

# International **Comparative** Legal Guides



## Real Estate **2021**

A practical cross-border insight into real estate law

**16<sup>th</sup> Edition**

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# Germany



Dr. Damian Tigges



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## 1 Real Estate Law

1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 12.1. Those relating to tax should be listed in response to questions in Section 9.

The Civil Code (*Bürgerliches Gesetzbuch*) contains the main regulations of real estate law. Furthermore, there are other sources of law that govern different subjects of real estate law, such as the Hereditary Building Rights Act (*Erbbaurechtsgesetz*) for the scope of heritable building rights, the Condominium Act (*Wohnungseigentumsgesetz*) which governs provisions on residential and part ownership and the related community and the Land Register Act (*Grundbuchordnung*) regarding the procedure of filing entries for the land register.

1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?

Local Common Law has no substantial impact on real estate in the German jurisdiction.

1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.

Ordinarily, international laws are not relevant to real estate in the German jurisdiction.

## 2 Ownership

2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?

There are no legal restrictions on ownership of real estate regarding resident and non-resident persons. Every natural person of legal capacity and every legal entity is permitted to own real estate.

## 3 Real Estate Rights

3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?

There are different sorts of ownership and similar rights in real estate in German law. The absolute and exclusive ownership of a piece of land is the strongest right (*Volleigentum*). It is also possible for two or more entities/persons to own a piece of land together (*Miteigentum*).

In German law, a form of ownership of a single apartment is called residential ownership or condominium ownership (*Wohnungseigentum*). Besides that, non-residential premises of a building are called part ownership (*Teileigentum*).

In addition, the legal institute of heritable building right (*Erbbaurecht*) also exists in the German jurisdiction.

Furthermore, there are so-called rights *in rem*, which secure rights on the property. They are listed in section two of the land register (*Abteilung II*). Those are, e.g. easements which give certain rights to a foreign property, such as a right of way on the property of the neighbour (*Grunddienstbarkeit*). Limited personal easements entitle a person to use the property in a certain way (*beschränkt persönliche Dienstbarkeit*).

Charges on the land (*Grundschulden*) and mortgages (*Hypotheken*) are used to secure claims. They are listed in section three of the land register (*Abteilung III*).

None of those rights *in rem* are purely contractual.

3.2 Are there any scenarios where the right to land diverges from the right to a building constructed thereon?

As a general rule, the ownership of land and the constructed essential components on the particular land form a unit. The right to land and the right to a building constructed thereon are combined. These rights only diverge in the case of the above-mentioned heritable building right. Heritable building rights allow the development and use of a foreign property without acquiring the ownership of the property.

3.3 Is there a split between legal title and beneficial title in your jurisdiction and what are the registration consequences of any split? Are there any proposals to change this?

There is no split between legal and beneficial title.

## 4 System of Registration

**4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

The land register lists all land and rights *in rem*. Rights without effect *in rem* are not to be registered.

**4.2 Is there a state guarantee of title? What does it guarantee?**

A state guarantee of title does not exist under German law.

**4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?**

The rights *in rem* must be entered in the land register in order to have the absolute effect in relation to any person. If rights are not registered in the land register, there is no public faith as to their existence.

**4.4 What rights in land are not required to be registered?**

Contractual rights do not have to be registered when they do not have effect *in rem*, e.g. rental agreements.

**4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.**

There is no probationary period following first registration. Furthermore, no difference is made regarding classes or qualities of titles on first registration.

**4.6 On a land sale, when is title (or ownership) transferred to the buyer?**

Title or ownership of land gets transferred to the buyer as soon as the new purchaser is registered in the land register as the new owner.

**4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?**

Rights obtain priority over other rights if they have been entered earlier. The date of entry of a certain right in the land register ranks it. Earlier registrations consequently provide a prioritised rank over other rights. However, anyone who is registered as a beneficiary in section two or three of the land register is entitled to change his rank in favour of any other beneficiary, who is registered subordinately, through a so-called postponement of priority (*Rangrücktritt*).

## 5 The Registry / Registries

**5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.**

In Germany, a multiplicity of land registries operates. A centralised system of registration does not exist. The land registries are located at the lower district courts (*Amtsgerichte*). As a result, the local jurisdiction of the land registry offices is generally determined by the jurisdiction or district of the respective district court.

**5.2 How do the owners of registered real estate prove their title?**

If owners of registered real estate want to prove their title, they can request an extract from the competent land registry office (*Grundbuchauszug*). The extract contains, among other things, information on ownership, burdens and restrictions on the property, as well as registered land charges.

**5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?**

Real estate cannot be transferred completely electronically.

The number of documents which need to be provided to the land registry for registration of ownership right depends on various aspects. Some documents, however, are needed in basically every case: a notarial declaration of conveyance (*Anflassung*) must be submitted. Furthermore, verification by the competent public authorities must be issued, that no pre-emptive right exists. Additionally, a tax clearance certificate (*steuerliche Unbedenklichkeitsbescheinigung*) needs to be submitted.

**5.4 Can compensation be claimed from the registry/registries if it/they make a mistake?**

Compensations can be claimed from the land registry office through an official liability claim (*Amtshaftungsklage*). A successful claim requires a mistake of the land registry office, such as incorrect registrations in the land register, and an identifiable damage on the part of the claimant.

**5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate and is this achieved by a search of the register? If not, what additional information/process is required?**

Access to the land register is permitted to anyone who expresses a legitimate interest (*Berechtigtes Interesse*). The purpose of the scheme is to prevent abusive inspections which could infringe the legitimate interests of registered data. Legitimate interests can be approved in certain constellations. Possible scenarios are that the owner himself wants to see the land register or that a person or legal entity (e.g. the neighbour) wants to obtain information regarding a right registered in his favour (e.g. right of way).



A buyer usually has no legitimate interest to get access to land register extracts. However, he may obtain a power of attorney from the property owner to get information from the land register.

## 6 Real Estate Market

**6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.**

Buyers and sellers of a real estate transaction regularly have tax advisors and lawyers at their side. A notary is always involved in asset deals. In addition, asset managers and property managers often are involved in the preparation of a transaction. Finally, real estate agents usually operate by mediating and/or advising.

**6.2 How and on what basis are these persons remunerated?**

The involved parties are usually remunerated differently. It is common to remunerate advisors on the basis of hourly fees. On the other hand, notary publics are usually paid according to the statutory tariff. Real estate agents are ordinarily paid on the basis of a lump sum.

**6.3 Is there any change in the sources or the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?**

In the German market there are different sources of capital. According to our perception, the proportion of equity has increased in recent years. In addition, however, mostly complete debt financing also occurs, for example in many project developments. Furthermore, a multitude of properties are sold to different fund models.

**6.4 What is the appetite for investors and/or developers to invest in your region compared to last year and what are the sectors/areas of most interest? Please give examples.**

The German real estate market has been subject to sustained dynamism over the past years. Only a few years ago, for example, the field of micro-living was still new and undeveloped. This trend is becoming more and more of a focus, including the focus of investors. The office and logistics divisions are still popular for investors. Furthermore, properties in top locations with long-term tenants are still attractive.

**6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.**

The German real estate market continues to be in strong shape. The trends of recent years remain, especially with regard to the housing market. Trends in the housing market mainly remain due to the lack of affordable housing.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

**7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?**

An inevitable requirement is the notarisation of a formal agreement between the seller and the purchaser of real estate. All essential contractual conditions and agreements between the parties (*essentialia negotii*) must be implied in the notarial deed.

**7.2 Is the seller under a duty of disclosure? What matters must be disclosed?**

Under German law, there is no positively formulated obligation to disclose information. However, in order to avoid fraudulent misrepresentation, the seller is obliged to provide the buyer with all the information that a buyer would normally expect. Consequently, the seller must disclose everything that might be relevant for the purchase decision, e.g. information about (hidden) defects.

**7.3 Can the seller be liable to the buyer for misrepresentation?**

The seller can be liable for misrepresentation, although this may be contractually limited: a contractual regulation of the seller's liability, which includes a limitation of liability, is possible in the event of simple negligence. In case of intent and gross negligence, no exclusion of liability is possible.

**7.4 Do sellers usually give any form of title "guarantee" or contractual warranties to the buyer? What would be the scope of these? What is the function of any such guarantee or warranties (e.g. to apportion risk, to give information)? Would any such guarantee or warranties act as a substitute for the buyer carrying out his own diligence?**

There are a variety of legal provisions that govern warranty claims and liability issues. This includes, among other things, the assumption of a guarantee. Due to the freedom of contract, the statutory warranty provisions are regularly deviated from. The parties thus regulate the question of liability and warranty on a contractual basis. This includes the question of whether a guarantee is provided by the seller. In doing so, the seller regularly tries to exclude guarantees as far as possible.

The range of possible warranties is large; reference points can be, for example, possible defects in the property, lack of permits or existing leases.

It is conceivable to replace one's own due diligence with guarantees. In view of the attempt to exclude as far as possible the guarantees, replacement will be rare.

**7.5 Does the seller retain any liabilities in respect of the property post sale? Please give details.**

The seller retains liabilities in respect of the property post-sale, if he purposely concealed certain defects that led to substantial losses on the side of the purchaser. Furthermore, the contractually declared and incurred warranties may constitute liabilities post-sale.

### 7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?

Normally the buyer is responsible to pay the land transfer taxes (*Grundwerbsteuer*) and the costs of notarisisation. In addition, the buyer is liable, for example, for a delay in payment for which he is responsible.

## 8 Finance and Banking

### 8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?

Regulations concerning the lending of money to finance real estate can be found in the German Civil Code. There are no different rules between resident and non-resident persons. Nevertheless, the Civil Code provides for special protection for credits granted to consumers.

The provisions in the Civil Code regarding the lending of money to finance real estate are especially being completed by related regulations in the German Banking Act (*Kreditwesengesetz*).

### 8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?

The best way to secure and enforce the lender's right to repayment is to provide collateral. The German jurisdiction knows basically two types of collateral: real collateral; and personal collateral. Real collateral can be provided to the real estate lender by granting mortgages or land charges. Personal collateral can be provided by establishing additional securities such as guarantees or sureties.

### 8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?

If the debtor fails to meet his payment obligations, the mortgage creditor may have the property forcibly auctioned. Before auctioning the property, the mortgage creditor must normally sue the owner for foreclosure first. Since this might take a lot of time and effort, most creditors therefore immediately order a so-called enforceable mortgage. Through an enforceable mortgage, an owner already submits to foreclosure and allows the creditor immediate execution if the debtor does not pay. This (notarised) document then replaces the court ruling and the creditor can execute more quickly if necessary.

### 8.4 What minimum formalities are required for real estate lending?

The requirements of formalities for real estate lending depend on whether the borrower is a consumer or not.

In the non-consumer sector, there are no formal requirements for the effectiveness of a real estate loan. In the consumer sector, however, written form is an obligatory requirement for the effectiveness for the loan. Besides the required formality, the real estate lender has the duty to inform the consumer about his rights.

### 8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

Basically, a real estate lender is only protected from claims against the borrower or the real estate asset if he secured his repayment entitlement. Furthermore, the type of security is of importance. A mortgage or land charge, for example, can protect the real estate lender against other creditors through a granted right to priority satisfaction.

In order to access the debtor's assets, legal proceedings may have to be sought against its creditors, e.g. by actions for preferential satisfaction or third-party claims.

### 8.6 Under what circumstances can security taken by a lender be avoided or rendered unenforceable?

Security taken by a lender can be rendered unenforceable if the borrower invokes objections under substantive law or formal law.

It is also recognised that the lender's interest in securing its claims is limited by the case-law on overcollateralisation of the lender. In this respect, it is recognised, among other things, that there must be no "blatant disproportion" between the realisable value of the collateral and the secured risk.

### 8.7 What actions, if any, can a borrower take to frustrate enforcement action by a lender?

The borrower has the opportunity to invoke objections through different legal remedies in order to oppose enforcement. The borrower can assert that the debtor's claim to enforce is precluded by a substantive objection (*Vollstreckungsabwehrklage*). He could also claim procedural errors of the enforcement body, e.g. of the bailiff (*Vollstreckungserinnerung*).

### 8.8 What is the impact of an insolvency process or a corporate rehabilitation process on the position of a real estate lender?

The insolvency of the borrower has an impact on the position of the real estate lender. With the opening of insolvency proceedings, the lender has difficult access to the borrower's assets. The lender is entitled to separate satisfaction if he has had a security right created in a certain asset to secure a monetary claim against the insolvency debtor (for example, a mortgage). If such asset is realised during the insolvency proceedings, the proceeds will be used to primarily satisfy the claim of the entitled lender, and only proceeds in excess of such a claim will be distributed to the ordinary insolvency creditors. The debts incumbent on the estate will also be satisfied before the claims of the ordinary creditors. After that, the claims of the ordinary creditors without any special rights will be satisfied. The remaining assets are distributed among them, mostly on a *pro rata* basis.

### 8.9 What is the process for enforcing security over shares? Does a lender have a right to appropriate shares in a borrower given as collateral? If so, can shares be appropriated when a borrower is in administration or has entered another insolvency or reorganisation procedure?

Without any agreement between the borrower, or his company, and the creditor, the latter shall not be entitled to appropriate

shares as collateral. In order for a right to participate to be realised, a shareholding must be offered for sale or pledged as collateral by the other shareholders outside insolvency proceedings. Should the pledging of the shareholding take place before the opening of insolvency proceedings, the creditor is entitled to participate even during the insolvency proceedings. In case of the borrower's insolvency, however, the shares in the insolvent company are usually worth nothing.

Shareholdings in the borrower may also be acquired by a so-called conversion of receivables into corresponding shares in the context of insolvency plan proceedings.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

The transfer of real estate is subject to real estate transfer tax. The amount of the real estate transfer tax depends on the federal state (*Bundesland*) in which the real estate is located and varies currently between 3.5% and 6.5% of the assessment base. The assessment base is generally the purchase price for the property. Tax debtors are both parties involved in the sale; however, it is regularly agreed in the purchase contract that the buyer shall bear the real estate transfer tax. In addition to the direct sale of real estate, a large number of other transactions are also subject to real estate transfer tax, such as the creation or transfer of heritable building rights (*emphyteusis/Erbbaurecht*), the transfer of shares in companies holding real estate and if at least 95% of the shares are transferred or united in one hand. Overall, the details are complex and the question of whether a certain transaction triggers real estate transfer tax can therefore only be reviewed on a case-by-case basis.

### 9.2 When is the transfer tax paid?

The real estate transfer tax is generally triggered by the conclusion of the purchase contract (or other relevant agreement) and not by the *in rem* transfer of the real estate. The competent tax authority is notified about the purchase contract by the notary public; if no notary public is involved as is, for example, the case when partnership interests are transferred, the contracting parties are obliged to notify the tax authority. As soon as the relevant transaction has been brought to the knowledge of the competent tax authority, the tax authority will then determine the tax by means of a tax assessment. Subsequently, a payment period of one month from the date of notification of the tax debtor(s) applies.

### 9.3 Are transfers of real estate by individuals subject to income tax?

If the individual holds the real estate as a business asset (*Betriebsvermögen*), any profit resulting from the sale of such real estate will be taxable with income tax (*Einkommensteuer*), plus solidarity surcharge and church tax, if applicable. If the real estate is held as private property, the capital gain may remain tax-free under certain conditions, for example, if the respective real estate has continuously been owned by the individual for a period of more than 10 years or if it has continuously, or at least for a period of three years immediately prior to the sale, been used for own residential purposes.

### 9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

The transfer of real estate is exempt from VAT by law. However, VAT can be opted for, which is only reasonable from an economic point of view, if the property is used for any business activities which are subject to VAT or rented out and the rent is subject to VAT. With regard to the VAT option, strict formal requirements apply. The tax rate is 19%. The tax debtor is the buyer. If a leased property is sold, the transaction, for VAT purposes, is regarded as the sale of an entire business (*Geschäftsveräußerung im Ganzen*) and is not subject to VAT. Instead, the buyer, for VAT purposes, enters into the legal position of the seller.

### 9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

If an individual sells several real properties in close temporal connection, this may lead to the qualification of the transactions as commercial trade (*gewerblich*) and thus to the retroactive allocation of the relevant real properties to the business assets; income tax and trade tax (*Gewerbesteuer*) may be triggered. If the seller is a corporation, any gains resulting from the sale of real properties are subject to corporate tax (*Körperschaftsteuer*) plus solidarity surcharge, and trade tax. The amount of trade tax varies from municipality to municipality. Under certain circumstances, a company dealing with real estate may only (*reine Immobiliengesellschaft*) be exempt from trade tax.

### 9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

If shares in a real estate company are sold, real estate transfer tax is levied according to different rules, also depending on whether the company in question is a corporation or a partnership. In case of a partnership, real estate transfer tax may already be triggered if 95% or more of the partnership interests in the company change within a period of five years. In case of a corporation, the decisive factor is whether 95% or more of the shares are transferred or united in one hand. The percentage thresholds are currently under discussion and are expected to change in a short while. There are additional regulations to prevent abusive behaviour. The transfer of partnership interests or company shares is not subject to VAT; however, the seller may opt for VAT. In terms of income (or corporate) tax and trade tax, any profits from the sale of partnership interests are basically taxed in the same way as profits resulting from the sale of the real property itself (as for German tax purposes, a partnership is regarded as tax-transparent), whereas profits from the sale of company shares are taxed under a completely different regime.

### 9.7 Are there any tax issues that a buyer of real estate should always take into consideration/conduct due diligence on?

The transfer of a leased property may be qualified, for VAT purposes, as the sale of an entire business (*Geschäftsveräußerung im Ganzen*) with the result that the buyer, regarding VAT, enters into the legal position of the seller. This should therefore be given special attention in the course of due diligence. In such a case, the buyer may be faced with a liability obligation pursuant to Section 75 of the German Fiscal Code (*Abgabenordnung – AO*), according to which the business transferee (*Betriebsübernehmer*)

can be held liable for certain taxes relating to the business of the seller. The buyer may also be liable for outstanding property taxes (*Grundsteuer*). Furthermore, with regard to the buyer's future tax burdens, it may be relevant – and should therefore be taken into account during due diligence – if the prerequisites for an extended trade tax reduction (*erweiterte gewerbesteuerliche Kürzung*), which may lessen the buyer's future trade tax burdens, are fulfilled. The aforementioned reduction is jeopardised, for example, if the object of the lease is not only the lease of real estate, but also of operating equipment (*Betriebsvorrichtungen*). This is also usually taken into account during due diligence.

## 10 Leases of Business Premises

### 10.1 Please briefly describe the main laws that regulate leases of business premises.

Basically, the regulations of the Civil Code are applicable on the leases of business premises, unless the parties have agreed otherwise in a contractual manner.

### 10.2 What types of business lease exist?

The Civil Code distinguishes between leases and (rather rarely occurring) usufructuary leases (*Pachtverträge*).

### 10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?

- a) **Length of term:**  
As a rule, the term of a business premises lease is initially limited. In addition, an extension option is often agreed. The maximum time limit of a rental contract is 30 years. A rental contract can also be concluded indefinitely. In this case, the lease may be terminated after the statutory or agreed notice periods.
- b) **Rent increases:**  
The parties can contractually agree that the rent will be automatically adjusted over time. There are two ways to do this: a so-called graduated lease (*Staffelmiete*) or an index rental (*Indexmiete*) can be arranged. The agreement on a graduated lease determines exactly the timing and amount of future rent adjustments. An index rental agreement links changes in the rental amount to the development of the consumer price index (*Verbraucherpreisindex*) and requires a lease agreement with a term of at least 10 years (including tenant's extension options).
- c) **Tenant's right to sell or sub-lease:**  
A tenant is not permitted to sell the lease. However, the tenant may change party if the landlord agrees. The tenant is not permitted to sublet the premises as a whole without the permission of the landlord unless otherwise agreed. However, the landlord cannot prohibit the tenant from subletting without reason. If the landlord wrongly refuses to sublet, this may lead to claims for damages by the tenant. In addition, the tenant is entitled to a special right of termination.
- d) **Insurance:**  
As a rule, the landlord contractually agrees to take out property and construction liability insurance, as well as all-risk

insurance. The costs incurred within the scope of the insurances taken out are regularly transferred to the tenant via the ancillary costs.

- e)(i) **Change of control of the tenant:**  
If the lease does not include any regulations regarding the change of control, the lease remains with the tenant.
- e)(ii) **Transfer of lease as a result of a corporate restructuring (e.g. merger):**  
If a new legal entity emerges as a result of a company restructuring, the lease remains as a rule with the new legal entity.
- f) **Repairs:**  
The law stipulates that the landlord must, in principle, ensure the contractual use of the rental property. This means that he is responsible by law for all repairs and maintenance at his own expense. However, this obligation to maintain may be, and is usually, contractually waived and imposed on the tenant, with the exception of work on the essential building substance.

### 10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?

Income from leases will be subject to income tax at the level of the landlord, and business leases may be deducted as tax-effective expenses at the level tenant. However, generally speaking, income from leases is not subject to trade tax.

With regard to VAT, the lease is generally exempt from tax, but the landlord may, subject to certain prerequisites, opt for VAT.

### 10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?

The termination of the business lease regularly depends on the contractual provisions for the duration of the lease.

A business lease can be terminated in several ways: an expiration of time can lead to a termination of a business lease, if the contractually agreed termination period has occurred. In case of tenancies for an indefinite period, the contract needs to be terminated ordinarily. The contracting parties may also agree on the termination of the lease, regardless of any agreed time limit of the lease, or may agree on special termination rights by contract. Irrespective of this, in exceptional cases, there may also be an extraordinary right of termination if a party has breached an essential obligation under the lease.

In order to allow the tenant to continue the business lease beyond the term of a contract, the parties may include a so-called extension option. An extension option is to be understood as an agreement under which the tenant should have the right to extend a fixed-term contract for a further limited period before the end of the contract period.

### 10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?

The liability of the former landlord after the sale of the property



depends on the contractual agreements. In case of sale of the land built with rental property, the buyer becomes the new landlord at the time of registration in the land register. However, becoming the new landlord does not automatically establish his liability towards the tenant. If the liability of the former landlord is not contractually waived, he remains liable as a guarantor for the new landlord.

An assignment of the rights and obligations of the tenant from the lease to third parties is excluded, subject to the consent of the landlord.

**10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the “environmental footprint” of a building. Please briefly describe any “green obligations” commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).**

A lot of national and international certificates and quality seals document the sustainable standard of buildings nowadays. However, “green leases” for commercial premises that impose obligations towards sustainability are hardly widespread in Germany. Uniform directives have so far been missing. Currently, there are no legal provisions that are geared towards imposing obligations regarding the implementation of “green leases”.

**10.8 Are there any trends in your market towards more flexible space for occupiers, such as shared short-term working spaces (co-working) or shared residential spaces with greater levels of facilities/activities for residents (co-living)? If so, please provide examples/details.**

A trend already established in Germany is the use of so-called co-working spaces. These spaces provide infrastructure and workstations for a short term and allow the build-up of a community. In the housing market, especially in urban areas, there is a trend towards obtaining so-called micro-housing. Micro-apartments are small, furnished apartments, ideally useable for specific groups of people such as students or commuters.

## 11 Leases of Residential Premises

**11.1 Please briefly describe the main laws that regulate leases of residential premises.**

The regulations of the Civil Code are applicable on the leases of residential premises. Just like with the business leases, the parties can agree otherwise in a contractual manner. Due to the protection of tenants, however, certain legal regulations are stricter from the point of view of the landlord. These regulations therefore cannot be waived to the detriment of the tenant.

**11.2 Do the laws differ if the premises are intended for multiple different residential occupiers?**

No, the laws do not differ if the premises are intended for multiple different residential occupiers.

**11.3 What would typical provisions for a lease of residential premises be in your jurisdiction regarding: (a) length of term; (b) rent increases/controls; (c) the tenant’s rights to remain in the premises at the end of the term; and (d) the tenant’s contribution/obligation to the property “costs” e.g. insurance and repair?**

- a) Length of term:  
In principle, residential leases are concluded indefinitely. A limitation is only permissible in legally ordered cases.
- b) Rent increases/controls:  
There are three ways to determine a rent increase. The parties can agree to a graduated lease (*Staffelmiete*) or an index rental (*Indexmiete*). The agreement on a graduated lease determines exactly the timing and amount of future rent adjustments. An index rental agreement links changes in the rental amount to the development of the consumer price index (*Verbraucherpreisindex*).  
As a third option, the landlord may require the consent to the rent increase up to the local comparative rent.
- c) The tenant’s rights to remain in the premises at the end of the term:  
Basically, there are no provisions which provide for or permit the tenant to remain in the residential premises after the end of the rental period.
- d) The tenant’s contribution/obligations to the property “costs”, e.g., insurance and repair:  
The obligation of the tenant to contribute to the real estate costs is reflected in the payment of the ancillary costs. The so-called Ordinance on Operating Costs (*Betriebskostenverordnung*) determines which ancillary costs can be transferred to the tenant. The tenant usually pays a monthly advance payment in addition to the tenant. The landlord settles the ancillary costs once a year.

**11.4 Would there be rights for a landlord to terminate a residential lease and what steps would be needed to achieve vacant possession if the circumstances existed for the right to be exercised?**

A rental contract can only be terminated by the landlord in compliance with strict conditions. In the event of an important reason for termination, the landlord has an extraordinary right of termination. The regulations in the Civil Code define what an important reason for termination is. In addition, the landlord may have the right to an ordinary termination. In addition to complying with the notice period, there must also be a reason for termination. If the tenant does not vacate and surrender the apartment despite the termination, the landlord must enforce his eviction claim in court in order to obtain an eviction title which must be enforced by a bailiff.

## 12 Public Law Permits and Obligations

**12.1 What are the main laws which govern zoning/permitting and related matters concerning the use, development and occupation of land? Please briefly describe them and include environmental laws.**

There are various legal sources dealing with the development and use of land, as well as permitting procedures for a particular construction project. A development plan (*Bebauungsplan*) regulates the way in which land can be built and the resulting use. The legal bases for drawing up the development plan are the Federal Building Code (*Baugesetzbuch*) and the Federal Land Utilisation

Ordinance (*Baunutzungsverordnung*). Regulations for the prevention of danger that can occur during construction or by construction facilities are contained in the relevant state building regulations (*Landesbauordnung*). Depending on the individual case, the planning and developing process might require to include other legal sources as well, such as certain environmental laws.

**12.2 Can the state force land owners to sell land to it? If so please briefly describe including price/compensation mechanism.**

The freedom of ownership is guaranteed by the Constitution in Article 14. Expropriation interferes with this fundamental right and therefore requires constitutional justification. If a landowner is expropriated, he must be compensated for the loss of his assets. Compensation must be determined in a fair manner against the interests of the general public and the parties concerned. The owner concerned shall receive appropriate compensation for the loss of his property, which shall enable him to obtain a comparable item. Compensation is usually calculated on the market value that his property had at the time when the expropriation decision was made.

**12.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?**

The land/building use and/or occupation and environmental regulation are mainly controlled by local public authorities. The compliance control is essentially carried out by the local building authority (*Bauordnungsbehörde*). Development plans can either be accessed through the websites of the local building authorities or are made available by them on request. Information on the approval situation of individual plots can also be obtained from the local building authorities.

**12.4 What main permits or licences are required for building works and/or the use of real estate?**

The relevant local state building regulations determine whether a particular building project is subject to permits or not. Essentially, it depends on what kind of construction project is to be realised.

The building permit also determines the use of the building. If the purpose of the building is to be changed, it is usually necessary to apply for a change of use permit (*Nutzungsänderungsgenehmigung*).

**12.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?**

Building and use permits shall be granted only after the conclusion of formal proceedings. An authorisation procedure must be requested. Implied permissions cannot be obtained in any way.

Without a building permit, a particular construction project is formally illegal. This formal illegality entitles the local building authorities to intervene.

**12.6 What is the typical cost of building/use permits and the time involved in obtaining them?**

The amount of the costs and the duration of the authorisation procedure depend to a great extent on the particularities of the

individual case. The duration mainly depends on how extensive the construction project is. The costs are based on the fee regulations of the respective federal state. Finally, the processing time always depends on the locally responsible authority.

**12.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate or development/change of use?**

Each federal state has its own regulations on the protection of monuments. Depending on the federal state, these regulations can have an impact on real estate transfer. Should a monument be affected by such a transaction, the responsible monument authority must be informed.

**12.8 How can, e.g., a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?**

In order to ensure from the buyer's point of view that the land to be acquired does not contain any contaminated land or harmful soil contamination, the purchaser may request information in the registers of contaminated sites. These registers are maintained by the environmental offices of the respective federal states.

**12.9 In what circumstances (if any) is environmental clean-up ever mandatory?**

In principle, the owner, the occupier and/or the polluter are obliged to clean the land with contaminated soil.

The extent and cost of such an environmental clean-up depends largely on how dangerous the waste is to human health and the environment.

**12.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.**

Regulatory requirements for the assessment and management of the energy performance of buildings can be found in the Energy Saving Ordinance (*Energieeinsparverordnung*). The ordinance sets standard structural requirements for the efficient operating energy requirements of the building. The ordinance affects certain commercial and office buildings, as well as residential buildings. In addition, the regulation contains information on new constructions as well as on the refurbishment of buildings.

## 13 Climate Change

**13.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).**

Following the Paris Agreement and the EU's climate policy, Germany has set its climate change targets in the 2050 climate change plan. The Climate Protection Act (*Bundes-Klimaschutzgesetz*), to be adopted later this year, aims to ensure the achievement of these climate protection targets. The relevant point of the draft law is, in particular, the planned introduction of CO<sub>2</sub> pricing (CO<sub>2</sub> pricing from 2021 for the transport

and heat sectors). In addition, a so-called fixed-price system is to be introduced. It is planned to sell certificates to companies with the right to put heating fuels on the market, so that citizens and the economy can adapt to a particular development. As an example, certificates are to be issued in 2021 at a fixed price of €10 per tonne of CO<sub>2</sub>.

### 13.2 Are there any national greenhouse gas emissions reduction targets?

In order to achieve the EU-wide climate change target, greenhouse gas emissions on EU territory are to be reduced by at least 40% by 2030 compared to 1990 levels. In the draft of the Climate Protection Act, however, Germany has now set itself the target of a 55% reduction by 2030 compared to 1990. In the long term, greenhouse gas neutrality is to be achieved by 2050. The Climate Protection Act stipulates how much CO<sub>2</sub> each sector may still emit.

### 13.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?

Sustainability of newly constructed and existing buildings shall be improved through the requirement of Energy Certificates. The Energy Certificate is a document intended to provide information on the energy efficiency and energy costs of a building.

## 14 COVID-19

### 14.1 What principal changes to the laws that govern real estate in your jurisdiction have been introduced, in reaction to the effect of the Coronavirus (COVID-19) pandemic?

German legislature introduced restrictions on the termination of leases and usufructuary leases. Under the terms of the new law, landlords are not permitted to terminate leases for land or premises merely on the ground that the tenant did not make a rental payment in the period from 1 April 2020 to 30 June 2020 despite its being due, insofar as non-payment is due to the effects of the COVID-19 pandemic. The link between the COVID-19 pandemic and non-payment must be satisfactorily demonstrated by the tenant.

However, the duty to pay the rent is not suspended. This applies to tenants who cannot run their business as a result of a COVID-19-effected shutdown also.



**Dr. Damian Tigges** provides comprehensive advice to insurance companies, institutional investors, banks and project developers regarding real estate transactions. His broad range of activities includes performing due diligence reviews, contract writing and negotiation, and assisting in the conclusion of real estate transactions. In addition, Dr. Tigges provides advice on commercial tenancy law and leasehold law. He also regularly represents his clients in complex litigation cases regarding property transactions and commercial tenancy law before and out of court.

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