

Commercial real estate in Germany: overview

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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 the final quarter of 2012 there was a significant rise in investments in German real estate. Commercial real estate alone, reached a top volume of more than EUR10 billion. This has been the strongest result for a quarter period since the end of 2007. The strong trend has continued during the first half of 2013 with an overall figure of EUR13 billion for commercial investments.

The transaction key figures are driven by landmark single asset deals, but there is also a variety of portfolio sales and M&A deals. Investments in asset classes, such as logistics and light industrial are increasing. The regional focus remains on the main business centres, but due to the commercial and infrastructural landscape, minor business spots and traffic hubs are becoming more common in the logistics and industrial sector.

Landmark transactions and volumes from mid 2012 to mid 2013 were (all information taken from public sources):

- The sale of TLG Immobilien, the commercial part of the then state-owned developer, from the Federal state to Lone Star at EUR1.1 billion. The company holds 780 properties.
- The sale of a portfolio of 17 Karstadt department stores from Karstadt to Signa Holding at EUR1.1 billion.
- The sale of Die Welle, a multi-story office building in Frankfurt's business district, and Neues Kranzler-Eck, a mixed-use office and retail complex in the Western city of Berlin, from RBS Royal Bank of Scotland to a joint venture formed by Norges Bank and Axa Investment at EUR460m equity value.
- The sale of an SEB portfolio of 11 properties from SEB Asset Management, the open-ended fund of SEB Bank, to Dundee International, a Canadian REIT.

The residential market also saw increasing demand from various national and international investor groups. The residential rents have increased steeply over the past few months in German metropolitan areas but started to stabilise in the summer of 2013. However, there is important political discussion in Germany over political measures against rent excesses, fuelled by the upcoming elections in September 2013. However, according to the analysis of independent professionals, there are no signs of a rush into real estate or a real estate bubble. Demand remains strong, particularly for core assets in core markets, leaving room for more flexible investors.

A recent development is the "Skyline Plaza", a remarkable new shopping centre development in the fair and exhibition district of Frankfurt. Together with an adjacent congress centre, the overall investment volume reached EUR360 million. It is held by three partners ECE, CA Immo and Allianz.

REAL ESTATE INVESTMENT

2. How is real estate investment carried out in your jurisdiction and what structures do investors use?

Common structures

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. The following German property company structures are commonly used:

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

In addition, investors can choose closed-ended and open-ended funds as well as joint ventures for investment. Joint ventures provide for good combination opportunities for partners with a financial and a developer background. Finally, there are special investment funds managed by investment companies for selected investors.

Most foreign investors use tax-optimised structures using European jurisdictions, like Luxembourg, The Netherlands or the Channel Islands.

G-REITs

The German REIT concept was introduced in the first decade of the new millennium. It provides for tax incentives for investors in specially qualified listed vehicles. The product had not been accepted as an investment vehicle by German market participants. There are only four active German REITs (Alstria Office REIT AG, Fair Value REIT AG, Hamborner REIT AG and Prime Office REIT-AG).

Alternative investments

Alternative investment structures have become more and more attractive for foreign investors. Mortgage-backed loans, mezzanine loans, corporate participations and other forms of alternative investments form a significant part of the investment arena for investors with a wider scope of eligible asset classes.

REAL ESTATE LEGISLATION

3. What is 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*).
- Federal Town Planning Regulation (*Baunutzungsverordnung*).
- Building Ordinances of the Federal States (*Bauordnungen der Länder*).
- Capital Investment Act (*Kapitalanlagegesetzbuch*).

TITLE TO REAL ESTATE

Title and registers

4. 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 land owner. In exceptional cases, ownership of buildings and land can be separate, for example, when hereditary building rights are involved, or if the building was constructed by a tenant (see Question 9). However, there is no separate registry for title to buildings.

Evidencing title

5. How is title to real estate evidenced?

Legal title to real estate is evidenced in the public Land Register (*Grundbuch*) kept at the district courts (*Amtsgerichte*) (see Question 6). Each property is registered in a folio. In certain areas of the Federal State of Baden-Wuerttemberg, the Land Register is kept in notary offices.

Information in the public register

6. What are the main information and documents registered in the public register of title?

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.

Protection from disclosure

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 serious acquisition negotiations are sufficient.

State guarantee of title

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 notaries. Notaries have statutory liability to the parties and must maintain professional indemnity insurance of at least EUR500,000. 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. A buyer who relies in good faith on the actual entries in the Land Register is regarded by statute as a bona fide purchaser.

Title insurance is generally unavailable in Germany and usually not offered by German insurance companies.

Tenure

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

Additional types of tenure besides ownership include the:

- Right to possess and use due to long-term tenancy (*Pacht*).
- Lease (*Miete*).
- Right to use *in rem* (*Nutzungsrecht*).

SALE OF REAL ESTATE

Main stages and documents

10. What are the main stages and documents in the sale of real estate?

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

Investors conduct commercial negotiations in a transaction with support and advice from surveyors, lawyers and tax advisers. Usually, commercial negotiation starts between the seller and the buyer before the involvement of other advisers to assess whether the expectations differ too much.

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 their 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.

Usually, the public notary collects the required documents and applies for registration of title in the land register once the purchase price has been paid and the clearance certificate has been sent to him as evidence that the transfer tax has been paid (see *Question 18*).

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.

Seller's liability to the buyer

11. Does a seller have any statutory or other liability to the buyer in a disposal of real estate?

The seller's statutory liability for property and construction defects is generally excluded. The buyer is responsible for carrying out due diligence to obtain information about possible damage to the property, and about the overall legal position (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 both:

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

The seller is deemed to have acted fraudulently if it fails to disclose 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.

Due diligence

12. What real estate due diligence is typically carried out before an acquisition?

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.

Sellers' warranties

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?

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. Conservative investors usually 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.
- That the transfer of the property is 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.

Inheriting liability

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?

The present owner of the real estate does not generally 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, the

present owner is jointly liable for real estate tax accrued since the start of the calendar year before the acquisition (*Real Estate Act (Grundsteuergesetz)*). In addition, 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 (*Federal Soil Protection Act (Bundesbodenschutzgesetz)*). 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*).

Retention of liability after disposal

15. Does a seller or occupier retain any liabilities relating to the real estate after it has disposed of it?

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 give representations and warranties on the basis of the information 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.

It is important to note that the seller, as the former landlord, remains liable for the returning of rent securities received from the tenants after the security purpose has expired.

Seller and buyer costs

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. Notary costs and court fees are fixed by law and based on the value of the property.
- Real property transfer tax (*see Question 18*).
- 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 TAXES AND MITIGATION

17. Is value added tax (VAT) (or equivalent) payable on the sale or purchase of real estate?

The sale and purchase of real property is generally 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. The buyer pays

VAT at 19% of the net purchase price. 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 and who pays?

The acquisition of real property is subject to real property transfer tax. Both parties are jointly liable to the tax authorities for the real property transfer tax, while between the parties it is usually agreed that the buyer pays this. Federal states can change the tax rate at their discretion. The actual rates are (as a percentage of the purchase price):

- Baden-Württemberg: 5%.
- Bavaria: 3.5%.
- Berlin: 5% (this will increase to 6% as of 1 January, 2014).
- Brandenburg: 5%.
- Bremen: 4.5% (this will increase to 5% as of 1 January, 2014).
- Hamburg: 4.5%.
- Hesse: 5%.
- Mecklenburg-Western Pomerania: 5%.
- Lower Saxony: 4.5% (this will increase to 5% as of 1 January, 2014).
- North Rhine Westphalia: 5%.
- Rhineland-Palatinate: 5%.
- Saarland: 5%.
- Saxony: 3.5%.
- Saxony-Anhalt: 5%.
- Schleswig-Holstein: 5% (increase to 6.5% as of 1 January 2014).
- Thuringia: 5%.

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

Climate change targets

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?

The government is committed to the reduction of greenhouse gas emissions and the efficient use of renewable energies. The Energy Savings Ordinance (*Energieeinsparverordnung*) which was amended in October 2009, contains a full set of measures to obtain this goal. Frameworks for even tighter energy savings is in the process of being implemented. One aim is to introduce a nearly

zero-emission standard for new building developments in 2019 and other new developments in 2020.

An energy pass (*Energieausweis*) is mandatory for all non-residential buildings. 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.

The new energy savings construction standards also apply in case of material variation of existing buildings or parts of the building.

Third party outsourcing

21. Is it common for companies to manage their real estate portfolios and their accommodation needs by using third parties through outsourcing transactions?

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 intended 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.

Restrictions on foreign ownership or occupation

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. However, implicit restrictions for entities may result from land registers refusing to acknowledge foreign entities as being vested with legal capacity and therefore refusing registration.

Issues on change of control

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.

Compulsory purchases

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

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.

If the local authority exercises the right of pre-emption to which it is entitled, it must in principle pay the purchase price agreed by the

buyer and seller. If the local development plan for the property to be sold involves public use (for example, surfaces for public good) or environment-protecting balance measures, the authorities can determine that the market value of the property is owed at the time of the purchase (compensation value (*Entschädigungswert*)) instead of the purchase price.

Municipal taxes

25. Are municipal taxes paid on the occupation of business premises? Are there any exemptions?

Real property tax is a local tax levied on a specific tax value, which is generally considerably 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 in practice agree that real property tax and other public burdens pass to the buyer (see *Question 10*).

REAL ESTATE FINANCE

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

Acquisitions of large real estate portfolios are usually financed by secured lending (see *Question 27*) (particularly land charges), through sale and leaseback, and asset-backed securitisations.

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

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

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

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)?

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:

- **Hypothek.** This 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.
- **Grundschuld (land charge).** This is the more commonly used type of mortgage. It 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 this 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.

29. Is real estate securitisation common in your jurisdiction?

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*). Financial institutions may refinance using the German covered bond (*Pfandbrief*).

REAL ESTATE LEASES

Negotiation and execution of leases

30. Are contractual lease provisions regulated or freely negotiable?

Rent is generally freely negotiable. However, excessive rent above a certain level when 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, are 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.

31. What are the formal legal requirements to execute a lease?

Generally, there are no specific formal legal requirements to execute a lease. A valid lease only requires a mutual agreement between landlord and tenant, which can be concluded orally. However, leases with a fixed term must be in line with the written form requirement under section 550 of the Civil Code, to avoid triggering statutory termination rights.

If the lease object is located in a redevelopment area (*Sanierungsgebiet*), or other specifically designated zoning areas, then the consent from the competent redevelopment authority is required. A lease concluded or extended without this consent is invalid. In addition, a lease must be notarised if it includes, for example, a pre-emption right regarding real property.

Rent levels and reviews

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

Recurring rent reviews during the term of the lease are uncommon. However, rent is often connected to the cost of living index for all households (*Verbraucherpreisindex*). Usually, the parties agree to adjust rent in line with the index. This indexation is only possible if the lease is binding on the landlord for a period of at least ten years. It must not be limited to a rent increase but must include a decrease according to 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 this is agreed in the lease.

Length of term and security of occupation

33. 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?

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 (see *Question 38*).

Tenants of business premises generally have contractual rights and claims as a security of occupation. However, if further protection is required, a restricted personal servitude (*beschränkte persönliche Dienstbarkeit*) in favour of the tenant can be agreed and registered in the land register of the leased property. This is a right *in rem* and allows the tenant to occupy the rented premises during the term of the lease. The right is particularly beneficial if the landlord becomes insolvent because, unlike a lease, it cannot be terminated for statutory reason by an insolvency administrator.

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

Restrictions on disposal

34. What restrictions typically apply to the disposal of the lease by the tenant?

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.

Use of premises within a corporate group

35. Can tenants usually share their business premises with companies in the same corporate group?

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*).

Repair and insurance responsibilities

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

The landlord is legally 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.

37. 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.

Grounds for termination

38. On what grounds can the landlord usually terminate the lease? Can the tenant terminate the lease in certain circumstances?

Landlord

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. Termination for cause generally requires prior warning from the terminating party.

Tenant

The tenant can terminate an indefinite lease at any time by observing the statutory notice period (see *above, Landlord*). 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.

Tenant's insolvency

39. 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

40. What authorities regulate planning control and which legislation applies?

Based on the land use plan (*Flächennutzungsplan*), 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, facade 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, including the:

- Federal Building Act, as amended on 23 September 2004 (*Baugesetzbuch*), which sets out how plots of land are prepared by zoning and planning for construction.
- Building Ordinances of the Federal States (*Bauordnungen der Länder*), which defines, among others, permission procedures and technical, safety and fire protection requirements.
- Land use plan produced by the local authority, to define territory, including industrial, commercial and residential areas.

41. What planning consents are required and for which types of development?

Every kind of construction which is not of minor interest (for example, certain cabins, attachments and some types of temporary buildings) generally requires building permission. In addition, 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. In addition, the local authorities can also verify compliance during construction (see *Question 40*).

42. What are the main authorisation and consultation procedures in relation to planning consents?

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 40*).

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

43. Are there any proposals to reform real estate law in your jurisdiction?

Real Estate Transfer Tax

There are strong efforts by lawmakers to abolish corporate structures to avoid real estate transfer tax on acquisitions. Several approved corporate structures (RETT Blocker) may become ineffective following the implementation of new RETT laws.

Notary and Court Fees

The law on notary and court fees (*Gerichts- und Notarkostengesetz*) has recently been introduced, replacing the former cost ordinance (*Kostenordnung*). This means that notarial fees that accrue in the notarisation of sale, the creation of land charges or other property encumbrances have increased slightly. The new cost scheme applies to all procedures that were initiated after 1 August 2013.

Planning law

The public planning and zoning law has been amended. The amendments deal with new instruments to implement climate protection and internal municipal development as planning goals into the Federal Building Code (*Baugesetzbuch*) and into the Federal Town Planning Regulation (*Baunutzungsverordnung*). The statutory pre-emptive right has been extended. The municipality may also execute the pre-emptive right in favour of third parties not only pursuing the creation of public housing, but any other public interest secured by the pre-emptive right. The revisions became effective on 20 September 2013.

Architects and engineers remuneration

The relevant Architects and Engineers Fees Order (*Honorarordnung für Architekten und Ingenieure*) has recently been changed. The basic services which are covered by the

statutory fee scheme have been extended and the scheme itself has been adjusted. The changes became effective on 17 July 2013.

REAL ESTATE ORGANISATIONS

Federal Government (*Bundesregierung*)

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

W www.bundesregierung.de

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

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

W www.bvi.de

Notaries Institute (*Deutsches Notarinstitut*)

Main activities. This is the institute of German notaries.

W www.dnoti.de

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

Main activities. This is the association of real estate experts.

W www.bvs-ev.de

Federal Government for foreign investment

Main activities. The official website provides information for foreign investors in Germany.

W www.invest-in-germany.de

ONLINE RESOURCES

W www.gesetze-im-internet.de

Description. This is the official website of the German Federal Ministry of Justice. Some Acts and Ordinances are translated. The translations of these materials into languages other than German are intended solely as a convenience to the non-German reading public. Any discrepancies or differences that may arise in translations of the official German versions of these materials are not binding and have no legal effect for compliance or enforcement purposes.

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Recent transactions Real estate related advice for:

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- Deutsche Land.
- Mariner Financial.
- Teachers (TIAA).
- Allianz Global Investors.
- Morgan Stanley Real Estate Fund VI.
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- Internationales Immobilien Institut.
- DEGI Deutsche Gesellschaft für Immobilienfonds.
- Morgan Stanley Real Estate Investment Fund.
- Arminius Real Estate Opportunity Fund I.
- Internationales Immobilien-Institut.
- VALAD Property Group.
- Rynda Property Investors LLP.