Global Corporate Real Estate Guide - Germany

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*This chapter was last reviewed in June 2023.*

# Authors

# Real Estate Law

## What is included in the term “real estate”?

The term “real estate” includes the following:

Land

Any buildings and other integral parts on land

## What laws govern real estate transactions?

Real estate transactions are mainly governed by the German Civil Code (BGB). Other private and procedural property law applicable to real estate transactions is spread over various German acts, including the German Hereditary Building Right Act (ErbbauRG), the German Land Register Act (GBO), and the German Notarial Recording Act (BeurkG).

## What is the land registration system?

In Germany, the entire surface of the country is measured and specified on cadastral maps showing the exact location of a piece of land (i.e., its district, parcel and plot). The real estate so specified is registered in the land register (Grundbuch) competent for the district in which the real estate is located. The land register is divided into an inventory and three divisions. The inventory describes the location and size of the real estate. Division I of the land register lists the current owner, Division II lists encumbrances and restrictions of the real estate such as easements, pre-emptive purchase rights, usufruct rights, priority notices and hereditary building rights, except for mortgages and land charges, which are registered in Division III. Unless agreed and registered otherwise, the priority of the rights depends on their respective date of registration.

## Which authority manages the registration of titles?

Title registration is managed by the land register kept at the local court (Amtsgericht) competent for the district in which the real estate is located in all federal states.

## What rights over real property are required to be registered?

Most rights in rem over real estate require registration. This includes:

Ownership (registered in Division I of the land register)

Encumbrances over real estate (registered in Division II of the land register), such as easements (Grunddienstbarkeiten), pre-emptive purchase rights (dingliche Vorkaufsrechte), usufruct rights (Nießbrauchsrechte), priority notices (Vormerkungen) and hereditary building rights (Erbbaurechte)

Security interests (registered in Division III of the land register), such as land charges (Grundschulden), mortgages (Hypotheken) and rent charges (Rentenschulden)

Residential and commercial lease agreements do not require registration in Germany.

## What documents can landowners use to prove ownership over real property?

Land registers in Germany do not issue physical title certificates to new property owners. Rather, land ownership can be proven from the registration of the change of ownership in the land register. Excerpts from the land register can be obtained by everyone who can demonstrate a legitimate interest. In practice, it is generally the seller who provides a potential buyer with a current excerpt from the land register. The registration in the land register allows for a bona fide acquisition if (i) the seller is registered in the land register although actual ownership is with a third party; and (ii) the acquirer does not actually know that this registration is incorrect.

## Can a title search be conducted online?

In most federal states, the local courts have already digitized the land registers and offer electronic searches for registered users (mainly notary publics). However, for the remaining land registers only physical hard copies can be obtained. The same is true for underlying deeds and other registered records filed with the land register. In any case, a legitimate interest for an inspection needs to be demonstrated.

## Can foreigners own real property? Are there nationality restrictions on land ownership?

There are generally no restrictions specifically applying to foreign ownership of German real estate.

## Can the government expropriate real property?

German real estate can be expropriated by quasi-government authorities, but only under very strict requirements (including the payment of adequate compensation).

## How can real estate be held?

Generally, an interest in German real estate can be held by any of the following:

Freehold/full ownership

Partial ownership

Condominium

Hereditary building right (transferrable real estate-like right entitling its holder to build on land owned by a third party)

## What are the usual structures used in investing in real estate?

Limited liability companies

Co-ownership

Partnerships

Limited partnerships

Open-ended funds

## How are real estate transactions usually funded?

Most real estate financing is arranged through institutional lenders such as banks, real estate funds, credit unions and insurance companies. Interest rates are generally fixed for a specific time period. Lenders usually ask for real estate-specific collateral such as land charges, security assignments, duty-of-care agreements with the property managers and share pledges over the property holding company.

German open-ended real estate funds are an alternate source of real estate financing in Germany and on a global level, especially for larger tickets.

Another alternate source of financing is mezzanine capital. Specialized mezzanine funds offer financing against a combination of interest payments and equity allowing the borrower to reduce leverage.

## Who usually produces the documentation in real estate transactions?

Generally, the seller’s lawyer will prepare the initial draft of the purchase agreement to be marked up by the buyer’s lawyer and subsequently negotiated until a final agreement is reached.

## Can an owner or occupier inherit liability for matters relating to the real estate even if they occurred before the real estate was bought or occupied?

Real estate liability may not only result from encumbrances registered in the land register (land charges, mortgages, easements, etc.), but also from public burdens on real estate. Such public burdens do not require registration in the land register and include property tax, development charges and settlement contributions for remediation and development measures. Government authorities may require the owner to clean up historic contamination even if the owner did not cause it. In addition, under German tax law, the buyer of the real estate may be held liable for past taxes relating to the property if the acquisition qualifies as the acquisition of a business.

## Does a seller or occupier retain any liabilities relating to the real estate after they have disposed of it?

Generally, a seller disposing of real estate by way of an asset deal will remain fully liable for contractual liabilities entered into in relation to the sold real estate, unless such liabilities are assumed by the buyer in the purchase agreement. For this reason, German real estate purchase agreements typically provide for the buyer assuming conclusively listed property agreements (such as utility or maintenance contracts or property management agreements). As an exception to this general rule, lease agreements and insurance policies relating to real estate generally transfer to the buyer by operation of law once the buyer has been registered as the property’s new owner in the land register.

Similarly, under the Federal Soil Protection Act, government authorities may require the polluter, its legal successor, the owner and/or occupier of the real estate to investigate and clean up any soil and groundwater contamination.

# Acquisition of Real Property

## What are the usual documents involved in such transactions?

The key document is the purchase agreement. In the event of a direct acquisition by way of an asset deal, the real estate purchase agreement has to be recorded by a notary public. It usually includes the conveyance of title (Auflassung), i.e., a joint declaration by the parties that the title shall be transferred to the buyer. The parties instruct the notary public to file that declaration with the land register once the buyer has fully paid the purchase price. Upon registration of the buyer as new owner in the land register, the transfer is effective and legal title transfers.

Other documents typically involved in German real estate transactions include acquisition finance arrangements, asset/property/facility management agreements, other property agreements and due diligence reports on legal, financial, technical, environmental and/or insurance matters.

## What are the warranties given by a seller to a buyer?

The scope of warranties and indemnities varies and depends on individual circumstances. A limited catalogue of representations and warranties is very common. As a minimum, the seller usually warrants that unrestricted title will be transferred (unless and to the extent encumbrances are not assumed by the buyer or disclosed in the purchase agreement). A buyer is often requested to conduct a comprehensive due diligence with respect to the property that limits the seller’s liability under the purchase agreement.

## When is the sale legally binding?

Principally, any undertaking governed by German law to sell or buy real estate must be notarially recorded. This form requirement covers all parts and understandings in connection with the sale, including letters of intent providing for transfer obligations or side agreements. The notary acts as an independent, impartial and objective adviser to all parties to a transaction. If the purchase agreement is concluded abroad, other form requirements may apply. However, in practice, a conclusion abroad is the rare exception, since the conveyance of title must be notarized by a German notary anyway. Noncompliance with the notarization requirement leads, in principle, to the invalidity of the entire transaction. In certain situations, an invalid transaction may subsequently be cured and become legally effective with the registration of the change of ownership in the land register.

## When is title transferred?

Title transfer occurs upon the registration of the buyer as the new owner in the land register. However, beneficial ownership usually transfers at closing already after the purchase price has been fully paid.

## What are the costs usually shouldered by the parties?

The buyer usually pays for the following:

Notary fees

Due diligence costs for its consultants

Registration fees

Agent/broker fees

Financing costs

Own legal fees

Real estate transfer tax

The seller usually pays for the following:

Discharge costs for release of security not assumed by buyer

Own legal fees

Income tax on any profit made on the sale of the real estate

Under German mandatory law, the seller and buyer are jointly liable for the notary and court fees incurred for the recording of the purchase agreement (including the conveyance of title) and real estate transfer tax triggered by the transaction, even if in the purchase agreement they typically agree otherwise.

# Leases

## What are the usual forms of leases?

Hereditary building rights (Erbbaurechte)

A hereditary building right entitles its beneficiary to own and/or develop one or multiple building(s) on real property owned by another party. It must be registered in the land register and can be separately disposed of and/or encumbered. As consideration, the beneficiary pays rent to the owner of the real property. Upon expiration of the hereditary building right’s term (for example, 99 years), the title to the building(s) developed by the beneficiary is transferred to the owner of the real property by operation of law. Whether the owner must compensate the beneficiary for the loss of the title to the building(s) depends on the individual agreement. Hereditary building rights are often granted by municipalities or churches to allow building measures on their property without losing title and to create jobs in their area.

Commercial leases

Most commercial lease transactions commence with an offer to lease, which contains the business terms agreed upon by the parties, including the space, term, rent and any tenant inducements (such as rent-free periods or construction allowances). Commercial leases generally provide for rent plus additional service charges comprising a proportionate share of the operating costs caused by the ownership of the real property, e.g., taxes, insurance premiums, utility and common area maintenance charges. In a retail lease, a tenant may also be required to pay rent based on a percentage of its annual sales.

Residential leases

Residential leases are subject to a tighter legal regime under German mandatory law, which strongly protects residential tenants. As a consequence, residential lease agreements cannot be fully and freely negotiated or terminated, but certain compulsory statutory law prevails and must be taken into account (e.g., limiting the ability of the landlord to terminate the lease or to increase residential rent).

Tenancy agreements (Pachtverträge)

Tenancy agreements are similar to commercial leases granting the tenant not only the right to use the leased space, but also the additional right to reap the fruits generated on the leased space (e.g., stones from a stone quarry or profits generated by a leased filling station, restaurant, etc.).

## Are lease provisions regulated or freely negotiable?

Generally, lease provisions are freely negotiable. While commercial leases and hereditary building rights can be widely negotiated between the parties, residential leases are strongly regulated. Further restrictions apply if lease provisions qualify as general terms and conditions; if so, they are subject to particular scrutiny and have to comply with a specific set of statutory provisions and case law to be valid. These restrictions mainly apply to standard residential leases, but may also influence the validity of standard clauses in commercial leases which needs to be taken into account when drafting and negotiating the lease agreement.

## Is there a maximum term for leases? Can these be extended?

German leases may have an indefinite term subject to termination within the statutory or contractually agreed notice periods. Generally, fixed terms must not exceed a term of 30 years. A lease agreement providing for a fixed term of more than 30 years will be deemed a lease having an indefinite term after 30 years and may be terminated accordingly. The 30-year period is calculated as of the day on which the lease term has been agreed or has last been renewed. It is therefore possible to extend the term of an existing lease for a further 30 years. Hereditary building rights are not subject to any restrictions as to their term.

## What are the usual lease terms?

Ground leases/hereditary building rights often have a term of 99 years as this term is usually deemed to be the economic lifetime of buildings. Commercial lease agreements usually provide for a term of five or 10 years with one or two options in favor of the tenant to extend the term by five more years. Residential leases must provide for an indefinite term, unless a fixed term is expressly permitted under German law (e.g., if the landlord needs the leased space for its own use).

## Are there instances where tenants may demand an extension of the lease?

Residential tenants may challenge a termination of the lease by the landlord for social reasons.

## On what grounds may a lease be terminated?

German mandatory law provides that each lease agreement may be terminated by either party for cause. Generally, a lease can be terminated if the other party is in material breach of contractual obligations so that the other party cannot reasonably be expected to continue the lease. Further restrictions apply to the termination of residential leases and termination due to insolvency.

## Must rents be paid in local currency?

Parties are generally free to set rent in other currencies but arrangements for paying rent in a currency other than euro are not typical.

## Is rent paid on a monthly basis? Is it required to be paid in advance?

Rent is usually paid in advance on a monthly basis, before the third business day of each month.

## How is rent reviewed? Are there limits to the increase in rent?

Rents are usually fixed for the initial term, unless otherwise agreed in the lease.

The German Price Clause Act generally prohibits an automatic indexation of monetary obligations. As an exception to this rule, rent under commercial leases with a term of at least 10 years may be linked to the consumer price index published by the German Federal Statistic Office on a monthly basis. Sometimes, commercial leases provide for stepped rent or a lease review clause instead to adjust the rent to fair market price at the time of renewal or extension.

Rent increases under residential leases are highly regulated. Generally speaking, rent may be agreed upon as stepped rent, be linked to a certain price index, or increased if the average rent of comparable space in the same area is higher than the rent initially agreed upon. Also, modernization works may entitle the landlord to increase the rent. Effective as of 1 June 2015, the German parliament has adopted a controversial bill aiming to strengthen the rights of tenants in metropolitan areas identified as having overstretched housing markets (Mietpreisbremse). The bill entitles German federal states to determine so-called “tight housing areas” where new leases must not exceed the local average rent by more than 10%. So as not to hamper the development of new housing space, the bill provides for an exception for newly constructed and fully renovated buildings.

## What are the basic obligations of landlords and tenants?

The following are usually required of landlords:

Hand over the leased space in the agreed condition

Repair and maintain the roof and shell of the property (provided that the general maintenance and repair obligations are effectively shifted to the tenant)

Insure the property

The following are usually required of tenants:

Pay rent on time

Keep the property in good order and to carry out the maintenance and repair works for which the tenant is responsible

Inform the landlord of required repairs

Give access to the landlord for inspections or landlord's work (commercial lease)

## What provisions or restrictions typically apply to the transfer of the lease by the tenant? May a tenant sublet the leased premises?

Typically, tenants are only allowed to sublet the leased space with the landlord’s consent. Unless the lease provides otherwise, the landlord may grant or withhold such consent at its sole discretion. If the landlord withholds the consent other than for cause, the tenant may terminate the lease. However, in commercial leases such termination right can be excluded. The transfer of the lease also requires the landlord’s consent, and is usually effected by the landlord and both the current and new tenant signing a three-party transfer agreement.

## What happens in the event of destruction of the leased premises?

If the premises are substantially damaged or destroyed by force majeure, the lease can usually be terminated by the parties. Rent generally abates depending on the extent of the damage or destruction.

If the premises are substantially damaged or destroyed due to causes attributed to the tenant, then the tenant remains obligated to pay the rent and may also be held liable for repairs or replacement.

## Who is usually responsible for insuring the leased premises?

The landlord is usually responsible for insuring the leased premises. The cost of standard insurance such as building insurance and landlord’s liability insurance can be recovered from the tenant through the service charges. Commercial leases usually obligate the tenant to obtain further insurance such as third-party liability insurance, plate glass insurance, inventory insurance, burglary insurance and business interruption insurance.

## Will the lease survive if the owner sells the leased premises?

Lease agreements survive and will be transferred to the new owner by operation of law once the change of ownership is registered in the land register. It is common in asset sales for the parties to agree on an economic transfer of all right and burdens of a lease already with effect as of closing/ transfer of beneficial ownership.

## Will the lease survive if the leased premises are foreclosed?

Generally, lease agreements survive, but the new owner is entitled to extraordinarily terminate the lease agreement within the statutory notice periods.

# Planning and Environmental Issues

## Who has authority over land development and environmental regulation?

Land development is mainly carried out by the authorities on municipal and district level. Planning law sets forth the legal framework for municipal land planning through zoning plans (Flächennutzungspläne) and building plans (Bebauungspläne) and determines whether a construction project is permissible under the applicable local planning law. While the zoning plan constitutes the basic guideline for land use within a community and is only binding to the planning authorities, the building plan determines the use of the land it is issued for and defines whether land may be used as a residential area, commercial area, mixed zone or others, and designates the type of buildings permissible in such area.

Environmental issues are typically handled by district and regional authorities or, in case of major cities, on a municipal level.

## What environmental laws affect the use and occupation of real estate?

Nature conservation laws

Soil protection laws

Waste laws

Laws on handling hazardous substances, e.g., chemicals

Regulations on the use and transportation of energy and renewable energy, etc.

Water resources laws

Emission protection regulations, e.g., with regard to noise, odor and pollutants

Laws on nuclear safety and radiation protection

## What main permits or licenses are required for building or occupying real estate?

Except for certain small projects, construction of a building or plant is subject to governmental authorization. This authorization can either be granted in the form of a separate building permit or, for certain installations that are listed in an ordinance, as part of an emission-control permit issued under the Federal Emission Control Act.

A building permit is required for the construction of a new building, for material amendments or the change of use of existing premises and for the demolition of an existing building. A building permit is granted upon written application by the competent authority if the envisaged project complies with local planning laws and the technical standards set forth under building laws. Furthermore, the project may not conflict with any other requirements established under public law (e.g., monument protection law or emission limits pertaining to the project).

The construction and operation of installations which are likely to cause harmful effects on the environment because of their emissions are specifically regulated in the Federal Emission Control Act. If a permit under the Federal Emission Control Act is issued, no separate building permit is required. For certain facilities – e.g., power plants, combustion plants or wind farms – an emission control permit must be obtained to erect and operate such installation.

## Can an environmental cleanup be required?

Generally, the authorities may require remediation of historic contamination if necessary to avert hazards to human health and the environment. Measures may be addressed *inter alia* to the owner of the land, to the polluter or to their legal successor.

## Are there minimum energy performance requirements for buildings?

The Buildings Energy Act, which entered into force in 2020 and replaced the former Energy Saving Act, the Energy Saving Ordinance and the Renewable Energies Heat Act, is the central legal instrument aimed at increasing energy efficiency and the use of renewable energies in the building sector in Germany. It was amended as of 1 January 2023 to further tighten energy performance requirements.

In principle, all new buildings must be constructed as "nearly zero-energy buildings". As of 1 January 2023, this means that annual primary energy consumption (for hot water, heating, ventilation and cooling) must remain below 55% of the equivalent value of the statutory reference building ('EH55 standard'). The German Government has already announced plans to introduce an even stricter EH40 standard to take effect on 1 January 2025. Under the Buildings Energy Act, changes to existing buildings are also subject to certain energy performance requirements and existing buildings can also be subject to (rather limited) renovation obligations. Additionally, the Buildings Energy Act sets minimum requirements regarding the use of renewable energies in buildings and regarding the energy certification of buildings.

The Federal Government announced plans for a second amendment of the Buildings Energy Act. According to the initial proposals, all newly installed heating systems would be required to be powered by at least 65% energy from renewable energy sources.

Apart from these specific requirements for the building sector, the Act on Energy Services and Further Energy Efficiency Measures requires so-called large enterprises to conduct an energy audit of the entire enterprise including all buildings owned or used by the enterprise at least every four years. A large enterprise is a company with a staff headcount of at least 250 and/or with an annual turnover exceeding EUR 50 million and an annual balance sheet exceeding EUR 43 million. Under certain circumstances, similar buildings may be clustered and only one building per cluster can be audited. Energy auditors may be internal or external experts as long as they render independent advice and fulfil the professional requirements.

## Are there other regulatory measures that aim to improve the sustainability of newly constructed and existing buildings?

Under statutory lease regulations, in principle, landlords may improve the sustainability of existing buildings without the tenant’s consent, but subject to an extraordinary termination right for the tenant (Sections 555b, 555d and 555e Civil Code). Energetic modernization works must be tolerated by the tenant without being entitled to reduce the rent during that period. Modernization costs may be partly shifted to the tenant. The statutory lease regulations also facilitate heating contracting.

Additionally, the Federal support program for efficient buildings (Bundesförderung für effiziente Gebäude - BEG) promotes energy efficiency and renewable energies in the building sector and provides financial incentives for, among other things, the use of new heating systems, the optimization of existing heating systems and the use of optimized systems technology.

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