

THE REAL ESTATE  
LAW REVIEW

NINTH EDITION

Editor  
John Nevin

THE LAWREVIEWS

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NINTH EDITION

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# PREFACE

The ninth edition of *The Real Estate Law Review* is testament to the book's success and the continued significance of real estate as a global asset class. A great deal has happened since the first edition appeared in 2012. *The Real Estate Law Review* has proved its worth by providing readers with an invaluable overview of how key markets across the globe operate and how they have evolved in the context of world events. It is no longer possible to look at domestic markets in isolation. Investors and their advisers need to understand real estate assets in the context of the global investment market, and *The Real Estate Law Review* seeks to help its readers to do just that.

This edition extends to 28 key jurisdictions around the world and I am very grateful to all the distinguished practitioners for their insightful contributions. Each chapter has been updated to highlight key developments and their effect on the relevant domestic market. Together, the chapters offer a helpful and accessible overview of the global real estate market. Overseas investors are key influencers in most markets, and it is vital that practitioners are able to advise on a particular deal in the light of an understanding of the client's own jurisdiction.

In the year that the UK was expected to leave the EU, Brexit and the associated economic and political fallout has continued to be the dominant issue for UK real estate markets. Although there has been a drop-off in investment volumes, continued interest from a wide range of investors from around the world underlines the need to see each issue in the context of world events. A growing cache of investment capital is likely to prompt a surge in investment activity once some degree of certainty is finally achieved. The UK, and London in particular, seem certain to remain attractive to overseas investors troubled by matters of greater significance than Brexit.

Once again, I wish to express my deep and sincere thanks to all my fellow contributors to this ninth edition of *The Real Estate Law Review*. I would also like to thank the members of the Law Review team for their sterling efforts in co-ordinating the contributions and compiling this edition.

**John Nevin**

Slaughter and May  
London  
February 2020

# AUSTRIA

*Tibor Fabian and Markus Uitz*<sup>1</sup>

## I INTRODUCTION TO THE LEGAL FRAMEWORK

The term ‘ownership’ under Austrian laws signifies the full right to freely use the substance and the benefits of an asset and to exclude everyone else therefrom. There are qualitative grades of this full right of ownership. In particular, the following four types of rights to real estate thus seem to be interesting for investors.

### i Ownership of real estate

#### *Full ownership or freehold*

In Austrian law, the principle *superficies solo cedit* applies, meaning that the owner of land is generally also the owner of any building thereon. The most common right to real estate is, therefore, to own both land and building. However, there are two major exceptions when talking about the *superficies solo cedit* principle: superstructures and building rights (as described under ‘Superstructures’ and ‘Building rights’ below).

#### *Condominium ownership*

A condominium right grants the co-owner of land the right to exclusively use an independent unit in a building. The condominium right is not created automatically; it needs to be established, mostly by a ‘condominium agreement’ signed by all co-owners and the registration in the land register. The owner of a condominium has free disposal of the allocated unit and can sell or encumber it without the agreement of the other co-owners.

#### *Superstructures*

Superstructures are buildings that are constructed on someone else’s land with the intention of not remaining there permanently. Usually the developer acquires ownership of the superstructure through a ‘superstructure agreement’ with the owner of the land, granting the developer the right to erect the planned building as its owner. It is particularly remarkable that no registration in the land register for superstructures is necessary. In practice, superstructures mostly appear like permanent buildings, which is because of generous court rulings when it comes to the admissibility of creating superstructures.

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<sup>1</sup> Tibor Fabian and Markus Uitz are partners at Binder Grösswang Rechtsanwälte GmbH.

### ***Building rights***

A building right is the right to have a building on or beneath (e.g., underground parking garages) the ground surface on a third-party land. This right is granted for a limited period of time between 10 and 100 years. The most important difference to superstructures is the fact that building rights are to be registered in the land register.

#### **ii System of registration**

All land plots within the federal territory as well as the rights in rem associated with them have to be registered in a land register maintained by district courts. The land register consists of two parts, the main book (where all land-plot related rights and data are entered) and the document archive (where the documents on which the entries are based are registered). The main book contains four different sections (known as ‘folios’):

- a* A1-Folio: this folio includes general data on the land plot, such as surface area and the type of use (e.g., agriculture or construction area);
- b* A2-Folio: this folio contains rights (e.g., easements) in conjunction with the specific land plot as well as restrictions imposed by public law;
- c* B-Folio: this folio contains information regarding the ownership in the land plot (e.g., the respective shares of each owner in case of co-ownership); and
- d* C-Folio: this folio includes information about encumbrances connected with the plot of land, such as mortgages, possible building rights, sale restrictions and registered tenancy rights.

The land register is publicly accessible. The Austrian land register system follows both an ‘intabulation principle’ as well as a ‘principle of trust’ on registrations: on the one hand, the acquisition, transfer or deletion of in rem rights may only be accomplished by a registration in the land register (with certain exceptions such as acquisitive prescription) and, on the other hand, persons may generally rely on the correctness and completeness of registered facts and are legally protected in doing so (except for cases of bad faith) without them having to examine specific documentation in the document archive maintained by the district courts.

#### **iii Choice of law**

Pursuant to Regulation (EC) No. 593/2008 (Rome I), the parties are generally free to elect the law applicable to real estate transactions except for the respective in rem rights, which are always subject to Austrian law for properties located in Austria. To the extent that the law applicable to the contract has not been determined by the parties, Austrian law generally applies (as the law of the country where the property is located).

## **II OVERVIEW OF REAL ESTATE ACTIVITY**

Despite the shortfall in the supply of investment properties in 2019, foreign investors (in particular German and Asian investors) are still increasingly moving into the Austrian real estate market, keeping the demand high. Regarding high-value transactions, offices, hotels and residential properties remain the most demanded asset classes.

With rental prices still on the rise, the ongoing demographic trends and supply shortages in the affordable housing sector in most of Austria’s urban areas, the Austrian residential real estate market sees an ongoing trend to affordable accommodation, including micro-living apartments and student houses. Residential rent has only increased moderately

as compared to residential purchase prices (presumably at least partly owing to the Austrian Rental Act imposing caps on a large number of rented living space). Demand for high-priced luxury apartments in Vienna, therefore, seems to be in decline; market experts recommend taking the demand for cheaper apartments into consideration when developing new housing projects.

As regards the commercial real estate market, modern office clusters outside of residential areas (but rather in proximity to other successful businesses) have become the focus of office occupiers in 2019. Due to general lack of new development land close to the city centre of Vienna, developers are now turning their attention towards the refurbishment of outdated office properties, including for co-working spaces. Even though top locations remain strong with stable rents in retail real estate, shopping streets are generally affected by a decline in frequency. Because of lack of supply and the steady increase in online retailing, yields in the retail sector have fallen to a record low (shopping streets from 3.50 per cent in 2018 to 3.25 per cent in 2019 and retail parks from 5 per cent in 2018 to 4.75 per cent in 2019); yields on office spaces have slipped from 3.8 per cent in 2018 to just under 3.7 per cent in 2019.

### **III FOREIGN INVESTMENT**

Because of the generally stable political and economic framework, the demand for Austrian real estate is booming, fostered by extremely low interest rates and available financing. Even though real estate prices have increased significantly over recent years, Austria is still considered to be a place for non-speculative real estate investments, in particular as the demographic development and expected urban conurbation (with Vienna being consistently ranked as one of the world's best cities to live in) results in a situation where demand exceeds supply. As a consequence, real estate investments appear attractive to foreign (institutional) investors. Nevertheless, local investors still account for a major part of the total Austrian real estate investment volume in 2019, followed by German and Asian institutional investors, whereby Asian investors are primarily interested in properties over the €100 million mark. The activities of other international institutional investors and funds remain behind expectations as these groups' interests generally lie in large-scale investments and there are rarely suitable properties available on the current market, in particular due to the limited amount of new spaces added to the market this year and the fact that a large portion of properties built in 2018 has already been sold. On a positive note, a substantially higher number of completions of new office space has been announced for 2020 (165,500m<sup>2</sup>).

The transfer of property rights to foreign investors may require an approval according to land transfer regulations. In this respect, each Austrian federal province has its own legal framework defining the applicable restrictions and approval process. As long as the necessary approval has not been obtained, the transfer of the ownership cannot be registered in the respective land register and the contemplated transaction may not be carried out (as ownership of real estate is generally only obtained by the registration of the new owner in the land register). Persons and corporate bodies of Member States of the European Union or of signatory parties to the agreement on the European Economic Area have the same status as domestic persons or corporate bodies.

## IV STRUCTURING THE INVESTMENT

The structuring of the investment for the acquisition of a property should be based on various economic, fiscal and legal considerations, whereby investments may generally be structured as asset or share deals. The advantage of an asset deal is that the investor may be better aware of the transaction scope (in particular in relation to potential tax or other liabilities of a pre-existing company). A share deal would generally be tax advantageous, as with correct structuring, real estate transfer tax can be avoided. While an asset deal generally triggers Austrian real estate transfer tax of 3.5 per cent of the consideration, only a transfer of at least 95 per cent of the shares in a company holding Austrian real estate is subject to real estate transfer tax. Under this tax situation, it has become common practice to implement a share deal structure with two acquiring entities that each have to acquire more than 5 per cent in the target company (e.g., in a 94/6 per cent structure).

Further, a share deal will not result in a change in the ownership of the property itself, which means that registration fees of 1.1 per cent of the consideration or market value of the real estate may also be avoided. Three different legal forms are typically used as real estate holding entities and acquisition vehicles:

- a* The limited liability company (GmbH) offers flexibility and can be set up by one or more individuals as well as legal entities, which in general are not personally liable for the liabilities of the company. The minimum share capital amounts to €35,000, of which at least €17,500 has to be paid in. (Since 2014, there is an option to limit the share capital for up to 10 years to €10,000, of which at least €5,000 has to be contributed.)
- b* The stock corporation (AG) is also a limited liability entity, where shareholders participate in the share capital divided into shares by means of contributions without being personally liable for the liabilities of the company. The minimum capital stock amounts to €70,000. The ongoing legal structure costs of an AG are higher than for the GmbH; in addition, it offers less flexibility except in relation to share transfers and equity transactions.
- c* Partnerships may be established by at least two parties either as a general partnership or a limited partnership. The difference is the limitation of the liability of at least one partner in a limited partnership, while all partners of the general partnership are personally fully liable. Besides the flexibility of a partnership (which is even higher than in the GmbH), the main advantage of the partnership is its tax transparency, allowing a direct allocation of profits and losses to its partners for tax purposes.

## V REAL ESTATE OWNERSHIP

### i Planning

Austrian building law provisions, such as zoning laws and construction regulations, differ between each of the nine federal provinces (and in certain instances even the respective communities within these provinces), are quite strict and the approval process may have to be carried out under different authorities. The requirements for planning permission vary according to the envisaged location as every Austrian federal province has enacted its own building, planning and zoning laws. In some provinces a simple notification to the planning authority suffices for certain types of buildings, while in others a formal building permit has to be obtained in the course of an administrative procedure (which in some cases includes

the participation of the direct neighbours). Additionally, federal laws have to be obeyed and permissions under these laws may have to be obtained (e.g., under heritage protection laws, air traffic safety laws, forest protection laws).

The protection and development of historic and cultural buildings is governed by the Austrian Heritage Law, which is administered by the Federal Heritage Commission. Subsidiary rules might apply from provincial heritage laws, which differ between each of Austria's nine federal provinces. An existing heritage protection of real estate may generally be seen from the publicly available land register.

## **ii Environment**

As a general rule, a 'polluter pays' principle applies to environmental clean ups: whoever causes pollution is primarily responsible for the cleaning up and the associated cost. In certain instances, the owner of a polluted land plot and his or her legal successor may also be held liable in the second degree, mainly if they agreed to, or tolerated, the pollution.

No particular environmental disclosure obligations apply to real estate sales in Austria. Austrian case law assumes a fraudulent intent of the seller, however, if information was withheld to the potential purchaser that would otherwise typically be disclosed or could reasonably be expected to be disclosed in fair business dealings.

## **iii Tax**

Typically, the following taxes could become payable in connection with real estate transactions.

### ***Real estate transfer tax***

The acquisition of Austrian real estate as well as the consolidation of more than 95 per cent of the shares in a company owning Austrian real estate in the hand of a single shareholder are generally subject to Austrian real estate transfer tax. The taxable base for the determination is the value of the consideration (i.e., as a rule the purchase price) or the true value of the real estate in case the purchase price is lower. The real estate transfer tax generally amounts to 3.5 per cent in case of an asset deal and to 0.5 per cent in case of the consolidation of more than 95 per cent of shares in a company. Also, transfers without consideration (donations) are subject to the real estate transfer tax under application of a progressive tax rate ranging from 0.5 to 3.5 per cent.

### ***Real estate profit tax***

The profit from the sale of the real estate is subject to a real estate profit tax, which is generally subject to a flat tax of 30 per cent provided that a flat tax rate of 25 per cent applies to all profits generated by profits from corporate entities (including from the sale of real estate).

### ***Registration fees***

In addition to the real estate transfer tax, a registration fee for entering the right of ownership in the land register amounting to 1.1 per cent of the consideration or market value of the property is incurred. For the registration of mortgages, an additional 1.2 per cent of the mortgage amount needs to be paid.

## **VAT**

Real estate transactions are generally not subject to VAT. The selling party, if an entrepreneur, may opt to treat the sale of real estate as VAT taxable subject to a 20 per cent tax rate. An entrepreneur would typically take this option into consideration if it has reclaimed input tax regarding the real estate (which would otherwise have to be refunded) within the past 10 years for real estate acquired prior to 1 April 2012 or the past 20 years for real estate acquired after this date.

## **Stamp duties**

The execution of a purchase agreement and the contemplated acquisition of real estate generally no longer triggers stamp duty.

## **iv Finance and security**

Generally, real estate financing is provided by banks via loans. Restrictions on who may provide financing in relation to real estate transactions mainly stem from banking regulations that restrictively regulate the commercial granting of loans (including within groups). Typically, mortgages serve as collateral for real estate financings. In relation to share deals, pledges over the shares of the borrower, pledge of movables, accounts pledges, assignments of receivables or rights under any major contracts are also considered. To create a mortgage, the pledgor and pledgee need to execute a mortgage agreement in writing with the signatures being notarised. Generally, both fixed amount mortgages (securing a specific amount) as well as maximum amount mortgages (which may be recurrently used under a specific relationship) are possible under Austrian law. The mortgage is only established upon its registration with the land register.

## **VI LEASES OF BUSINESS PREMISES**

Austrian law generally differentiates between usufructuary leases (where an object is leased for use and profit) and tenancy agreements (where an object is leased for use) with different legal rules being applicable. Several conditions have to be met for the qualification as usufructuary leases (with the Austrian Supreme Court taking a strict view) so that the majority of business premises leases constitute tenancy agreements.

Tenancy agreements may be fully, partially, or not at all subject to the Austrian Rental Act, which contains several restrictions and a general legal framework applicable to lease agreements. The qualification depends on the type of lease and its purpose, its duration, and the building in which the premises are located.

Depending on the applicability of the Austrian Rental Act, the law could in particular provide for mandatory restrictions on the landlord's termination rights, the maximum amount of rent as well as the maintenance obligations. Within the scope of a partial applicability of the Austrian Rental Act, mainly termination restrictions regarding the lease agreement apply.

## **i Conclusion of lease agreements**

There are no special formal requirements for the conclusion of lease agreements. Orally concluded lease agreements are also binding. Certain exceptions apply to agreeing on a fixed term for a tenancy agreement within the applicability of the Austrian Rental Act that need to be concluded in writing.

## **ii Term and termination**

Generally, the term may be freely determined between the parties; lease agreements may thus be concluded for a fixed or indefinite period of time. Minimum periods only apply to residential leases within the scope of the Austrian Rental Act (minimum period of three years). Long-term and short-term tenants have the same rights under Austrian law without special extension or renewal rights applying to either of them.

Fixed-term leases terminate automatically upon the end of their term; indefinite lease agreements terminate upon their termination by either the landlord or the lessee after the lapse of the termination period (which depends on the qualification of the lease). Within the applicability of the Austrian Rental Act, a landlord may only terminate indefinite agreements for a limited number of legally specified reasons such as a detrimental use of the property by the lessee or defaults of the lessee in paying the rent.

An eviction of the lessee from the property is only possible after having obtained an appropriate legal title in the course of court proceedings.

## **iii Rent and adjustments**

The rent may generally be freely determined by the parties except if the Austrian Rental Act is fully applicable. In the latter case, only an adequate rent (or even a legally capped rent) may be asked for by the landlord. The amount of an adequate rent or the legal cap is basically determined by the size, location and equipment of the premises.

In the event of (temporary) non-usability of the rented object, a tenant is entitled to (partially) withhold rent payments depending on the gravity of the defect.

In the event of a sale of a business with a lease contract falling in the applicability of the Austrian Rental Act, the landlord is entitled to increase the rent to an adequate level within six months after having been notified of the transfer. The same principle applies to a change of control (e.g., as a consequence of a share deal).

## **iv Deposits**

The Austrian Rental Act contains specific provisions on rent security deposits that apply to certain lease agreements. These rules include an obligation on the landlord to invest it in an interest-bearing way if the deposit is delivered in cash (e.g., on a savings account). After the termination of the lease agreement, the landlord has to immediately return the deposit including the interest unless there are claims against the former tenant. Outside the applicability of the Austrian Rental Act, a landlord and lessee may freely agree upon the conditions for rent security deposits. There is no legal cap on the rent security deposit. Typically, rent security deposits amounting to the rent of three to six months are asked for.

## **v Subletting**

Subletting is allowed for the lessee unless contractually prohibited in the underlying lease agreement. In the case of subletting of the entire leased premises or for an unreasonably high sublease rent (as compared to the head lease rent and investment), each without the consent of the landlord, the landlord may terminate the lease agreement. The termination of the lease agreement automatically leads to the termination of the sublease agreement.

## VII DEVELOPMENTS IN PRACTICE

The following developments in real estate law and practice throughout 2019 seem noteworthy.

Since the recovery from the real estate crisis began in 2009, prices have risen steadily. Also throughout 2019, the real estate market in Austria continued to flourish. Despite the decline in the total number of real estate transactions, which is primarily down to the limited availability of suitable investment options and not the fading interests among investors, the value of properties sold has once again increased compared to the record level of 2017 and 2018. According to land register analyses carried out by the broker association RE/MAX, 64,171 transactions were recorded in the first half of 2019, meaning 1.1 per cent fewer than in the same period of the previous year. The value of traded real estate in the first six months rose from €15.6 billion to €16.4 billion, however, with Vienna being the front runner regarding the value of properties traded and Lower Austria regarding the number of properties sold. Another noteworthy feature of the first half of 2019 was the large proportion of hospitality transactions in Austria (almost €500 million), especially the purchase of the Hilton Vienna by Stadtpark in Vienna's third district by a South Korean fund for more than €330 million.

In the office property market a new trend has emerged. Since most of the development areas in the office locations close to the city centre are already occupied, developers are turning their attention towards the revitalisation potential of outdated office spaces in Vienna (110,000m<sup>2</sup> of completely refurbished office spaces are expected by 2023). Last year, the take-up of new, high-quality office spaces amounted to 270,000m<sup>2</sup> and clearly exceeded the expectations for 2018. This positive performance continued into the first quarter of 2019 with a number of prominent contracts signed (e.g., the letting of roughly 4,000m<sup>2</sup> of office space in the QBC 2 by Grant Thornton Austria) and will most likely lead to a take-up in the amount of 220,000m<sup>2</sup> by end of 2019. In contrast, high pre-lettings and low completions of new office spaces have led to a record low vacancy rate of 4.8 per cent. Also, the construction of new offices has been stagnating, dropping from almost 300,000m<sup>2</sup> in 2018 to 40,000m<sup>2</sup> in 2019.

The Austrian market, in particular, continues to be dominated by about two dozen institutional investors, who buy and sell the top objects among themselves in considerable amounts and thus have an interest in keeping prices high. As a consequence, commercial real estate prices have risen significantly in the last few years. For all these reasons, the medium-term outlook for the real estate market remains good.

Further, because of the demographic development, an increase in development projects relating to students and elderly people are expected. As a consequence of supply shortages in the affordable housing sector in urban areas and an increase of people living alone or in smaller groups, the living space used per person has generally declined.

In the course of the acquisition of real estate, there is an increasing number of insurance products to provide protection against warranty risks and even environmental risks.

There were attempts to void the current system of capped rent and time limitations as unconstitutional, in particular due to the fact that no location-related premiums may be requested from tenants in *Gründerzeit* quarters. The Austrian Constitutional Court did not follow these arguments, however, so the current system remained in place.

The stamp duty for leasing residential premises has been abolished as of 11 November 2017. Until then, the stamp duty for residential premises (i.e., premises that are mainly used for residential purposes) amounted to 1 per cent of the gross rent for the total contractual period, limited to 1 per cent of the 36-fold monthly rent. This stamp duty has

been abolished for lease agreements concluded from 11 November 2017. However, written lease agreements for residential premises concluded prior to 11 November 2017, as well as other lease agreements (i.e., for commercial premises), remain subject to this stamp duty.

On a regional level, the Vienna State Parliament passed an amendment to the Vienna Building Act in November 2018. The changes aim to provide for simpler, faster and cheaper building procedures, in particular regarding small construction projects (constructions of up to 150m<sup>2</sup>). Only a notification and no approval by the building authorities is from now on required for insignificant changes in the external design of buildings. Also, the Parking Space Directive, which stipulates the number of parking spaces to be allocated to each apartment, will be handled more flexibly in the future. Unused garage parking spaces, inter alia, may from now on be converted into storage rooms or rented to residents of other residential complexes, providing that one parking space for each 100m<sup>2</sup> of living space remains available. In addition (and questionable if a valid restriction at all), short-term tourist rentals (i.e. Airbnb) in residential areas are no longer permitted and will be more closely monitored in the future.

On the other hand, the amendment to the Vienna Building Act has made the demolition of existing buildings more difficult: The demolition of certain buildings erected before 1 January 1945 requires the prior approval by the building authority; thus developers are facing challenges in increasing the stock of land available for building in the urban conurbation, which led to a price increase of land plots.

## VIII OUTLOOK AND CONCLUSIONS

Political discussions about a reform of the Austrian Tenant Act and the general legal tenancy system will most likely continue in 2020 as the government intends to carry out a fundamental reform of the Austrian tenancy law. The main points of discussion in this context are a substantial decrease in the allowed rent for time-limited lease agreements, increased transparency for tenants through comprehensive information obligations of landlords, abolition of the possibility of relatives to enter into favourable rental agreements, abolition of the prohibition of location-related premiums in *Gründerzeit* quarters, simplification of the Austrian Condominium Act, etc. It remains uncertain whether this long-planned reform will eventually take place in 2020.

The expected decline in supply as a result of the amendment to the Vienna Building Act and the high land prices in urban Vienna made the surrounding areas considerably more attractive for both developers and investors (e.g., Signa Group is developing a new district with apartments, offices, retail and services on the old shipyard site in Korneuburg). Also, long-requested reforms in the administrative law and the abolishing of unnecessary legal and administrative barriers are most likely not to occur in the near future. Unless the new government keeps its promise to 'deregulate', real estate developments and construction projects will thus continue to face the same administrative burdens as today.

In general, the outlook for the Austrian real estate market remains positive, but a lack of availability of new development land is slowly putting brakes on interest from foreign institutional investors. The availability of affordable development land will, therefore, continue to be a prominent topic in all urban city areas. Given the general political and economic stability, however, investments and real estate prices are still expected to rise.

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Tibor Fabian has been a partner since 1996 and a real estate specialist at Binder Grösswang, and advises on all aspects of real estate law, including tenancy law and property development. He has advised various Middle East, German and Austrian investors on the sale, purchase and development of commercial, retail, residential and special portfolios (hotels, logistics). He also teaches as a lecturer at the law faculty of the University of Vienna.

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