

# Germany

Dr Joerg M Lang and Frank D Endebrock, Mayer Brown LLP

[www.practicallaw.com/9-500-5012](http://www.practicallaw.com/9-500-5012)

## THE CORPORATE REAL ESTATE MARKET

### 1. What have been the main trends in the real estate market in your jurisdiction over the last 12 months? What have been the most significant deals?

In 2008, volume of real estate trade declined in comparison to 2006 and 2007. Only EUR25.4 billion (about US\$35.8 billion) was invested and the market diminished to 2005 levels.

During the first half of 2009, EUR3.32 billion (about US\$4.68 billion) was invested in commercial properties, that is, less than 73% of the volume compared with the same period in 2008. Generally, most deals involved investment of between EUR20 million (about US\$29.2 million) and EUR50 million (about US\$73 million), although there were larger deals that exceeded these figures.

#### Deals

The sale of the following property portfolios and investments are among the most important deals that took place in Germany in 2008 (*DEGI Research, 2009*):

- LEG Portfolio (residential company with some 93,000 units) for EUR3.4 billion (about US\$4.78 billion), from LEG North Rhine Westphalia to Whitehall.
- Piccadilly Portfolio (mixed use property on Potsdamer Platz, Berlin) for EUR1.4 billion (about US\$1.97 billion), from Daimler to SEB.
- Post-Portfolio (mixed use properties), for EUR1 billion (about US\$1.46 billion), from Deutsche Post AG to Lone Star Real Estate Fund.
- KarstadtQuelle Portfolio (retail), for EUR800 million (about US\$1.17 billion), from Arcandor to RREEF, Pirelli RE, Generali Real Estate Fund.

## REAL ESTATE INVESTMENT

### 2. Please briefly outline the opportunities for investing in real estate in your jurisdiction. In particular, consider:

- The structures commonly used (for example, property companies and partnerships).

- Are real estate investment trusts (REITs) available? If so, are they commonly used?
- Institutional investors.
- Private investors.

Investors can use any form of property company (partnership or corporation) under German law to invest in real estate, and property companies structured according to the law of a foreign state. However, the following German structures of property companies are commonly used:

- Co-ownership.
- Civil law partnership.
- Limited liability company.
- Commercial law partnership (general or limited partnership).
- Public limited company/stock corporation.

Further, investors can choose closed-ended and open-ended funds as well as joint ventures for investing purposes. A special investment opportunity is available through special investment funds managed by investment companies for selected investors.

REITs are a new kind of real estate vehicle in Germany. The law introducing REITs was passed at the end of March 2007 with retrospective effect from 1 January 2007. Although several investors were already in the process of forming REITs in 2007, in July 2008 there were still only two German REITs (Alstria Office Reit AG and Fair Value Reit AG) and a Frankfurt business paper has already proclaimed REITs as “the shelf warmers of the stock market” (*FAZ online, 26 June 2008*).

Institutional investors are a driving force in German markets. Opportunity and equity funds from foreign countries, as well as international property companies, have been the biggest investors. Open-ended funds and other German investors, such as insurance companies, now account for far less transaction volume than before. Open-ended funds began to market fund properties in Germany when they began reorganising their domestic-focused portfolios.

Private investors are becoming increasingly active, particularly in relation to single investments, where they represent an important group of buyers.

## REAL ESTATE LEGISLATION

### 3. Please briefly set out the main real estate legislation that applies in your jurisdiction.

The main sources of real estate law are the:

- Civil Code (*Bürgerliches Gesetzbuch mit Einführungsgesetz*).
- Notarisation Act (*Beurkundungsgesetz*).
- Land Register Ordinance (*Grundbuchordnung*).
- Act on Transfer of Real Property (*Grundstücksverkehrsgesetz*).
- Federal Building Code (*Baugesetzbuch*).
- Building Ordinances of the Federal States (*Bauordnungen der Länder*).
- Act on German REITs (*Gesetz zur Schaffung deutscher Immobilien-Aktiengesellschaften mit börsennotierten Anteilen*).

## TITLE

### 4. Please briefly state what constitutes real estate in your jurisdiction. Is land and any buildings on it (owned by the same entity) registered together in the same title, or do they have separate titles set out in different registers?

Real estate consists of land and buildings attached to the land (*section 90, Civil Code*). Therefore, buildings are automatically in the possession of the owner of the land. In exceptional cases, ownership of buildings and land can be separate, for example, when heritable building rights are involved or if the building was constructed by a tenant. However, there is no separate registry for title to buildings.

### 5. How is title to real estate evidenced, for example by registration in a public register of title? Which authorities manage the public title register?

Legal title to real estate is evidenced in the public Land Register (*Grundbuch*) kept at the district courts (*Amtsgerichte*) and, in the Federal State of Baden-Wuerttemberg, this is kept in notary offices.

### 6. Please briefly set out the information and documents registered in the public register of title, for example a description of the real estate, the owner, matters affecting the title and any relevant documents.

The Land Register holds property information in the Land Register Index (*Bestandsverzeichnis*), and there are also three divisions, providing further information (*see below*). The index provides general property information, such as:

- Cadastral details.

- Postal address.
- Use.
- Size.

The divisions provide the following information:

- **Division I.** The legal owner of the property is registered here.
- **Division II.** This sets out property encumbrances such as:
  - easements;
  - priority notices;
  - public notices.
- **Division III.** Mortgages (*Hypotheken*) and land charges (*Grundschulden*) are registered here.

Acquisition of title requires, among others, registration of the buyer in division I. Accordingly, legal ownership is usually evidenced by a copy of the Land Register for the property, which can be an ordinary or certified copy.

### 7. Can confidential information or documents be protected from disclosure in the public register of title?

Confidential information or documents are protected by law, which grants individuals with a legitimate interest, the right to inspect or obtain a copy of the Land Register. Only reasonable interest justified by the circumstances is deemed sufficient. However, the threshold is not unreasonably high. Economic reasons such as profound acquisition negotiations suffice.

### 8. Is there a state guarantee of title? Is title insurance available? If so, is it commonly used?

There is no state guarantee of title, but the seller is fully liable for defects in title and liability cannot be limited or excluded. Registration involves formal Land Register procedures taken care of by the notaries. Notaries have statutory liability to the parties and must maintain professional indemnity insurance of at least EUR500,000 (about US\$704,250). However, if the Land Register is at fault, parties can bring compensation claims against the Federal state, for wilful or negligent acts or omissions relating to the Land Register.

### 9. How can real estate be held (that is, what types of tenure exist)?

The most common way to hold real estate is land ownership, that is, buying the land with the buildings on it. Generally, title to buildings and land are not legally separate, except in special circumstances, for example in:

- **Flat ownership (*Wohnungseigentum*).** Title is to specific, legally separate premises, with a co-ownership share in communal areas and installations.
- **Hereditary building rights (*Erbbaurechte*).** Buildings are constructed and remain legally separate for a certain period, so the buildings can be sold separately from the land.

As an alternative to purchasing real property directly, an investor can often purchase (indirect purchase) shares of a company that owns the property (special purpose vehicle). Investments in this form are particularly popular in project developments. An indirect purchase follows separate rules, however careful evaluation of the property is still important.

## SALE AND PURCHASE OF REAL ESTATE

### 10. What are the main stages and documents in the sale and purchase of real estate? In particular:

- How is real estate marketed, when does commercial negotiation occur and what pre-contractual arrangements are used?
- When is the sale contract negotiated and executed?
- When are the parties legally bound?
- When is the change of title registered?
- When does title transfer and what are the formal legal requirements to transfer real estate (for example, in writing and signed by the parties)? Is notarisation required?

#### Marketing

A seller is usually first contacted through one of the major international investment consultancy firms, and less frequently, through smaller regional estate agents. Open tenders, where major real estate portfolios are offered by public tender, follow separate rules to some extent.

#### Commercial negotiation

Surveyors, lawyers and tax advisers conduct commercial negotiations in a transaction.

#### Pre-contractual arrangements

Pre-contractual arrangements are not valid, unless the major points of the main contract are agreed, and the content of the main contract is determinable. Further, pre-contractual arrangements relating to real estate are only binding if authenticated by a notary. Therefore, pre-contractual arrangements are not common in Germany. Instead, parties often sign a non-binding letter of intent to set out the mutual negotiating positions. Non-compliance with the letter of intent before the transaction begins can lead to compensation claims.

#### Sale contract

The purchase price is only payable after certain conditions have been satisfied, rather than on the date when the purchase agreement is concluded. The most common conditions include:

- Registration of a priority notice in favour of the buyer.
- Waiver or negative clearing certificate of statutory pre-emption rights from the local authority.

When the purchase price is paid, occupation of the property and the right to its benefits (and the burden of its obligations) pass to the buyer, so the property passes to the buyer commercially, but not legally at this stage. Generally, rent claims arising after the purchase price is paid are assigned to the buyer. The purchase

and payment of the purchase price can be subject to certain notification duties under tax law and banking law.

#### When legally binding

The purchase agreement becomes binding on the parties after:

- A public notary has notarised the purchase agreement.
- All outstanding conditions, approvals and declarations have been obtained.

The most common conditions are:

- Approval of declarations in the agreement by one party, if it has been represented by an attorney-in-fact who may (intentionally or otherwise) have acted without a sufficient power of attorney.
- Consent to sell under certain administrative regulations, such as in Eastern Germany, and in certain areas where administrative procedures apply.
- Conditions precedent in the purchase agreement being satisfied.
- Expiration of terms before which the agreement cannot become binding on the parties.

#### Registration

Registration requires:

- A notarised conveyance of ownership (*Auflassung*) between the buyer and seller.
- A clearance certificate (*Unbedenklichkeitsbescheinigung*) of payment of real property transfer tax, issued by the tax authorities and submitted by the buyer.
- The local authorities to confirm they are not entitled to a right of pre-emption, or will not exercise such right (see *Question 24*).
- In certain cases, official permission for, among others, the sale of agricultural or forestry land (*Grundstuecksverkehrsgesetz*). In the five Eastern States, transfer of real property requires a permit under the Real Estate Transaction Ordinance (*Grundstuecksverkehrsordnung*) from the public authorities, because properties there can be subject to unresolved restitution matters.

#### When title transfers

Title passes when the buyer is registered as owner on the Land Register for the property, which can happen some time after the purchase agreement has been concluded. Title does not pass at the moment the purchase agreement is concluded.

### 11. Does a seller have any statutory or other liability to the buyer in a disposal of real estate, for example to disclose real estate information, or in relation to title?

Generally, the seller's statutory liability for property and construction defects is excluded. The buyer is responsible for obtaining information about possible damage to the property, and about the overall legal position by carrying out careful due diligence (see *Question 12*).

However, the seller has statutory liability for title. The seller is fully liable for title defects, and liability cannot be limited or excluded. In addition, the seller is responsible for disclosing any technical damage or property defect which is:

- Known to it.
- Not easily discoverable through due diligence

The seller is deemed to have acted fraudulently if it fails to disclose such technical damage or property defects. Therefore, it is common to include a clause in the contract that, to the best knowledge of the seller, there is no such damage or defect.

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**12. Please briefly outline the real estate due diligence that is typically carried out before an acquisition (including title investigation and searches of public authorities).**

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Real estate due diligence is common, although in Germany, it is not regulated by law. Traditionally, due diligence is carried out on behalf of the buyer, but current trends involve due diligence being carried out on the seller's request, which is sometimes also made available to the buyer.

Real estate due diligence is complex and can be divided into four main parts:

- Legal due diligence.
- Technical/environmental due diligence.
- Tax due diligence.
- Financial due diligence.

It involves assessing:

- Deeds.
- Land registry records.
- Loan documents.
- Lease and employment agreements.
- Service and advertising contracts.
- Insurance policies.
- Licences.
- Permits.
- Zoning.
- Environmental and engineering inspection and surveys.
- Financial and tax records.

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**13. What real estate warranties are typically given by a seller to a buyer in the sale of corporate real estate and what areas do they cover?**

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In the sale of commercial property, the scope of a warranty depends on individual circumstances. It depends on whether buyers are speculative or conservative investors (for example, open-ended funds). While speculative investors tend not to demand strict warranties (for example, concerning rental income),

conservative investors generally do so. Usually, conservative investors demand the following warranties from the seller:

- The transfer of the property without defects in quality, including the residual pollution risk.
- Compliance with construction permits or certain existing agreed features.
- The transfer of the property free from environmental damage.
- Validity of existing leases and guaranteed rental income.
- The absence of pending legal disputes or remedy proceedings.
- A guarantee that there are no arrears of real estate taxes or public liens at the time of transfer of possession.

In the sale of large real estate portfolios or companies holding real estate, sellers usually give only very limited representations and warranties.

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**14. Can an owner or occupier inherit liability for matters relating to the real estate even if they occurred before it bought or occupied it? For example, environmental liability, or liability under a lease.**

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Generally, the present owner of the real estate does not inherit liability for pre-ownership matters such as municipal duties and taxes. Exceptions apply when provided by law or when contractually agreed with the former owner. For example, under the Federal Soil Protection Act (*Bundesbodenschutzgesetz*), the present owner of a property can always be held responsible and liable by the competent authorities for contamination of soil and groundwater, even if he did not cause the contamination. Expenses incurred by the public authorities to remedy contamination accrue as a public burden on the real estate. Existing leases bind the new owner, unless the lease states otherwise (*Civil Code*).

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**15. Does a seller or occupier retain any liabilities relating to the real estate after it has disposed of it? For example, environmental liability, defects in the real estate, and contractual liability to the buyer.**

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The seller is liable for defects and damages to buildings for five years after handover of the property. However, this statutory warranty is usually excluded in the purchase agreement. Therefore, the parties can agree that the seller gives representations and warranties according to what the buyer has become aware of during due diligence.

For new building developments, the seller usually assigns claims against contractors, architects and engineers to the buyer, together with warranty bonds.

The seller is responsible for public burden payments in certain circumstances. In relation to the removal of pollution by the authorities, the environmental liability of a former owner can last a considerable time. If the seller does not comply with its duty to sell the property in a state that is free from title defects, the buyer can demand the removal of the defect as a supplementary form of specific performance. Charges secured on the real estate are a title defect.

## 16. What costs are usually paid by the buyer? What costs are usually paid by the seller?

### Buyer's costs

The buyer typically pays:

- Transaction costs, notary costs and court fees, which are fixed by law and based on the value of the property.
- Real property transfer tax (see *Question 17*).
- Estate agents costs, at between 1.5% to 3% of the purchase price, plus VAT, depending on the purchase price, which is subject to negotiation.

### Seller's costs

The seller typically pays its own costs relating to the purchase agreement, including legal fees.

## REAL ESTATE TAX

### 17. Is value added tax (VAT) (or equivalent) payable on the sale or purchase of real estate? Who pays? What are the rates? Are there any exemptions?

Generally, the sale and purchase of real property is VAT exempt. However, parties can decide to subject the transaction to VAT, in which case, the seller must reimburse VAT to the tax authorities deducted in connection with construction costs. VAT is charged at 19% of the net purchase price and is payable by the buyer. The parties must provide a tax registration number and apply an invoice number to the purchase agreement for VAT purposes.

### 18. Is stamp duty/transfer tax (or equivalent) payable on the sale or purchase? Who pays? What are the rates? Are there any exemptions?

The acquisition of real property is subject to real property transfer tax. Federal states can change the tax rate at their discretion. The rate is 3.5% of the consideration, taking into account any non-cash consideration, except for Berlin and Hamburg, where the rate is 4.5% for any acquisition completed after 1 January 2007.

### 19. Are any methods commonly used to mitigate real estate tax liability on acquisitions of large real estate portfolios?

Tax-efficient acquisition structures involve one or more special purpose companies holding real estate to avoid real property transfer tax. However, transfer tax can also apply in an indirect purchase of real property. An indirect purchase of real property takes place if at least 95% of the shares in a company holding real property are acquired at once, or if at least 95% of the interest in a partnership holding real property is transferred during a period of five years.

## HOLDING BUSINESS PREMISES

### 20. Are there targets to reduce greenhouse gas emissions from buildings in your jurisdiction? Is there legislation requiring buildings to meet certain minimum energy efficiency criteria? If yes, please give brief details.

The government is committed to the reduction of greenhouse gas emissions and the efficient use of renewable energies. The Energy Savings ordinance (*Energieeinsparverordnung*) which will be amended in October 2009, contains a full set of measures to obtain this goal. An Energy Pass (*Energieausweis*) is mandatory from 1 July 2008 for residential buildings completed before 1965. An energy pass for other residential buildings is mandatory from 1 January 2009, and for all non-residential buildings from 1 July 2009. The Energy Pass contains information about current consumption relating to the general demand of energy used for heating and hot water. Its aim is to provide information on the energy efficiency of the building. It can be issued by architects, engineers, chimneysweepers and so on, and is valid for ten years. A potential buyer can waive its right to obtain an Energy Pass. If it does not, failing to provide an Energy Pass is an administrative offence.

Further measures contain tighter requirements for energy savings of newly built houses by 30%, including material variation of existing buildings and the obligation to refit old equipment and buildings.

### 21. Is it common for companies to manage their real estate portfolios and their accommodation needs by using third parties, for example through outsourcing transactions? If yes, please give brief details.

Recently, some companies have assigned property management of their real estate portfolios to estate agencies or property managers. Large real property holders such as insurance companies have also begun to use asset management subsidiaries which are planned to provide third party services themselves. Some large estate agencies already maintain special departments or subsidiaries for this purpose. Property managers typically provide services concerning commercial and technical management of real estate portfolios.

### 22. Are there restrictions on foreign ownership or occupation of real estate, or on foreign guarantees or security for ownership or occupation?

There are no restrictions on foreign individuals or entities owning or occupying real estate.

### 23. Does change of control of a company affect its holdings of real estate?

Change of control does not affect a company's holdings of real estate. However, in partnerships (*Personengesellschaften*), particularly civil law companies (*Gesellschaften bürgerlichen Rechts*), company changes may require amendments to the Land Register.



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**24. In what circumstances can local or state authorities purchase business premises compulsorily? Is the purchase price market value?**

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The authorities can demand expropriation for certain purposes, which generally involve infrastructure planning. All expropriation is subject to paying compensation at market value. In addition, the relevant local authority has a statutory pre-emption right for a real estate purchase to, for example, secure land for infrastructure.

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**25. Are municipal taxes paid on the occupation of business premises, for example business rates? Are there any exemptions?**

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Real property tax is a local tax levied on a specific tax value, which is generally well below the property's market value. The actual tax payable depends on the municipality where the real property is located. Real property tax is deductible as a business expense from the income derived from the real property. It is imposed on the registered landowner. For the period between the economic transfer (the handover) and the legal transfer (registration of the buyer), the parties agree that real property tax and other public burdens pass to the buyer (see Question 10).

## REAL ESTATE FINANCE

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**26. How are acquisitions of large real estate portfolios or companies holding real estate generally financed?**

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They are usually financed by secured lending (see Question 27) (particularly land charges), through sale and leaseback, and asset-backed securitisations.

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**27. How is real estate commonly used to raise finance?**

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Business premises can be encumbered with mortgages or, more commonly, land charges as security for business credit agreements, and for the acquisition of the property. In addition, there has been an increasing number of sale and leasebacks.

Real property can also be used in structured finance products such as asset-backed securitisations.

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**28. What are the most common forms of security granted over real estate to raise finance? How are they created and perfected (that is, made valid and enforceable)?**

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In most cases, property financing is secured by a mortgage (*Grundpfandrecht*). As a charge on property, it gives the lender a power of sale *in rem* (*dingliches Verwertungsrecht*). There are two types of mortgage:

- A *Hypothek* is dependent on a claim, which means it cannot be created or assigned without a claim. It identifies a sum

of money, which is paid on the borrower's default from the encumbered property, to satisfy the claims of the mortgage creditor against the proprietor or a third party. The proprietor is not obliged to pay the claim directly. The proprietor only has to allow compulsory execution (*Zwangsvollstreckung*) over the property and objects on the property. As a statutory assignment, a *Hypothek* is automatically transferred on assignment of the claim.

- A *Grundschild* (land charge) (the more commonly used type of mortgage), is abstract and therefore independent from a claim. The link between a claim and a land charge is made by agreement, which involves specifying the purpose of the mortgage (*Sicherungsabrede*). A land charge also identifies a sum to be paid. Payment of such sum under the land charge does not automatically settle the underlying claim, as the land charge is still legally independent from the claim. The proprietor must also allow execution over the property. Independence from a particular claim makes the land charge much more flexible than the *Hypothek*, because it can be used by a variety of claims. Consequently, the land charge has far greater significance in practice.

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**29. Is real estate securitisation common in your jurisdiction? If yes, please give brief details.**

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Real estate securitisation is common. Encumbrances on real estate (*Grundpfandrechte*) serve as safeguards. Land charges are the most common method of securing real estate because of their legal organisation (see Question 28).

## REAL ESTATE LEASES

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**30. Are contractual lease provisions regulated or freely negotiable?**

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Generally, rent is freely negotiable. However, excessive rent above a certain level compared to the usual rent is prohibited. If rent is about double the rent customarily in place, the internal lease may be ineffective due to usury (*paragraph 1, section 138, Civil Code*). Agreeing excessive rent, taking advantage of and exploiting the other party's exigence, is also prohibited.

Lease terms are regulated by sections 535 et seq. of the Civil Code. These regulations are usually modified in commercial leases. General terms and conditions of trade are also regulated.

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**31. How are rent levels usually reviewed and are there restrictions on this? Is VAT (or equivalent) payable on rent?**

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Often, rent is connected to the cost of living index for all households (*Verbraucherpreisindex*). Usually, the parties agree to adjust rent in line with the index.

Rent is generally free from VAT. However, the landlord can opt for rent to be subject to VAT. The tenant only needs to pay VAT on rent if agreed in the lease.

**32. Is there a typical length of lease term and are there restrictions on it? Do tenants of business premises have security of occupation or rights to renew the lease at the end of the contractual lease term? If yes, please give details.**

Parties can freely negotiate the term of the lease. A fixed lease term of several years is often agreed (for example, five, ten or 15 years). The term of a lease is often combined with a right for one party to renew the lease for a further fixed term, and/or a tacit extension of the lease if neither party terminates before expiry. If no fixed term is agreed, the lease can be terminated by either party giving a statutory notice period.

Generally, tenants of business premises have no security of occupation. Therefore, in some leases a restricted personal servitude (*beschränkte persönliche Dienstbarkeit*) in favour of the tenant is agreed. This is a right *in rem* and allows the tenant to occupy the rented premises during the term of the lease. The right must be registered in the Land Register, and is particularly beneficial if the landlord becomes insolvent because, unlike a lease, it cannot be terminated easily by an insolvency administrator.

Rights of renewal at the end of the contractual lease term only exist if they are agreed in the lease.

**33. What provisions or restrictions typically apply to the disposal of the lease by the tenant (for example, can the tenant assign or sublet the lease with the landlord's consent)?**

A transfer of the lease by one party to a third party requires the consent of the other party, unless the owner sells the property, in which case, the lease generally automatically passes to the buyer. Parties do not usually deviate from this.

Tenants are not generally allowed to share their business premises with group companies (third parties) without the landlord's consent. Some leases provide for the landlord's consent to a future subletting of the premises to companies specified in the lease.

**34. Can tenants usually share their business premises with companies in the same corporate group? If yes, on what terms?**

Tenants must generally have the landlord's consent to sublet if the lease does not include its consent to a future subletting of the premises, for example to affiliated companies (see *Question 33*).

**35. Who is usually responsible for keeping the leased premises in good repair?**

Under statute, the landlord is responsible for all repairs to the premises. This consists of structural and decorative repairs.

The parties often agree that the landlord is responsible for structural repairs to the building and the rented premises, and the tenant is generally responsible for all internal repairs. In this case, the obligation for decorative repair must depend on the actual state of wear and tear. A duty of decorative repair in a strict time frame is prohibited.

**36. Who is usually responsible for insuring the leased premises?**

Most leases state that the landlord must take out property insurance and third party liability insurance, and the tenant pays the premiums.

**37. On what grounds can the landlord usually terminate the lease? Please briefly outline any restrictions or procedure that applies. Can the tenant terminate the lease in certain circumstances?**

The landlord can terminate an indefinite lease at any time by observing the statutory notice period. The notice periods are about six to nine months for commercial leases, and about three months or longer, depending on the duration of the terminated lease, for residential leases. A fixed-term lease can only be terminated by the landlord if the parties agree a termination right for the landlord. However, any lease can be terminated by the landlord for cause, particularly if:

- The tenant violates the landlord's rights by endangering the premises due to its negligence, or by giving the premises to a third party without the landlord's consent.
- The tenant is in arrears with rent for two months, or with an amount equal to two months' rent.
- The tenant disturbs the sanctity of the property, to the extent the landlord cannot be expected to continue the lease with the tenant.
- The landlord cannot be expected to continue the lease with the tenant, taking into consideration the circumstances, and any fault and/or negligence of the parties.

Often the parties specify additional events allowing termination for cause in the lease. Generally, termination for cause requires prior warning from the terminating party.

The tenant can terminate an indefinite lease at any time by observing the statutory notice period. A fixed-term lease can be terminated by the tenant if the parties have agreed a termination right for the tenant. However, any lease can be terminated by the tenant for cause, particularly if:

- The contractually agreed undisturbed use of the premises is breached. This only applies to substantial breaches, and only if the landlord does not provide relief.
- The condition of the premises is detrimental to health.
- The landlord disturbs the sanctity of the property to the extent that the tenant cannot be expected to continue the lease.

**38. What is the effect of the tenant's insolvency (under general contract terms and insolvency legislation)?**

If the tenant becomes insolvent, the lease generally continues. After a petition to begin insolvency proceedings has been filed, the landlord cannot terminate the lease due to default in payments or deterioration of the tenant's financial situation. However, the landlord has the right to terminate once the insolvency proceedings have begun and the tenant defaults in payment again.

The insolvency administrator can terminate the lease at any time by observing the statutory notice period, irrespective of any agreed fixed term. If a fixed-term lease is terminated by the insolvency administrator, the landlord can claim damages on grounds of premature termination from the insolvency administrator (for example, rent for the remaining period of the fixed term). However, this claim may not be (or may only be partly) successful, due to the insolvent tenant not having any assets.

If the insolvency administrator does not use this termination right, the landlord can claim rent from the insolvency administrator that is due on and after the start of insolvency proceedings. The insolvency estate must be used to settle this claim as a priority before the assets are distributed to creditors.

A landlord's claim for rent or other payments that accrued before the start of insolvency proceedings is not settled in advance, so the landlord may only have this claim satisfied if sufficient assets are available.

## PLANNING LAW/ZONING

### 39. What authorities regulate planning control and which legislation applies?

Based on the land use plan (*Flaechennutzungsplan*), the local authority develops a local development plan (*Bebauungsplan*), which is a more detailed zoning plan covering parts of a certain area. This is a public procedure, which includes publishing a draft plan and an invitation for suggestions from the public, and is finalised by the municipal council which then adopts the plan as a bye-law. The local development plan determines certain characteristics of permitted uses and/or building specifications in the plan's jurisdictional area, such as size and type of use, but can include further requirements about the design, for example type of roof, façade and building materials.

A building permit must comply with the relevant local development plan and the requirements of the Building Ordinance of the Federal State. However, the building authority has certain discretion to grant partial relief (*Befreiungen*) from the restrictions set out under the plan and the code.

If no land use plan applies, whether a building is allowed depends on whether it will comply with the existing neighbourhood. Common practice and a broad range of case law allow a fair evaluation of this criteria.

Planning law consists of federal, state and local law. In particular, the:

- Federal Building Act, as amended on 23 September 2004 (*Baugesetzbuch*) sets out how plots of land are prepared by zoning and planning for construction.
- Building Ordinances of the Federal States (*Bauordnungen der Laender*) define, among others, permission procedures and technical, safety and fire protection requirements.

## REAL ESTATE ORGANISATIONS

### Federal Government (*Bundesregierung*)

The official website of the Federal Government shows annual reports of real property information.

W [www.bundesregierung.de](http://www.bundesregierung.de)

### Investment Fund Association (*BVI Bundesverband Investment und Asset Management eV*)

This association represents, among others, open-ended real estate funds.

W [www.bvi.de](http://www.bvi.de)

### Notaries Institute (*Deutsches Notarinstitut*)

This is the institute of German notaries.

W [www.dnoti.de](http://www.dnoti.de)

### Association of publicly certified and qualified experts (*Bundesverband öffentlich bestellter und vereidigter sowie qualifizierter Sachverständiger eV*)

This is the association of real estate experts.

W [www.bvs-ev.de](http://www.bvs-ev.de)

### Federal Government for foreign investment

The official website provides information for foreign investors in Germany.

W [www.invest-in-germany.de](http://www.invest-in-germany.de)

- Local authority produces the land use plan for its territory defining, among others, industrial, commercial and residential areas.

### 40. What planning consents (for example, planning permission or building permits) are required and for which types of development?

Generally, every kind of construction which is not of minor interest (for example, certain cabins, attachments and some types of temporary buildings) requires building permission. Additionally, certain alterations of existing buildings or changes of use require approval from certain authorities.

Planning law has been deregulated over recent years. Many types of residential buildings or buildings limited to a certain height are regulated by a simplified permission process (as defined in Building Ordinances of the Federal States). In these cases, an architect or construction engineer must confirm in writing that the building complies with the relevant building regulations. Further, the local authorities can also verify compliance during construction (see Question 39).



**41. In relation to planning consents:**

- Which body grants initial planning consents?
- Do third parties have the right to object? If yes, please give brief details.
- In what circumstances is there a public inquiry?
- How long does an initial decision take after receipt of the application?
- Is there a right of appeal against a planning decision? If yes, please give brief details.

**Initial consents**

The municipal authorities grant initial planning consents.

**Third party rights**

Third parties may have a right to object to a building permit within a limited time, stating that their rights have been violated. Usually, this right will be limited to adjacent neighbours, and recent legislation has limited these objections, to assist real estate investment.

**Public inquiries**

The local development plan and certain buildings for industrial use may require a public inquiry (see *Question 39*).

**Initial decision**

Under most state law, a permit should be granted or denied within three months. However, the authorities may extend this period.

**Appeals**

The owner can appeal a decision about a building permit within one month by filing an objection with the municipal authority. If the objection is denied, it can appeal to the administrative courts.

**REFORM****42. Please summarise any proposals for reform and state whether they are likely to come into force and, if so, when.**

The Act, which establishes the introduction of electronic land registries and of electronic land records, is expected to become effective in September 2009. The land registry will almost entirely be kept in electronic form. In addition, the legal relationship with the land registry, and the keeping of files with the land registry which, until now, were solely conducted in paper form, will also be possible electronically. The Federal States determine the time and extent of the implementation of electronic legal relations and the electronic files which require the setting-up of technical infrastructure at the land registries.

Further, the Act contains provisions designed to reinstate the marketability of real estate of a BGB company (partnership organised under the Civil Code, *BGB-Gesellschaft*), in line with recent jurisprudence of the Federal High Court of Justice (*Bundesgerichtshof, BGH*). After decades during which the BGB company had been considered to have no legal capacity, and the shareholders had been regarded as legal entities, the Federal High Court of Justice has now ruled that the BGB company can have its own legal capacity, and can, as such, become the owner of real property. As the BGB company is not currently registered in any public registry and, consequently, the shareholder cannot be determined, it was not possible to produce evidence of the power of disposal required to dispose of the company's assets. Under the new Act, the shareholders of a BGB company (among others), will be registered, and it will be assumed that the registered persons are shareholders and that there are no other shareholders.

**CONTRIBUTOR DETAILS**

**Dr Joerg M Lang and Frank D Endebruck**  
**Mayer Brown LLP**

**T** +49 69 79 410

**F** +49 69 79 41100

**E** [jlange@mayerbrown.com](mailto:jlange@mayerbrown.com)

[fendebruck@mayerbrown.com](mailto:fendebruck@mayerbrown.com)

**W** [www.mayerbrown.com](http://www.mayerbrown.com)

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### Mayer Brown LLP

#### Frankfurt

Bockenheimer Landstraße 98-100, 60323 Frankfurt am Main

T: +49 69 79 41 0, F: +49 69 79 41 100

#### Köln

KölnTurm, Im Mediapark 8, 50670 Köln

T: +49 221 57 71 100, F: +49 221 57 71 199

#### Berlin

Potsdamer Platz 8, 10117 Berlin

T: +49 30 20 67 30 0, F: +49 30 20 67 30 100

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