initially caused the contamination.

2.8 Permitted Uses of Real Estate under Zoning or Planning Law

In order to ascertain the permitted uses of a parcel of real estate under the applicable zoning or planning law, a prospective investor can access the various state databases on zoning, which are mostly available online. However, such databases do not necessarily reflect the latest state of zoning, which is why it is advisable to engage the local authorities directly and access the up-to-date zoning plans on-site. It is also possible to request a statement on the zoning of a particular parcel of real estate. In some federal states of Austria, developers can enter into urban development agreements (*städtebaulicher Vertrag*) with municipalities, which usually facilitate a project.

2.9 Condemnation, Expropriation or Compulsory Purchase

The right to property is a fundamental right protected by the Austrian Constitution. Accordingly, the state may only deprive a person or entity of their property in terms of laws of general application, and when the expropriation serves the public interest. Furthermore, adequate compensation must generally be paid to the expropriated owner.

Currently, there are several federal and state laws enabling expropriation. Typical examples for cases in which expropriation may occur are land acquisitions for public railways or public housing. The usual process followed by the expropriating (governmental) body will be to engage the land owner and negotiate the sale

of the real estate in consideration for fair compensation. If no agreement can be reached and the specific legislative requirements are met, the real estate can be expropriated for adequate compensation.

2.10 Taxes Applicable to a Transaction

The transfer of real estate is subject to a land transfer tax of 3.5% and a registration fee of 1.1% of the purchase price including value added tax, if applicable. These costs are typically borne in full by the purchaser. Land transfer tax, but not a registration fee, also applies if an entity acquires (or otherwise holds) more than 95% of the shares in a company that holds real estate, irrespective of when and how this threshold is exceeded. Exemptions may apply in some instances – for example, in different restructuring scenarios (mergers, demergers, etc).

Furthermore, profits generated from the sale of real estate are subject to real estate income tax (*Immobilienverkehrssteuer*) at a rate varying from 25% to 30%, depending on whether an individual or a legal entity that is subject to corporate income tax is the tax subject.

2.11 Legal Restrictions on Foreign Investors

State legislation generally restricts the acquisition of real estate by non-EU nationals. The approval of the competent state authority is required for the transfer of real estate in such cases.

3. REAL ESTATE FINANCE

3.1 Financing Acquisitions of Commercial Real Estate

The acquisition of real estate is financed with equity or debt capital. Typical financing options for acquisitions of real estate are senior and sub-

ordinated debt, operating and finance leasing, and sale and leaseback transactions.

3.2 Typical Security Created by Commercial Investors

When borrowing funds to acquire or develop real estate, the borrower will typically grant the creditor a pledge over the real estate in question (*Hypothek*). The pledge must be registered in the Land Register in order to be valid, even towards third parties, and is accessory to the secured claim. This means that it can only be transferred to a third party together with the secured claim, and will cease to exist once the secured claim has been discharged in full.

A pledge over real estate extends to the buildings and other structures erected on it. However, due to the registration system in place, the real estate pledge is a non-possessory pledge, which means that the owner can continue to use the real estate.

Other common security instruments in real estate financing transactions include guarantees granted by affiliate companies, the pledge of certain receivables (eg, claims generated from leases, future insurance claims, etc), a pledge over bank accounts or a pledge over the shares and interest (dividend payments) in the entity that owns the real estate. Although possible, the assignment of receivables as security (*Sicherungsabtretung*) is often avoided in bigger transactions, since stamp duty (*Rechtsgeschäftsgebühr*) at a rate of 0.8% may apply.

3.3 Restrictions on Granting Security over Real Estate to Foreign Lenders

There are no restrictions on granting security over real estate to foreign lenders, nor on repayments being made to such under a security document or loan agreement.

3.4 Taxes or Fees Relating to the Granting and Enforcement of Security

A pledge over Austrian real estate requires a notarised pledge agreement as well as the registration of the pledge in the Land Register. Notary fees and a registration fee of 1.2% of the pledge's value will be payable, in addition to the costs of legal representation. Other forms of security (eg, share pledge, receivables pledge, etc) are usually not subject to such fees as they require neither a notarised agreement nor registration in a public register.

In order to enforce the pledge, judicial enforcement proceedings are usually required. Such proceedings are subject to court fees and possibly fees for an appraiser. The amount of such court fees depends on the value of the secured claim. The creditor may claim reimbursement for such fees, which can be granted by the court in a cost order.

3.5 Legal Requirements Before an Entity Can Give Valid Security

Austrian corporate law incorporates a rigorous system of capital maintenance rules (*Kapitalerhaltungsvorschriften*), which, inter alia, prohibit the return of equity from a company to its shareholder. A company may not make any payments to the shareholder other than the distribution of profits or in the course of a formal reduction of statutory capital. The provisions on the repayment of capital also include any benefits granted by the company to its shareholders where no "adequate consideration" is received in return. Any agreement between a company and its shareholder and/or any third party granting a benefit to the shareholder which would not have been granted to a third party, or at least not in the same way, is void.

The Austrian courts have interpreted this mandatory principle broadly, and held that the prohibition on the return of equity generally also

encompasses the granting of security by a company for a loan extended to its shareholder or any other group company, other than such company's subsidiaries – for example, up-stream or cross-stream guarantees or pledges of assets. However, what can be drawn from the Austrian Supreme Court's past decisions is that the granting of security by a company for a loan to its shareholder is permissible if:

- it is at arm's length, hence adequate consideration is received in return and, after due investigation by the company, no doubts towards the reliability and solvency of the borrower (ie, the shareholder) are established that could give reason to believe that potential recourse claims might fail; or
- the granting of security is for the operational benefit of the company.

In addition to these capital maintenance rules, directors of companies must act with the diligence of a prudent businessperson at all times. In many cases, internal corporate governance rules exist, which outline the directors' responsibilities in more detail.

Furthermore, with regard to security granted by companies over their real estate assets, Austrian corporate law usually prescribes that such transactions require the approval of the shareholders and/or the supervisory board.

3.6 Formalities When a Borrower Is in Default

Most loan and security documents contain a detailed procedure for when an event of default occurs. Usually, the creditor will be given written notice of the default and a certain amount of time in which to remedy it. Failure to comply will then typically trigger the enforcement clause in the respective security document, which entitles the creditor to realise the pledge without any

other legal court action, either by public auction or by private sale.

With regard to the enforcement of a pledge over real estate, however, such out-of-court realisation has not yet been tested in the higher courts. Therefore, enforcement typically involves judicial proceedings. First, the lender's claim must be established in so-called title proceedings. If successful, the lender can then enforce the pledge in separate execution proceedings. This usually entails a public auction in which the real estate will be auctioned off to the highest bidder. The auction proceeds will then be used to repay the debts. Any excess will be transferred to the debtor.

The rank of various pledges over the same real estate depends on the time of registration (principle of priority) – ie, older pledges will have priority over younger ones.

3.7 Subordinating Existing Debt to Newly Created Debt

In general, existing secured debt can only be subordinated by agreement and by law. If an existing land pledge should be subordinated to a newly created land pledge, the registration of such subordination in the Land Register is required in order for it to become effective. Before that, the consent of the pledgee must be obtained.

3.8 Lenders' Liability under Environmental Laws

A lender who holds a pledge over real estate is not liable for soil pollution or any other environmental damage.

3.9 Effects of a Borrower Becoming Insolvent

In principle, security rights (particularly pledges) are not affected by the debtor's insolvency, and the beneficiaries of such rights have a right of

segregation. However, there are a few exceptions to this principle, depending on the type of pledge and the time the pledge is acquired.

For example, if the pledge was created within the two years before the opening of insolvency proceedings and is to disadvantage other existing creditors, the insolvency administrator may challenge it in court if he or she can prove that the beneficiary knew or should have known the debtor's intention to disadvantage other creditors. In another example, a pledge that is newly created within 60 days before the opening of the insolvency proceedings by judicial order (*richterliches Pfandrecht*) would automatically expire.

If it jeopardises the possible continuation of an insolvent company, the fulfilment of a pledge cannot be demanded before the expiry of six months from the opening of the insolvency proceedings.

3.10 Consequences of LIBOR Index Expiry

One of the key consequences of the expiry of the London Interbank Offered Rate (LIBOR) index by the end of 2021 is the necessary transition to new reference rates, unless banks continue to submit the underlying data and Intercontinental Exchange (the LIBOR administrator) continues to publish LIBOR. When replacing LIBOR with other rates, issues may arise from the fact that the new rates could be structurally different from LIBOR. In such cases, borrowers may be required to renegotiate the terms of their loan agreements, which may have an impact on their funding. Mechanisms to manage such risks include contract reviews, more conservative project planning and renegotiating a different reference rate before the expiry of LIBOR takes effect.

4. PLANNING AND ZONING

4.1 Legislative and Governmental Controls Applicable to Strategic Planning and Zoning

Strategic planning and zoning across regions and in localities in Austria are governed by federal legislation (*Bundesgesetze*), the legislation of the nine Austrian federal states (*Landesraumordnungsgesetze*), and regional and local development and zoning plans enacted through municipal by-laws (*Flächenwidmungs- und Bebauungspläne*). The federal competence to enact legislation with regard to zoning is limited to specific sectors, such as railways, federal roads, aviation, etc.

4.2 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction

The design, appearance and method of construction of new buildings or the refurbishment of existing buildings, as well as the safety of such buildings, are generally governed by the applicable state legislation on construction (*Bauordnungen*).

4.3 Regulatory Authorities

Municipalities are responsible for regulating the development and use of individual parcels of real estate; they also issue local development and zoning plans through municipal by-laws. The general zoning principles and guidelines for such plans are outlined in the relevant state legislation on zoning (*Raumordnungsgesetze*).

4.4 Obtaining Entitlements to Develop a New Project

In order to obtain entitlements to develop a new project or complete a major refurbishment, the developer (or owner) must submit an application to the competent municipality, outlining in detail the intended use of the real estate and

the planned development. If a particular project affects areas other than technical and safety standards or compliance with zoning (eg, the use as business premises, landmark protection or possible environmental implications), the applicant may be required to file the necessary application with the relevant authorities.

Furthermore, the owners of adjacent properties are typically parties to proceedings concerning the issuance of building permits, so must be granted the right to be heard. The relevant state legislation usually awards specific rights to such neighbours, which may not be violated by the planned development.

If a development project complies with the relevant planning, zoning and building legislation, a building permit will be issued. In most cases, building permits are subject to a specific catalogue of conditions that must be fulfilled by the owner of the real estate and – if the condition is a permanent one – also by every subsequent owner.

If the existing zoning plan needs to be changed in order to realise a particular development project, the developer can file an application for rezoning (*Umwidmung*) with the competent municipality. However, there is no guarantee that the application will be granted, as rezoning may not divert from applicable zoning principles and guidelines. In such cases, it is advisable to cooperate with the local authorities as closely as possible to achieve the desired rezoning.

4.5 Right of Appeal Against an Authority's Decision

If the competent municipality dismisses an application for the issuance of a building permit or subjects it to unreasonable or unnecessary conditions, legal action can be taken against the municipality's decision.

Neighbours may institute proceedings to fight the issuance of a building permit if the decision to grant it infringes upon their rights as provided by the relevant state legislation. Unlawful decisions that do not affect their specific rights cannot be appealed by a neighbour.

4.6 Agreements with Local or Governmental Authorities

In some federal states of Austria, including Vienna, it is permissible for municipalities to enter into private law agreements with real estate owners, also called urban development agreements (*städtebaulicher Vertrag*). The aim of such agreements is to support the realisation of planning objectives and, in particular, to involve the real estate owners in the infrastructure costs resulting from the rezoning of their land.

4.7 Enforcement of Restrictions on Development and Designated Use

If a certain development project or the subsequent use thereof does not adhere to the building permit, and particularly to the conditions it contains, the competent authorities can issue an order requiring the owner to reinstate the (previous) lawful state or cease the unlawful use. Such orders may even require the owner to demolish an unlawfully erected building.

5. INVESTMENT VEHICLES

5.1 Types of Entities Available to Investors to Hold Real Estate Assets

Under Austrian law, any legal entity that possesses the necessary legal capacity can acquire ownership in real estate. Various types of companies are available to investors in Austria, with the most common ones being:

- the stock company (*Aktiengesellschaft* – AG);
- the limited liability company (*Gesellschaft mit beschränkter Haftung* – GmbH);

- the open commercial partnership (*offene Gesellschaft* – OG); and
- the limited commercial partnership (*Kommanditgesellschaft* – KG).

Austrian law also grants partial legal capacity to real estate funds within the meaning of the Austrian Act on Real Estate Investment Funds (*Immobilien-Investmentfondsgesetz*).

The entity most commonly used for the acquisition and development of real estate is the limited liability company. However, stock companies or limited partnerships are usually used for the management of larger portfolios of real estate, particularly real estate investment funds.

5.2 Main Features of the Constitution of Each Type of Entity

The incorporation of a limited liability company requires a notarial deed and registration with the Austrian Companies Register. A limited liability company and its assets are fully independent of its shareholders who, save for certain rights and obligations, are typically not involved in the day-to-day operation of the company. Shareholders are not personally liable to the company's creditors if their respective capital contributions have been fully paid. Exceptions may apply in cases of collusion and qualified under-capitalisation of the company.

The company may have one or more managing directors who are responsible for the day-to-day operation of the company. The managing directors are bound by the shareholders' instructions, which may also take the form of a corporate governance code. Limited liability companies can have a voluntary supervisory and/or advisory board. However, in some instances – for example, when a company has on average more than 300 employees or its share capital exceeds EUR70,000 – the establishment of a supervisory board is mandatory. In practice, it is rather

unusual for limited liability companies in the real estate sector to have a supervisory board.

5.3 Minimum Capital Requirement

The minimum capital for incorporating a limited liability company is EUR35,000, half of which must be paid in cash. A contribution in kind is also possible but can be subject to certain limitations. It is possible to make use of a so-called founding privilege, which reduces the minimum capital to EUR10,000 for the first ten years of incorporation. After the expiry of the privileged ten years, the capital must be increased to EUR35,000. In practice, it is rather unusual to make use of the founding privilege when investing in real estate, since shareholders could expose themselves to liability for qualified undercapitalisation of the company.

5.4 Applicable Governance Requirements

Generally speaking, Austrian law does not prescribe any specific governance requirements for (private) companies in respect of real estate investments, apart from the general principle that managing directors must always act with the diligence of a prudent businessperson.

However, if real estate assets qualify as real estate funds pursuant to the Austrian Act on Real Estate Investment Funds, a statutory regulatory framework applies to them. The assets of such funds are owned by a specific real estate investment company, which holds them in trust for the investors and manages them. The investment company requires a licence under the Austrian Banking Act, and its management is regulated by the Austrian Alternative Investment Fund Manager Act, which implemented Directive 2011/61/EU into Austrian law.

Real estate investment funds and alternative investment fund managers are subject to super-

vision by the Austrian Financial Markets Supervisory Authority (*Finanzmarktsaufsichtsbehörde*).

5.5 Annual Entity Maintenance and Accounting Compliance

The annual entity maintenance and accounting compliance costs can vary depending on the type of company used and the real estate it holds. A general estimate is not possible – an assessment must take place on a case-by-case basis.

6. COMMERCIAL LEASES

6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

Austrian law distinguishes between two main categories of leases:

- *Miete*, which entitles the lessee to use the lease object (eg, for housing purposes or as commercial premises); and
- *Pacht*, which entitles the lessee to use the lease object and generate profits from it.

A typical example of *Pacht* would be the lease of an already established medical practice. Whether a lease agreement is considered *Miete* or *Pacht* depends on the contents of the agreement. In many respects, however, similar statutory rules apply to both.

6.2 Types of Commercial Leases

Apart from the differentiation between *Miete* and *Pacht*, Austrian law does not provide for further categories of commercial leases.

6.3 Regulation of Rents or Lease Terms

Lease agreements are mainly regulated by the General Civil Code, which contains certain rights and obligations for the parties in respect of the lease. These default rules apply unless the par-

ties agree otherwise. In general, the amount of rent chargeable is subject only to the limitations that it may not be against good morals (contra bonos mores) nor exceed an adequate market rate by more than 50% and the lessee had no knowledge of the amount that would be considered an adequate market rate (laesio enormis). Within these bounds, the amount of rent can be freely negotiated. The term of lease agreements is not regulated by law and may also be freely agreed by the parties.

Mandatory rules apply in respect of lease objects that fall into the (full) ambit of the Austrian Tenancy Act (this particularly concerns lease objects situated in buildings erected before 1945) regarding, among others, the lessor's maintenance responsibilities, the lessee's rights in respect of the lease object, the maximum rent chargeable, the (minimum) term, and the grounds on which the lease agreement may be terminated.

It is also possible for lease objects to not fall into the ambit of the Austrian Tenancy Act, or to do so only partially, in which case the lessor is subject to fewer mandatory obligations, and lessees typically have fewer rights. Whether a lease object falls into the full or partial ambit of the Austrian Tenancy Act, or is not subject to it at all, must always be assessed on a case-by-case basis.

The 2nd COVID-19 Justice Accompanying Act afforded special protection against termination to lessees whose economic productivity was significantly impaired by the COVID-19 crisis and who were, as a result thereof, unable to pay the full rent in the period from 1 April 2020 to 30 June 2020. In such cases, the lease agreement cannot be terminated by the lessor until the end of 2022 solely due to an arrears that stems from this period. Furthermore, there is also a moratorium on the possibility of judicial recovery or covering the arrears from the lessee's deposit

until 31 March 2021. This applies regardless of whether the lease agreement is subject to the Austrian Tenancy Act or not. However, the protection does not apply to leases of commercial premises.

6.4 Typical Terms of a Lease

The term of a lease typically varies between three and ten years, although it is possible to agree on longer terms.

In general, the lessor is obliged by law to maintain the lease object in the same condition as agreed by the parties, and to bear the costs for the repairs necessary in this respect. It is common practice to deviate from this default rule and agree on a transfer of the maintenance obligations from the lessor to the lessee; the lessor will then no longer be responsible for maintaining the lease object. However, with regard to the structure of the building and the common spaces thereof, the transfer of the lessor's maintenance obligations can in some instances be unlawful.

The Austrian Consumer Protection Act and the Austrian Tenancy Act further restrict the possibility to shift maintenance and repair obligations from the lessor to the lessee. The Austrian Tenancy Act, for example, contains a catalogue of mandatory maintenance obligations and grants the lessee the right to enforce such obligations in court if the lessor fails to fulfil them.

If the term of the lease exceeds one year, the rent is payable every six months; in leases with shorter terms the rent is payable at the end of the term. It is common market standard to deviate from these rules and agree on monthly payments in advance.

Pursuant to Austrian law, a lessee is not required to pay rent if the lease object cannot be used or occupied due to extraordinary circumstances (eg, a pandemic). For certain types of commer-

cial leases, this applies only if the rent agreement was concluded for one year. Since parties to a lease agreement may legally deviate from these statutory regulations, it can be assumed that lease agreements for business premises that are drawn up in the future will increasingly contain provisions to that effect.

6.5 Rent Variation

Unless agreed otherwise by the parties (eg, turnover-linked rent), the rent payable to the lessor will usually remain the same throughout the term of the lease. The use of indexation clauses in lease agreements is common practice and allows the lessor to adjust the rent in accordance with the current Consumer Price Index (*Verbraucherpreisindex*).

With regard to lease objects that fall into the full ambit of the Austrian Tenancy Act (and serve housing purposes), the rent chargeable is strictly regulated by law. Rent that exceeds the maximum amount permissible, which is typically calculated with a view to factors such as area, building facilities, green spaces, etc, would be unlawful. However, indexation of the rent would be possible.

6.6 Determination of New Rent

As there is no statutory right to increase rent after the passing of a certain amount of time, there are no standard procedures for how to determine new rent. If a gradual increase of the rent or a turnover-linked rent is (validly) agreed upon by the parties, the lease agreement usually determines the way in which the rent and any increase thereof is to be determined. Turnover-linked lease agreements often contain a fixed minimum amount of rent to address the risk of weak economic performance.

Agreed indexation of the rent must be announced to the lessee in order to be valid, and may be claimed for up to three years in retrospect. Index-

ation clauses usually contain a certain threshold (5% to 10%), and stipulate that an indexation may only take place once the respective threshold has been exceeded. Within the ambit of the Austrian Tenancy Act, an indexation must be announced in writing and may not take place retroactively.

6.7 Payment of VAT

The lease of an object for housing purposes is subject to 10% VAT in Austria. The lease of business premises is generally exempt from VAT. However, the lessor may opt to subject the rent to VAT, in which case a tax rate of 20% will apply.

6.8 Costs Payable by a Tenant at the Start of a Lease

Cash deposits or a bank guarantee in the amount of three to five months' rent are common securities agreed upon in lease agreements, and are typically demanded before the beginning of the lease. An administration fee for drafting the lease agreement may also be payable to the lessor.

Stamp duty applies to lease objects for commercial purposes, usually in the amount of 1% of three times the annual rent for unlimited term leases, or 1% of the annual rent multiplied by the term of the duration in years (maximum of 18 years) for limited term leases. This is usually paid by the lessee, but both parties are jointly liable to the tax authorities for the full amount.

6.9 Payment of Maintenance and Repair

The maintenance and repair of common areas is the obligation of the lessor, unless otherwise agreed on by the parties. Lease agreements concerning entire buildings used for commercial purposes typically contain provisions that require the lessee to perform such maintenance and repair duties at its own cost. However, such deviations can be unlawful if the lease object falls into the ambit of the Austrian Tenancy Act

or if the lessor is an entrepreneur and the lessee a consumer.

6.10 Payment of Utilities and Telecommunications

In leases that are considered *Pacht*, the lessee has to bear the costs for utilities and telecommunications. Other agreements are of course possible. In lease agreements that are considered *Miete*, it is the lessor's responsibility to shoulder such costs, unless otherwise agreed on by the parties.

The operating costs for utilities and telecommunications may be billed in accordance with actual consumption or a flat-rate model. In practice, the flat-rate model is usually used, pursuant to which each lessee pays a proportional amount of the expenses for the entire building (based on the actual expenditure for the previous calendar year).

The lessee's proportional share of these costs depends on the size of the lease object in comparison to the entire building. If an increase of the operating expenses is required due to increased expenditure in the previous year, the lump sum may be increased by a maximum of 10% compared to the total of the previous year.

6.11 Insuring the Real Estate That Is Subject to the Lease

It is common practice for owners to insure buildings against risks such as fire, personal liability, water damage, glass breakage and storm damage. This task is usually entrusted to the building administration, which, incidentally, can conclude a corresponding insurance policy even without instructions. Lessees can be charged with the costs for such insurances. It is possible to insure further risks and pass on such costs to the lessee, unless the lease object falls into the ambit of the Austrian Tenancy Act.

6.12 Restrictions on the Use of Real Estate

The purpose for which a lease object may be used is usually agreed on between the parties in the lease agreement and is also subject to the respective building permit, the latter of which considers relevant state legislation on construction and zoning. Furthermore, in many instances the lessor and the lessee agree on certain house rules that regulate the use of the lease object as well as common spaces. The lessor may also prohibit the subletting of the lease object. However, within the ambit of the Austrian Tenancy Act this may only be done for certain reasons (eg, when the entire lease object is sublet or the rent charged by the lessee is unreasonably high).

Neither the lessor nor the lessee may unilaterally change this purpose without the approval of the respective other party. If the lessee wishes to use the lease object for a different purpose than agreed on with the lessor and it is permissible under the respective building permit, the lessee will have to acquire a permit from the responsible local authority to change the purpose of use. The costs for such a change and any construction measures that may be necessary or required by the authorities must generally be borne by the tenant.

6.13 Tenant's Ability to Alter and Improve Real Estate

Unless otherwise agreed, the lessee is generally not entitled to alter the lease object without the lessor's prior consent. In certain circumstances, necessary or useful improvements may be permissible without the lessor's consent and the lessee may claim reimbursement of its costs. Unless the lease object falls into the ambit of the Austrian Tenancy Act or the alterations are considered necessary (eg, the lease object poses a risk to the lessee's health) and the lessor is unable or unwilling to make such alterations, the

parties may generally exclude the right to make such alterations and claim compensation.

6.14 Specific Regulations

The Austrian Tenancy Act prescribes mandatory rules for certain lease objects in respect of a minimum term, maximum rent chargeable and specific grounds for termination, among others.

The Austrian Tenancy Act may apply fully or partially to a certain lease object if the lease agreement is considered *Miete*. It does not apply to *Pacht*. Whether an object falls (fully, partially or not at all) into its ambit will generally be determined by the amount of lease objects in the building, the age of the building, the length and purpose of the lease, or whether public funds were used to build or renovate the building. It must therefore always be assessed on a case-by-case basis.

6.15 Effect of the Tenant's Insolvency

When a lessee becomes insolvent, an insolvency administrator will usually be appointed to manage the lessee's remaining assets. The lessor must submit any claims it has against the lessee to the insolvency administrator for assessment. The latter may then either acknowledge or challenge these claims.

Without prejudice to the right to compensation for the damage caused, the insolvency administrator may also terminate the lease agreement in accordance with the statutory or agreed notice period. Lessors do not have an extraordinary right to termination in the case of a lessee's insolvency; any agreement granting such rights to a lessor would be unlawful.

Furthermore, in some instances the insolvency administrator may also apply to hold eviction proceedings for a certain period of time.

6.16 Forms of Security to Protect against a Failure of the Tenant to Meet Its Obligations

The form of security provided to a lessor to protect against a failure by the lessee to meet its obligations usually varies depending on whether the lease object is used for commercial or housing purposes. Typical securities for residential leases include a cash deposit or a bank guarantee. With regard to commercial leases, other forms of security are sometimes agreed on by the parties, such as sureties or guarantees from shareholders.

By law, the lessor also has a pledge over any movable property that was moved into the lease object by the lessee or one of its close family members living in the lease object together with the lessee (*Vermieterpfandrecht*).

6.17 Right to Occupy after Termination or Expiry of a Lease

Generally speaking, the lessee is not entitled to occupy the lease object after the expiry of the lease or after a valid termination took effect. However, if the lessee continues to use the lease object after the termination date and the lessor does not object to such use within a reasonable amount of time (usually 14 days), the lease agreement may extend by implication under the same conditions and usually for the same term that applied to the expired lease. *Pacht* typically only extends for one year in this manner.

The lease agreement may explicitly exclude the legal presumption on implicit extension. The Austrian courts, however, hold the view that such an exclusion does not automatically rebut this presumption.

If the lessee fails to vacate the lease object after the termination date, the lessor must file an eviction suit. A judgment granting the eviction may then be enforced through the courts. The lessor

may also claim appropriate compensation for the extended use of the lease object as well as other damages suffered.

6.18 Right to Assign a Leasehold Interest

In general, Austrian law does not permit a tenant to assign its leasehold interest in the lease to a third party without the landlord's prior consent. Such consent can be given either upfront (ie, in the lease agreement) or upon the tenant's request. An exception exists in regard to lease objects that fall into the ambit of the Austrian Tenancy Act. The leasehold interest in such lease objects can be assigned among close relatives if they (together) resided in the same lease object for an uninterrupted period of two years.

The subletting of lease objects is generally permitted in Austria, unless the lease agreement stipulates otherwise. However, if the lease object falls into the ambit of the Austrian Tenancy Act, the landlord may only invoke a contractual prohibition of subletting for important reasons, such as the subletting of the entire lease object or in the event that the sub-rent is disproportionately high in comparison to the rent payable by the sub-lessor.

6.19 Right to Terminate a Lease

The events upon which a lessor may terminate the lease agreement firstly depend on whether it is a fixed term or an unlimited term lease. Only in respect of the latter, the lessor has a statutory right to termination upon three months' prior written notice (in case of *Pacht*, the notice period would be six months). Permissible termination dates may vary from case to case, depending on the type of lease.

This right to ordinary termination may be varied or even excluded by the parties in the lease agreement, at least between entrepreneurs. In this case, the lease agreement may be termi-

nated for important reasons, which are generally circumstances in which one party cannot be reasonably expected to continue the lease with the respective other party.

Furthermore, it is common practice for the parties to a lease agreement to agree on further extraordinary termination rights in favour of the lessor. Within the (full and partial) ambit of the Austrian Tenancy Act, however, an exhaustive catalogue of grounds for termination applies.

6.20 Registration Requirements

Although it is standard market practice in Austria to enter into written lease agreements, Austrian law does not require lease agreements to comply with any specific formal or registration requirements. Apart from that, it is possible to register a lease in the Austrian Land Register with the landlord's consent. For tenants whose lease objects do not fall into the ambit of the Austrian Tenancy Act, this would have the benefit of securing them against premature termination of their lease agreements in case the property transferred to a new owner. If the lease agreement is registered in the Austrian Land Register, a one-off registration fee must be paid upfront. Typically, the registration fee and the costs for notarisation of the relevant documents are borne by the tenant. Furthermore, stamp duties may be payable in the case of commercial leases (see **6.8 Costs Payable by a Tenant at the Start of a Lease**).

6.21 Forced Eviction

Failure to pay rent on two consecutive due dates usually constitutes an important reason that allows for extraordinary termination. The lessor can terminate the lease agreement and – should the lessee fail to vacate the lease object – after the termination date the lessor must file an eviction suit. As each court proceeding involves a unique set of facts and circumstances, it is not possible to make a general statement on the

length of an eviction process. However, one year seems to be a reasonable duration for the proceedings in the first instance, if the lessee files any objections.

According to the 2nd COVID-19 Justice Accompanying Act, eviction proceedings must be deferred at the lessee's request without the imposition of a security deposit if the lease object is indispensable to satisfy the lessee's urgent residential needs and provided that eviction is not indispensable to avert serious personal or economic disadvantages to the lessor. The proceedings may be continued at the lessor's request six months after the granting of such deferral. The respective provision will be in force until 30 June 2021.

6.22 Termination by a Third Party

In the case of insolvency, the administrator appointed by the court may terminate lease agreements in respect of the insolvent company.

7. CONSTRUCTION

7.1 Common Structures Used to Price Construction Projects

The most common price structures in construction agreements are either a unit price or a fixed lump sum for the entire construction project. If a per unit price is agreed upon, the contractor may separately charge all services performed in order to complete the construction project. The final cost of construction will therefore only be determined after its conclusion. The construction agreement typically contains a non-binding cost estimate.

7.2 Assigning Responsibility for the Design and Construction of a Project

The assignment of responsibility for the design and construction of a project may vary depending on the respective project. Usually, it is divid-

ed between an architect, who is responsible for planning the project, and a contractor, who is responsible for construction. Another option would be to contract a general contractor for all construction and planning services. The general contractor would then instruct an architect with the necessary planning as sub-contractor.

Architect's and contractor's fees are not strictly regulated. However, the performance and remuneration models published by the chamber of architects (*Leistungs- und Vergütungsmodelle 2014*) contain detailed guidelines as to the services usually rendered by architects in average-sized projects (divided into basic and optional services) and a range of compensation models.

7.3 Management of Construction Risk

Generally speaking, Austrian private law provides for a comprehensive liability system that generally applies to all contracts, including contracts concerning the planning and execution of a construction project. The liability of a contractor is not limited under statutory liability. However, parties often enter into construction agreements based on a standardised term published by the Austrian Standardisation Body (ÖNORM B 2110), which offers a deviation from the statutory liability system, providing for a limitation of liability, among other things. Constructors usually conclude a general liability insurance to mitigate the risks involved in a construction project.

7.4 Management of Schedule-Related Risk

Under statutory liability, the contractor is liable for any delay in the performance of the construction work, if it is at fault (negligence or intent). Apart from that, the parties to a construction agreement often agree on contractual penalties (*Vertragsstrafe*) for delays in hitting contractual milestones; typically, a certain amount is payable by the contractor for each day's delay. However, contractual penalties may be subject

to adequate reduction by the court. Furthermore, the contractual penalties have to be deducted from any further damages claimed in respect of the delay of performance. Also, in the case of performance delays related to the COVID-19 pandemic, contractors whose ability to perform their obligations was severely hampered during that time may not be liable to pay contractual penalties under certain circumstances.

7.5 Additional Forms of Security to Guarantee a Contractor's Performance

It is common practice to agree on a performance bond (*Hafrücklass*) as security for the due performance of the contractor's obligations, and these are often partly retained until the end of the warranty period. The amount of such performance bonds varies on a case-by-case basis, but usually lies between 5% and 10% of the contractor's net fees. In many instances, it is possible for the contractor to alternatively present a bank guarantee.

7.6 Liens or Encumbrances in the Event of Non-payment

Contractors and architects do not have a statutory right to lien or otherwise encumber real estate in the event of non-payment. However, if their principal is also the owner of the relevant real estate and the outstanding payments were successfully claimed in court, a judiciary lien can be acquired in the enforcement proceedings. Furthermore, the contractors and architects have a right of retention in regard to movable items or securities of their principal that came into their possession as a result of the work commissioned.

7.7 Requirements Before Use or Inhabitation

Building permits must be obtained before construction commences, and the completion thereof must be notified to the competent local authorities. During the process of acquiring the

building permit, the applicant must typically show that the necessary fire safety and other technical standards are met, and must produce the necessary certificates to the issuing authority. If the intended use of a certain building or structure is commercial in nature, a specific licence may also be necessary (*Betriebsanlagengenehmigung*).

8. TAX

8.1 VAT

The transfer of real estate is subject to land transfer tax, which is to be paid by the seller, but is usually covered by the buyer. Sales of real estate are generally exempt from VAT but it is possible for the seller to opt into it in order to retain the right to deduct input tax (*Vorsteuerabzug*). However, this will usually only be the case if a subsequent purchaser is equally entitled to deduct input tax.

If an entrepreneur erects a building or carries out major repairs and deducts input tax, the input tax must be adjusted if the building is sold within ten years (20 years for new buildings).

8.2 Mitigation of Tax Liability

Land transfer tax at a rate of 3.5% applies to almost any act of transferring real estate, so it is usually not possible to avoid this tax in asset deals. In share deals, however, land transfer tax only applies if 95% of the shares of the company are held by one owner. For this reason, it is common practice in large transactions to transfer only 94.9% of the shares in the company, with the remaining 5.1% being held by a third party.

8.3 Municipal Taxes

Ownership of real estate and certain other limited real rights are subject to property tax, which is levied by the municipalities on the basis of federal legislation (*Grundsteuergesetz 1955*).

The tax authorities determine a “basic value” (*Einheitswert*), which is usually far below the market value, and use it as a basis for calculating this tax. The tax rate varies between 0.5% and 2%, depending on the type of real estate and its basic value. There are certain exemptions from property tax, but they are generally limited to non-profit or religious organisations and governmental institutions.

8.4 Income Tax Withholding for Foreign Investors

Foreign investors whose seat or domicile is located outside Austria have restricted tax liability in respect of income tax in Austria – only their income generated in Austria will be taxable. Individuals are subject to income tax at progressive rates, while legal entities are generally subject to corporate income tax at a rate of 25%.

Profits generated from the sale of real estate are generally subject to real estate income tax at 30%. However, companies that are subject to corporate income tax at a rate of 25% are exempt from real estate income tax. The sale of homes that have served as the seller’s main residence for a minimum of either two consecutive years or five out of ten consecutive years are exempt from real estate income tax.

The basis for assessing real estate income tax is usually the difference between the purchase price and the selling price of real estate – ie, the profit made on the sale. Investments made in terms of the real estate (erecting a building) may be deducted. Real estate income tax is a self-assessment tax, which means that the seller must calculate the amount himself, notify the tax authorities and transfer the tax.

8.5 Tax Benefits

Insofar as a building constitutes a necessary business asset, it must be included in the list of assets and valued at either the purchase price or the costs of construction. The loss of value resulting from the building’s depreciation may be considered as operating expenses. In order to calculate the depreciation rates, the value allocated to the building must be distributed evenly over its remaining lifespan. The depreciation rate pursuant to the Austrian Income Tax Act is 2.5 % (1.5 % when the building is used for housing). Increased depreciation rates can be applied in the first two years for buildings acquired/built after 30 June 2020 (expedited depreciation).

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all areas of law, especially in connection with real estate matters. The team handles all kinds of real estate transactions, including providing legal advice on the purchase or sale of realties of any size, and providing legal support with a view to the optimisation of rental income and other questions arising in connection with building projects. The firm provides permanent legal representation for various real estate developers and building administration companies in respect of all matters concerning real estate law.

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