



Real Estate

in 31 jurisdictions worldwide

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2009



Published by
GETTING THE DEAL THROUGH
in association with:

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Advokatska Kancelarija Bogdanovic
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Acquisition of real estate

1 Legal system

How would you explain your jurisdiction's legal system to an investor?

The German legal system is a civil code system based on codified law. Legal disputes can either be settled before the courts or in the course of arbitration proceedings. In case of civil proceedings before courts, an avenue of appeals of generally three court instances is available. German law provides for preliminary reliefs and injunctions if otherwise the enforcement of a claim would be impeded or hindered. The range of procedures includes temporary reliefs as an injunction and orders of attachment. The German legal system basically does not provide for the concept of equity as it is known in the Anglo-American common law legal system. Merely in exceptional cases, a competent court will decide on basis of equity reasons (principles of good faith) in order to avoid undue cases of hardship.

As evidence in civil proceedings, visual inspection by the court, evidence by witness, experts, documents, interrogation of the parties and official information are admissible. Pretrial discovery is not accepted as evidence under German law.

As a general principle, oral contracts are valid and binding unless otherwise provided by law or agreed by the parties. However, the general possibility to orally conclude a contract does not apply to real property transactions. For such transactions written form as well as notarisation (real estate purchase agreement, agreement on the transfer of title) or public certification for registration with the land register are required by mandatory law.

2 Recording conveyance documents

What are the legal requirements for recording conveyance documents?

The German land register system is highly developed and provides uniform federal rules. The land register is part of the respective court of first instance of the district in which the real property is located. The land register provides reliable information on ownership and charges on land (land charges, easements). Information provided in the land register may be considered correct and complete with regard to any person relying on it in good faith.

The German legal system strictly distinguishes between two separate parts of a transaction that also apply to real estate transactions: the obligations constituted by the real estate purchase agreement (purchase agreement) and the performance in rem of such obligations by the transfer of title. The valid and binding purchase of a real property therefore always requires a respective purchase agreement and an agreement on the transfer of title (transfer deed). Furthermore, the transfer must be registered in the land register prior to its effectiveness. Even though the purchase agreement and the transfer deed are different legal acts, they usually are incorporated in one notarial deed in order to reduce the notarial fees.

The purchase agreement and the transfer deed require notarisation whereas the notification for registration of the transfer of ownership in the land register (notification) (at least) requires public certification. This applies to any type of agreement concerning the transfer of ownership in real estate – not only a specific purchase agreement – but also donation agreements, option agreements or agreements on the contribution or real estate to a company. The notarisation of the purchase agreement and the transfer deed (and the public certification of the notification) triggers fees for the notary public and the land register. The amount of such fees depends on the consideration paid for a transaction (cap for notarial fees is approximately €60 million). For example, the notarial fees for a real estate transaction with a consideration in the amount of €20 million will amount to approximately €53,000 and the land register fees to approximately €42,000. Such fees are determined by mandatory law and therefore may not be decreased by mutual agreement between the parties. From a practical point of view, the notary public usually is authorised and instructed by the parties to arrange for the required legal proceedings to close a transaction, liaises with the land register and often serves as an escrow agent securing the transfer of title and, if applicable, the discharge of any encumbrances simultaneously with the disbursement of the purchase price.

In addition, the transfer of ownership in a real estate triggers land transfer tax of 3.5 per cent (Berlin and Hamburg 4.5 per cent) of the consideration paid. Besides, the sale and transfer of real estate, land transfer tax is triggered by contributions of real property to a company and the apportionment of real property among several joint owners, as well as the sale and transfer of more than 95 per cent of the shares in a company owning real estate located in Germany. Land transfer tax normally refers to the consideration paid as basis amount, with the exception for cases in which the triggering event is the purchase of more than 95 per cent of the shares in a company owning German real estate. In such cases, the evaluated tax value of such real estate, which follows determination, forms the tax basis.

The fees due for real estate transactions as well as the triggered land transfer tax are usually borne by the purchaser; corresponding provisions to be incorporated in the purchase agreement.

3 Foreign investors

What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

German law does not provide for mandatory restrictions, neither for foreign natural persons nor for foreign companies that are not legally resident in Germany or companies controlled by foreigners. As mentioned above, the acquisition of real estate triggers land transfer tax and therefore requires notification to the competent financial authorities. Such reporting requirement is effected by the notary public. Furthermore, a foreign investor should be aware

of German-specific rights of third parties such as municipal pre-emption rights, restrictions of utilisation of the real estate under German zoning law, easements of third parties and potential tendering procedures.

4 Exchange control

If a non-resident invests in a property in your jurisdiction, are there exchange control issues? What about return of capital?

Not applicable. The extradition of capital is not restricted.

5 Legal liability

What types of liability does an owner of real estate face? Is there a standard of strict liability and can there be liability to subsequent owners? What about tort liability?

German law in general provides for legal obligations for owners of real estate; violation of such obligations may lead to liability. Owners of real estate have to keep their premises safe for persons and property of persons entitled to use and to protect them from risks. Buildings have to be operated and kept in a condition that allows tenants to use the real estate as agreed in the lease contracts and – like any other persons – may not endanger them or their property, through debonding parts of the building. Owners of real estate, including buildings, have to clear snow drifts, iced grounds and further risks affecting public areas. As an obvious principle, owners of real estate – like any persons – have to refrain from any environmental pollution. In cases of violation, respective damages and legal responsibilities of the owner of real estate apply.

In cases of environmental pollution, an exception applies if environmental pollution is concerned. The polluter, the former owners and the actual real estate owner will be liable for damages caused to third parties and the environment (for details see item 14). For the sake of completeness, owners of German real estate owe payment of an annual real estate tax levied by the municipalities. Real estate tax is based on the assessed value in accordance with the Valuation Act and is to be multiplied by a tax rate of 0.35 per cent on average.

6 Protection against liability

How can owners protect themselves from liability and what types of insurance can they obtain?

Owners of real estate can – to a certain extent – protect themselves from risks of personal – or damages to third-party property by insurances. Environmental problems to a certain extent can be covered by insurance policies that form part of the mandatory business liability insurance of companies. Coverage against damages related to the operation of a business, risks for buildings and certain environmental risks is offered (for example, water and soil pollution) but may involve substantial premiums. Insurance companies in the German market typically offer coverage for injuries to persons and damages to property resulting from incidents of accidental pollution. Customarily, the insurance of buildings is effected by covering damages from fire, storm, hail, supply water, etc. Furthermore, owners can obtain additional, optional insurance coverage for damage to property resulting from gradual pollution, construction defects, bad operation, etc.

As a protection from liability, risks relating to the real property are shifted to the seller by corresponding representations and warranties and indemnifications in the purchase agreement. Such provisions are basically only binding between the parties to the real estate purchase agreement; in case of breach (for example, occurrence of an environmental problem), the purchaser has a contractual claim for indemnity against the seller. Notwithstanding, such

contractual construction may not avoid an owner being held liable for environmental problems based on the legal ownership of a real property concerned. As a structure that shields owners from third-party claims, an investor may use corporate veils. For example, a limited liability company as an investment vehicle and respectively owner vehicle into German real estate protects from liability. The corporate veil may only be pierced based on limited legal principles that involve bad faith acts detrimental to creditors. Furthermore, a limited partnership under German law can offer limited liability combined with – depending on the investment structure – favourable taxation.

7 Choice of law

How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction?

Investments in real properties located in Germany are governed by the *lex rei sitae*. This general principle applies for the transfer of title irrespective of foreign involvement in a real property transaction. Hence, no choice of law is available to the parties of a real estate transaction for the transfer deed. Notwithstanding, German conflict of laws rules provide for the possibility of concluding a purchase agreement concerning real estate or shares in a company owning real estate located in Germany are governed by foreign law. However, this possibility is rarely pursued.

8 Subject-matter jurisdiction

Does subject-matter jurisdiction exist? Who are necessary parties? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

For German real property transactions, no subject-matter jurisdiction exists. The legal venue for real property and related litigations (for example, litigations of leases) is determined by the *rei sitae*. Necessary parties to a lawsuit are the plaintiff and the defendant. Any third party having a legal interest in the prevailing of one party may join such party as interpleader.

The requirements for out-of-jurisdiction service of the German courts depend on the particular case, the foreign state involved and the treaties to which both Germany and the particular foreign state are a party. For practical and legal reasons purchase agreements on German real estate always should provide for a contact persons for the parties located in Germany for the delivery of notices. Remedies are in general – according to the procedural requirements – enforceable in Germany irrespective of the nationality of the parties and their qualification to do business in Germany.

9 Investment entities

What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

German company law provides for a wide variety of legal forms investment entities can basically take. The most popular are the stock corporation (AG), the *Societas Europaea* (SE), the limited liability company (GmbH), the limited partnership (KG) and the civil partnership (BGB-Gesellschaft). In general, no particular pass-through entity for tax purposes can be recommended to avoid tax payments as each legal form may serve this purpose depending on the particular investment structure. As mentioned above, the limited liability company and also the limited partnership are most suitable to shield the ultimate owners from liability and to establish a favourable tax structure.

Institutional investors may also select real estate investment trusts. Open-ended real estate funds, which fall into the range of application of German investment law, qualify as special estates that are managed by an investment company. As determined by German investment law, investment companies may solely be operated in the legal form of a limited liability company or a stock corporation. Investors may consider that open-ended real estate fund within the applicability of German investment law are subject to the supervision of the Federal Financial Supervisory Authority (BaFin).

10 Foreign investors

What form of entities do foreign investors customarily use in your jurisdiction?

Further to question 9, foreign investors customarily use limited liability companies, stock corporations or limited partnerships as investment vehicles into German real estate transactions. These legal forms entail limited liability, limited disclosure requirements and enable the investors to implement a favourable tax structure. Furthermore, the choice of the preferable legal form for an investment entity besides liability depends on tax structuring options, financing issues for example, credit approval requirements, tax deductibility of transaction expenses, required capitalisation (equity debt rate), etc.

11 Organisational formalities

What are the organisational formalities of creating the above entities? What requirements does your jurisdiction impose on a foreign entity? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

There are no specific requirements for foreign entities when incorporating a German investment vehicle. The organisational formalities of establishing companies and partnerships depend on the respective legal form.

For matters of this overview, the requirements for the limited liability company and the limited partnership are focused; a limited liability company is established by contract between the shareholders (articles of association) and requires registration in the competent commercial register to enter into existence as a legal entity and protection from liability. The articles of association require notarisation and must contain at least the company name, the registered seat of the company, a description of the purpose of the company, the amount of the share capital and the amount paid up by any of the shareholders. The minimum share capital of a limited liability company amounts to €25,000 and a quarter of such must be contributed at least at the date of the notification for registration. The transfer of shares in a German limited liability company requires notarisation.

It is to be noted that a substantial revision of the law governing limited liability companies has been enacted on 1 November 2008. This revision in particular facilitates and expedites founding procedures, changes the legal relationship of the shareholders among each others and to third parties, and introduces a limited liability company without minimum capitalisation requirements. In real estate transactions, not all features introduced by the revision may be employed, though, and it is expected that limited liability companies with a minimum capital of €25,000 will still remain the typical form.

A limited partnership is established by contract between the limited partners and the general partner. For liability purposes, the general partner in the majority of cases is incorporated in the legal form of a limited liability company. The founding of a limited partnership has to be registered with the competent commercial register but opposed to a GmbH notarisation is not required and the transfer of

limited partnership interests does not require notarisation. To obtain registration, certain formal requirements have to be met (full name, date of birth and domicile of the partners (limited and general), the company name, the registered seat of the company, information on the power of representation and the amount of the deposits (liability amount) of the limited partners).

The tax consequences for a foreign investor may neither be determined by just selecting a particular legal form for an investment entity, nor can a particular legal form be determined as most advantageous for tax purposes. Cases with multi-jurisdiction involvements require specific and tailor-made investment and tax structures to find and implement the most favourable tax consequences for an investment. In general, partnerships are deemed to be transparent entities for income tax purposes, so the income and losses are aggregated on the partner level and the taxation of income also takes place only on the partner level. Nevertheless, the partnership is treated as a non-transparent entity for taxation purposes pertaining to sales taxes and business trade taxes. The taxation of corporations and other legal bodies separates between resident companies with registered seat or place of management in Germany and non-resident companies without a legal seat or place of management in Germany. Resident companies are subject to unlimited tax liability with their worldwide earnings; non-resident companies are taxable with their listed sources of income in Germany.

12 Documentation

Does your jurisdiction or customs recognise a non-binding form of agreement? Is there a form of non-binding agreement before a contract? Is it customary to take the property off the market while negotiation of a contract is ongoing?

German jurisdiction does not recognise a non-binding form of agreement such as a letter of intent if real estate transactions are concerned. The reason for this is the notarisation requirement which also applies to letters of intent and the fees involved. Nevertheless, such non-binding agreements are customary in real estate transactions to define the heads of terms on which the parties agreed. Moreover, it is customary to agree on an exclusivity period during which the seller refrains from negotiating with third parties.

13 Contract of sale

What are typical provisions in a contract of sale?

The body of a purchase agreement consists of the provisions dealing with the subject matter (the real estate), the purchase price and its adjustment, the representations and warranties, the remedies and the conditions to closing. Miscellaneous provisions are always added. The subject matter must be described in detail, customarily by reference to the respective excerpt from the land register. Also, the parties must agree on the quality of the real estate on transfer, that is, if it shall be free of any liens or certain encumbrances, etc. Otherwise, or if not documented properly, the purchaser bears the risk of unexpected liens, encumbrances, etc. Certain aspects like public charges are not registered with the land register and therefore must be discovered by due diligence investigation. The purchase price is almost never paid upfront but on the satisfaction of certain conditions to closure. Such conditions entail the clearance of the property from existing encumbrances before closing. A third party may have contractual or statutory pre-emptive rights (for example, for municipalities) and the seller first has to provide for the confirmation of the third party's waiver of its pre-emptive right. Consequently, the purchase agreement will provide that the consideration for the land will become due only after all agreed conditions to closure have been met and the acting notary is usually appointed to arrange for their occurrence and

verification. Since transfer of title will only be brought about after payment, no need for down payments arises.

From the viewpoint of commercial investor, a major part in the purchase agreement are the representations and warranties of the seller and their respective securitisation, in particular if the seller is a single purpose vehicle with no material assets beyond the real estate. According to German market standards, the seller, among other things, generally warrants the title transfer, absence of encumbrances and charges by third parties on the real estate if not assumed by the purchaser, absence of any defects affecting the ordinary or warranted use of the real estate, valid existence of leases, non-contamination, absence of litigation and payment of taxes when due. The seller normally has to procure cancellation of all charges on the land. On the other hand, as a rule, no warranty is implied that the property is not subject to public taxes and other non-registrable rights. Further, the seller is not burdened with implied warranties as to public zoning regulations. Since these statutory provisions are not mandatory, they may be expanded or restricted.

If the solvency of the purchaser is unclear, for example the purchasing entity is an SPE, the seller should ask for security in respect of the purchase price. This may be a bank guarantee, but usually a clause will be drawn up whereby the purchaser assigns to the seller a claim to a loan payment with which it will finance the acquisition. Also, escrow accounts may be opened with the notary public to ensure disbursement of the purchase price only against delivery of good title free of encumbrances.

Withdrawal rights form an important part, in particular, if development is to be effected by the seller. For example, if the seller will not be granted the required building permit in time, the construction completion and delivery to the purchaser is delayed, an anchor tenant cancels the tenancy agreement, or the construction shows unacceptable defects, the purchaser usually may only obtain sufficient comfort through withdrawal rights.

14 Environmental clean-up

Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

Under German public law, there are several causes of action to ensure future environmental clean-up. Generally speaking, the polluter, any former owner and the actual owner are subject to the obligation to clean up contamination and may have to clean up contaminated land and buildings. Therefore, it is fair to say that liability survives the term of the contract. There are no priority schemes which bind the competent authorities to enforce such obligation. The actual owner is entitled to recourse against the polluter under the German Federal Soil Protection Act if forced instead of the polluter but may not be able to recover. No general rule exists on the responsibility for future clean-ups in a real property transaction. Therefore, this is a matter of negotiating power, the probability of occurrence and the calculation of the purchase price. Consequently, no boilerplate covenants exist in this context, and there is specific language required to address this matter adequately under German public law. The statutory recourse under the German Federal Soil Protection Act may be excluded or limited between the parties.

Purchase agreements frequently provide for an indemnification on first request to ensure liquidity of the purchaser for the satisfaction of the obligations to clean-up.

Generally, the seller bears the risk of loss until the closing.

15 Leases

What are typical representations and covenants regarding leases?

Do they cover brokerage agreements and do they survive closing? Are estoppel certificates customarily required and can estoppel certificates substitute for representations?

The seller of real estate under a financial investment transaction will usually represent the existence and validity of certain leases, rent amounts and the like. This representation normally is made as of the execution and is brought down to the closing. No general rule exists and the contents of representations but the scope of the representation is very often similar. The solvency of tenants is rarely represented.

The representation must survive the closing due to its significance. If an even higher degree of comfort is required, rental guarantees by the seller or a third party may be employed. The duration of the rule of limitations under statutory German law is three years but may be changed by agreement between the parties.

Brokerage agreements play only a minor role in the transactions. Estoppel certificates are outside the market standard.

16 Leases and mortgages

Is a lease generally subordinate to a mortgage pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a mortgage upon foreclosure? Do lenders typically require subordination and non-disturbance agreements?

Leases are subordinate to mortgages. Subordination agreements therefore are not required.

17 Delivery of security deposits

What steps are taken to ensure delivery of security deposits to a buyer?

How common is it to get a security deposit under a lease? Do leases customarily have periodic rent resets?

Security deposits by tenants are customary in German leases. They usually amount to three monthly rentals plus ancillary costs and VAT. Normally, deposits are granted by the way of a bank guarantee. Security deposits are transferred to a purchaser by operation of law if the seller or landlord is the owner of the real estate. It is advisable to contact the guarantor and amend the documentation accordingly.

18 Due diligence

What is the typical method of a title search and is it customary to order searches? Is there something akin to title insurance and opinion letters?

Does your jurisdiction provide statutory priority for recorded instruments?

Due to the land register system, a title search is not required in Germany. Therefore, title searches do not play any significant role in Germany, nor do title insurances and opinion letters. Germany recognises instruments registered prior to a further instrument.

19 Reviews

Is it customary to arrange an engineering or an environmental review?

What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

Engineering or environmental reviews are a customary due diligence tool prior to a land acquisition in transactions exceeding a certain amount. The typical requirements are to be agreed and are standardised depending on the subject matter. It is customary that each party carries its own costs insofar.

Environmental insurances may be taken out by purchasers, for example, as part of business insurances. However, limitations apply and the premiums may be substantial.

20 Review of leases

Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

An essential legal principle of German law is the prevalence of a lease over a sale. In the event of a transfer of real estate, all commercial and residential leases are transferred to the new owner by operation of law. This increases the comfort of the (commercial) purchaser but requires a due diligence of all lease agreements. Therefore, lease agreements are reviewed by lawyers and the business side in a due diligence. While the lawyer may review the legal basics, he or she is unable to review the actual enforcement of the terms of the lease over the term. Therefore, representations are indispensable.

Standard issues to be pointed out are the allocation of ancillary costs, step-ups in rent, terms of leases, termination rights of tenants, unenforceable provisions under the leases and provisions bearing financial risks for the purchaser such as renovation obligations during the term.

Property management agreements (and further agreements of the seller) are not automatically transferred to the purchaser by operation of law under the principle of the prevalence of a lease over a sale. Therefore, they only play a minor role. However, in a share deal, of course, all agreements of the sold entity have to be reviewed.

21 Other agreements

What other agreements does a lawyer customarily review?

Other contracts will be reviewed by lawyers in the course of a due diligence on a case-by-case basis. Construction and design contracts may play a role in order to identify open potential warranty claims to be assigned to the purchaser and therefore are frequently reviewed.

22 Closing

How does a lawyer customarily prepare for a closing?

A 'closing' of a real estate transaction in German means the transfer of title, which takes place upon the entry in the land register.

Under the German legal system, main aspects of preclosing procedures will be administered by the notary public notarising the transaction. He or she will contact authorities, holders of rights of first refusal and the bank of the seller for release of securities, etc. Lawyers normally will focus on the preparations of documentation to satisfy the conditions to closure.

Lawyers prepare documents of legal relevance for the notarisation as well as the ancillary documentation and administer the satisfaction of closing conditions insofar as not administered by the notary public.

Financing**23 Form of lien**

What is the method of creating and perfecting liens?

The method of creating and perfecting liens on real estate, shares, movable property, accounts or intangible assets and rights varies from asset to asset.

Due to the relevance in the subject area, this overview focuses on the use of real estate as security. A purchaser should bear in mind the requirement of formal steps like a notarisation by a German notary public. Notarisations by foreign law notary publics are – generally speaking – invalid under German law.

In practice, the by far most frequently employed lien in real estate is the land charge. Financing banks will prefer it to a mortgage as

it is independent from the loan and the bank may use it flexibly to secure further claims against the purchaser. It comes into existence by agreement and entry in the land register. The agreement and the application for registration require notarial form.

The holder of a land charge under German law acquires only a restricted right in respect of the mortgaged real estate. It is entitled to seek satisfaction of its claim secured by the mortgage by applying for foreclosure or compulsory administration of the mortgaged land but does not become the legal owner of the land. It may not take possession of the land or appoint a receiver by itself. Foreign investors should be aware that the financing bank will normally have to force the sale and collect the – usually lower than fair market value – proceeds.

German land charge agreements often include a clause, permitting the mortgagor to so-called 'immediate execution'. Such a clause is treated as equivalent to a judgment and allows reducing the duration for the foreclosure procedure.

The lien is perfected by registration into the land register, a procedure administered by a notary public.

24 Legal requirements

What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

Foreign lenders do not have to be aware of unexpected requirements. Under certain instances a lender has to be qualified to perform under ancillary financial instruments such as hedging agreements that may not be covered by the banking licence of the respective foreign lender and may trigger termination rights under illegality clauses in standard agreements.

The creation of liens triggers register fees that are usually carried by the borrower. The same applies if liens are assigned, since the transfer of a lien requires the notarial agreement on the transfer of title and its entry in the land register. Apart from the above fees, no taxes, stamp duties or the like exist in Germany.

25 Interest

Is interest charged on a spread over LIBOR, Euribor or an equivalent? What rate of interest is unreasonably high in your jurisdiction and what are the consequences if a loan exceeds the reasonable rate?

Interest rates are customarily agreed on a spread over LIBOR or Euribor but may be based on any other equivalent or a fixed rate.

The interest rate will depend on the money market conditions, on the quality of the assets securing the financing and on the quality of the financing itself. An interest rate may be held unreasonable by a court if the rate exceeds the market standard by at least 20 per cent. The consequences range from invalidity of the agreement to appropriate reduction of the interest rate. Severability clauses are permitted under German law and normally avoid severe consequences.

Fees of the lender will not be included in the calculation of the interest rate provided the financing is not a loan to a private consumer.

Update and trends

Currently, there are no trends or hot topics expected in German real estate law. As the global financial crisis will potentially bring changes to the German financial system as well, real estate law may become effected, for example, by a change in accounting rules.

Other areas of law are currently subject to extensive revisions. The Limited Liability Company Act has been fundamentally revised.

Enactment occurred on 1 November 2008 (see question 11). Foreign investors envisaging a share deal and familiar with the past law governing the limited liability company should be aware of this.

Recently, Germany introduced more strict legislation on anti-money laundering, which leads to a higher degree of identification and documentation obligations of parties.

26 Enforcement

How are remedies enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding?

Remedies under a purchase agreement are enforced by judicial procedure in court. Choices of forum clauses are generally unavailable (see question 7).

A judgment or arbitral award may be enforced into all assets of the borrower. Also, an agreement made for 'immediate execution' may be enforced as a judgment.

One action generally is sufficient to realise all types of collateral in the subsequent enforcement procedure.

A foreclosure can be brought once the agreed triggering events occur. Normally, this will be monetary default under a loan agreement but the exact scope depends on negotiation.

However, as is the case for land charges, German collateral agreements will usually provide for means of realisation avoiding a court judgment and avoiding an official enforcement respective foreclosure process (see question 23). Therefore, the timeframe normally depends on how quickly the real estate can be sold in the market. There are certain defences available to a borrower to stop enforcement. Substantial litigation may occur even if the parties already are in enforcement procedures.

27 Protection of collateral

What actions can a lender take to protect its collateral until it has possession of the property?

A lender has very limited statutory means to protect granted collateral. The agreements made with the borrower normally provide for the protection of collateral. German financing contracts regularly provide for extensive clauses on the assignment of the real estate's rental income, on the borrower's limitations to cancel or amend lease agreements and on reporting obligations.

For immediate protection the German legal system provides for a range of preliminary reliefs and injunctions.

28 Recourse

Do the security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy filing?

A lender may obtain a monetary judgment that then may be enforced against all assets of the borrower. Therefore, lenders do have recourse to all of the assets of the borrower. However, judicial procedures may be time consuming and are not bankruptcy-proof.

Therefore, security packages are designed for the immediate access to certain assets of borrowers are required such as pledges, assignments and transfers of assets as a collateral.

Generally speaking, contractually collateral is bankruptcy-proof and entitles the lender to continue enforcement against these simulta-

neously to the insolvency with further creditors generally not having access to the collateral.

29 Cash management systems

Is it typical to require a cash management system and do lenders typically take reserves?

Cash-management systems are in Germany the exception rather than the rule and unusual in the context of real property transactions unless of substantial financial relevance. However, the German legal system does recognise respective agreements. Reserves are taken by lenders on a regular basis.

30 Credit enhancements

What other types of credit enhancements are common? What about forms of guarantee?

Typical credit enhancements are available in Germany as well. However, in the context of property transactions merely comfort letters and guarantees are market standard in Germany.

31 Covenants

What are commonly used covenants in loan documents? What is the difference depending on asset classes?

German financing agreements will provide for a variety of covenants similar to covenants under an Anglo-American financing instrument. When other asset classes are affected, different covenants apply.

Agreements also regularly provide for reporting and periodic valuation obligations of the borrower.

32 Financial covenants

What are typical financial covenants?

As explained above, financial covenants are typical for a German loan agreement and are similar or even identical to those typical for Anglo-American financing agreements. Loan-to-value ratios and debt-service coverage ratios form the core of the financial covenants.

33 Bankruptcy

Briefly describe the bankruptcy system in your jurisdiction?

Any creditor is entitled to apply for bankruptcy if based on careful investigations the debtor is insolvent or over-indebted under German law. The triggering events are overindebtedness and insolvency of the debtor.

After the application with the competent court, the court decides whether or not a bankruptcy proceeding shall be commenced. As of the date of the court's decision managing, disposal of assets or alterations or terminations of contracts is prohibited. The insolvency administrator appointed by the court will take over the position of the liquidator. Upon commencement of a bankruptcy procedure the

creditor of rental claims may not be able to collect any more until the decision of the insolvency administrator on the continuation of the underlying leases.

Creditors holding bankruptcy-proof collateral such as pledges or land charges have a right of simultaneous enforcement outside the bankruptcy procedures and preferred collection.

34 Secured assets

What are the requirements of creation and perfection of a security interest? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

Under German law a security interest is created by agreement and there are no 'perfection' requirements as under foreign legal systems. Land charges, mortgages and easements, etc require registration with the land register to be valid.

35 Single-purpose entity (SPE)

Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy filing, has the concept been upheld?

In general, lenders do not require that each borrower be an SPE but SPEs are frequently used. No particularities exist if a company is established as such. The German company law applicable on the particular form of entity will apply whether or not it is a single-purpose vehicle. Consequently, within the German jurisdiction independent directors play no role and would not be able to prevent bankruptcy.

It has to be pointed out that certain restrictions apply if a director is not an EU-member as the director requires the unlimited immigration ability.

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