Global Corporate Real Estate Guide - Germany

Real Estate Law

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# 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.

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