

TaylorWessing

# Property Passport Germany





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# Introduction

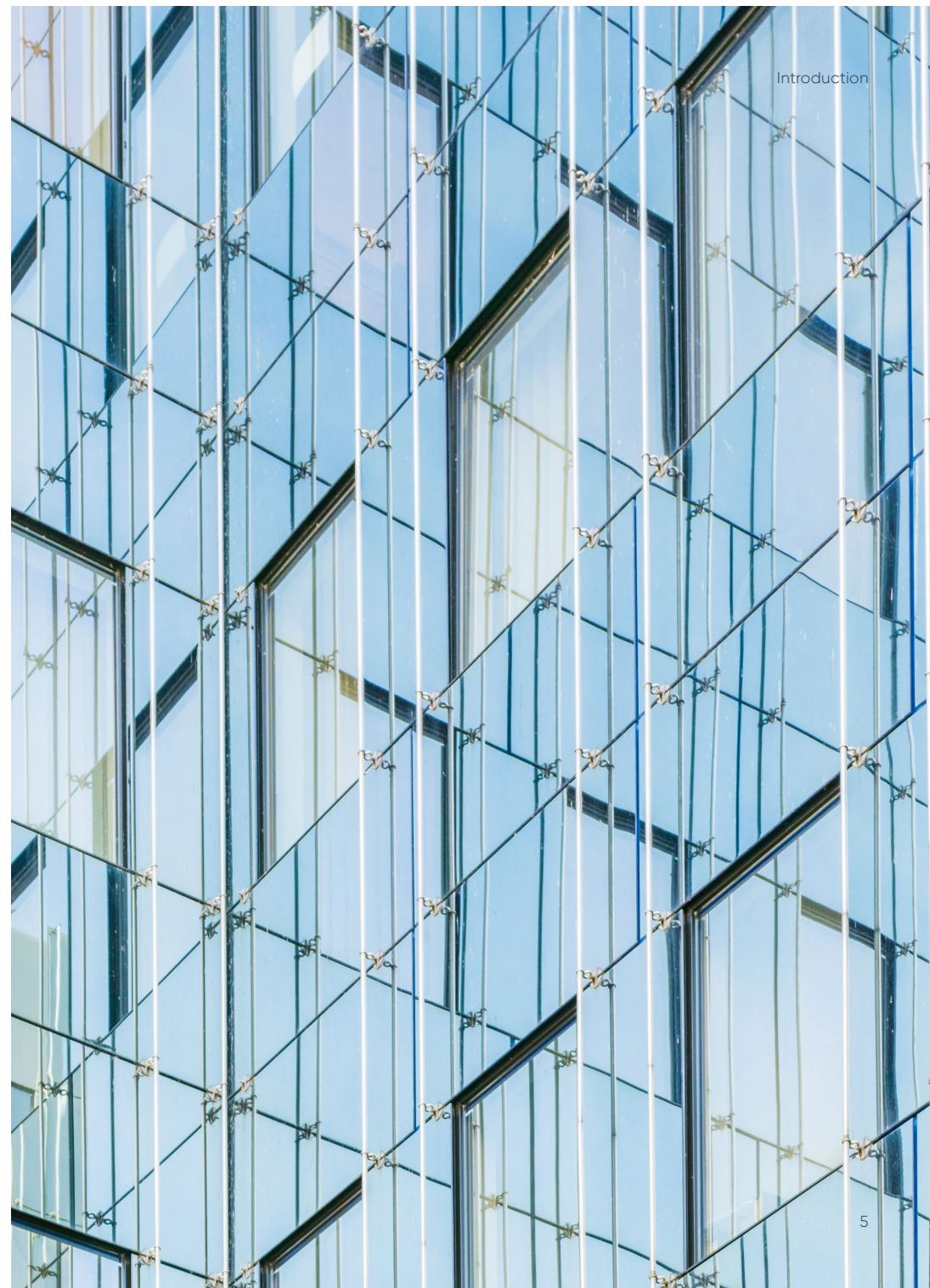
**This passport is intended to be a concise and practical guide for overseas investors and others who require advice on the following aspects.**

- Investing in German property  
– why is Germany an attractive investment location, reasons to invest, tips for a profitable investment, selecting the right asset, structuring the right deal.
- Managing property efficiently  
– understanding the rules which apply in relation to German landlord and tenant law in order to gain value from property investment.
- Structuring property investments for maximum return – considering the various corporate and tax structures that will enable investors to achieve their investment in the most economic and cost effective way.

Taylor Wessing is a leading full service law firm with a network of offices around the world. We offer a fully integrated service for high net worth individuals, families, institutional and other overseas property investors.

Our award winning real estate teams comprise real estate lawyers as well as specialists from corporate, tax, banking and finance with real estate experience, who can offer an integrated service as needed.

Together with advice on planning, construction, finance, tax and corporate structuring we provide comprehensive advice, which meets the requirements of our clients in a goal oriented manner. We would be delighted to discuss your needs with you.





## Why invest in Germany?

When it comes to investment strategy, global investors often differ in their thinking. Whilst some look for short term returns on their investment, others take a long-term view, holding and managing the asset for many years, if not decades, in order to secure their investments for future generations.

The key to unlocking the potential within Germany's real estate sector is underpinned by the strong German economy. The German market offers attractive investment opportunities across all sectors.

Germany as a leading global economy provides for safe and transparent market conditions. The German government is open and welcoming to overseas investors and the legal system is well-developed and transparent, which provides security and predictability for investors. The property market also provides for a professional environment in which long term investments are protected and enhanced.

The German property sector has an international mindset with a large number and variety of banks ready and willing to lend money for real estate investment. These banks are adept at operating across borders and are well immersed in the German property market.

Germany has retained its leading position for foreign investment, not just from the US, Asia and the Middle East but also from many European countries including France and the UK. This trend is due to the geographical attractiveness of Germany's central location within Europe and the easy access and links to the rest of Europe and the world that this facilitates.



Furthermore Germany has a large and diverse real estate market with a wide range of properties available in different locations, which can cater to different demands and budgets.

Whether you are looking to purchase, (re)fund or develop, you will be joining a growing group of international investors who consider Germany as a highly attractive place to invest.

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**A client praises Taylor Wessing's excellent overall service, high degree of partner coverage, and very pragmatic, creative and swift approach towards getting a deal through.**

Chambers and Partners 2022



## Selecting the right asset

Overseas investors vary in their investment strategy and range from those wanting to hold the asset for the long term to those working towards an early exit. In light of this, selecting the right asset is of paramount importance. Investors typically require advice on asset classes in which to invest, asset location, covenant strength of tenants and overall timing.

In Germany, international investors have typically focused on the top five cities of Berlin, Hamburg, Düsseldorf, Munich and Frankfurt and this is set to continue. In part, this is due to an influx of the creative industries and the technology sector, which has led to the strongest office uptake the cities have ever seen. A young, international and diverse employee base and a lower cost of living have also promoted the cities' attractiveness for international investors.

At Taylor Wessing we work closely with international firms of surveyors and other bespoke houses looking to work with international investors. They all contribute to selecting the right

asset. We are always focussed on delivering the deal efficiently with a strong commercial approach.

Our real estate team has decades of experience acting on property acquisitions and sales large and small for both commercial and residential properties. From trophy assets to dry investment purchases of multi-tenanted Grade A well let investment stock to the acquisition of shopping centres, from the forward purchase of complex development sites to the purchase of high end flats: we have a wealth of experience in all areas. Which means we appreciate the issues that particularly concern foreign investors.



Due to ambitious timescales a swift process is key to a successful purchase.

We guide investor clients and their advisors through the whole purchase process. Part of that comprises reporting on many different areas including:

- Title to the property (are there restrictive covenants or other compile party rights which restrict the use of the property?).
- The search package provided or a package that we agree to compile with you (ie searches of public registers for information relevant to any purchase).
- Replies to precontract enquiries.
- Reviewing and reporting on environmental and zoning/ planning matters, and the permissions, licences and consents that are required for development.
- Verifying tenancy schedules.
- Reviewing and reporting on the occupational leases (including service charge recoverability).
- Outstanding rent reviews.
- Outstanding tenant disputes or disputes with other parties such as neighbours.
- The build package.
- Real Estate Transfer Tax, VAT, capital allowances and other tax issues.
- Liaising with your surveyors on management contracts.
- Negotiating and agreeing on the form of purchase contract and ancillary documents.
- Advising on vacant possession strategies if the property is a target for development.
- Dilapidation claims if a lease is nearing the end of the term.



**Taylor Wessing has a large and a highly experienced team in the real estate law practice at all five German office locations and furthermore internationally with a wide scope. The cooperation of the team runs well and efficiently throughout the different legal areas and locations.**

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## Sustainability

**Given market expectations, increased public awareness of sustainability issues and numerous legislative initiatives on stricter sustainability obligations and disclosure requirements, the need to tangibly implement CSR and ESG is more urgent than ever.**

Sustainable real estate refers to the development, operation, and management of properties that are environmentally, socially, and economically sustainable. It includes measures such as energy efficiency, renewable energy, water management, waste prevention and recycling, and promoting social and economic inclusion. Sustainable real estate also considers the impacts on the health and well-being of users, and adaptation to climate change. Sustainable real estate can bring financial benefits by reducing energy and water consumption resulting in lower operating costs and increased property value, while also having a positive impact on the environment by reducing the environmental footprint of the building, conserving resources

and reducing pollution, and contributing to a more sustainable future for society and the environment.

In the future, sustainability criteria – concerning both European and national legislative requirements – will be crucial for the whole real estate life cycle and investment process. Therefore, sustainability criteria have to be taken into account during the (technical) due diligence in a standardised manner. Related specifications must be contractually regulated, eg through warranties.

Within the framework of the European green deal the EU taxonomy ordinance is established as a consistent classification system for sustainable economic activities.



Concerning relevant disclosure and transparency obligations numerous companies are required to compile reports, inter alia due to the Corporate Sustainability Reporting Directive (CSRD).

The taxonomy regulation defines the following six environmental objectives:

- climate change mitigation
- climate change adaptation
- sustainable use and protection of water and marine resources
- the transition to circular economy
- pollution prevention and control
- protection and restoration of biodiversity and ecosystems

In principle, the construction of new buildings, (certain) renovation measures on buildings, the acquisition as well as the letting of buildings are taxonomy-eligible. In order for these taxonomy-eligible activities to be taxonomy-compliant, they must fulfil the technical assessment criteria of at least one environmental objective and at the same time comply with the negative requirements.

Synergy effects between sustainability characteristics and building and portfolio performances are expected to increase.

In the scope of sustainable real estate transactions we offer ESG-ready products and provide legal advice to our clients to establish a functioning ESG compliance that meets the highest international standards.



**More consistently than many competitors, the firm's real estate practice is dedicated to specific sectors. This is especially notable in regulatory sectors such as energy and healthcare, but also in the technology sector. [...] This also includes providing strategic advice to clients on the future topic of ESG, for example in urban district development.**

Juve 2022/2023

## How to structure an acquisition

**There are several ways to invest in real estate in Germany: an individual can purchase a property directly, the investment can be made indirectly by using a German corporation or partnership or by using a foreign corporation or partnership.**

Indirect investments may be made via single corporations or partnerships that acquire the asset with the investor(s) holding shares or interests in that entity or by using a holding company that is a shareholder of one or more subsidiaries, each of which may own one or several properties.

Managing liability and tax efficiency are core. Investors will need to ensure that they have established appropriate German and/or foreign corporate structures, such as those described above. Such arrangements are bespoke and will require detailed discussions before an appropriate structure can be selected and implemented.

The following key issues will typically be relevant to a real estate investment. The purpose of a property owning company (PropCo) will be the holding, managing and renting of real estate assets. A typical legal form used for such types of transaction is a limited liability company established under Luxembourg laws as a Société à responsabilité limitée (S.à r.l.). Depending on the relevant double tax treaty other countries could also provide for similar tax structuring options.

### RETT

When the PropCo purchases the property by way of an asset deal, German Real Estate Transfer Tax (RETT) will be triggered. The RETT rate depends on the current tax rates



applicable in the federal state where the real estate is located and currently ranges between 3.5% and 6.5%.

According to the previous legal situation, changes of shareholders in real estate-owning partnerships amounting to at least 95% of the shares in the company's assets are recorded within a period of five years. In 2021, this provision was extended to changes of shareholders in real estate corporations (Kapitalgesellschaften). As with partnerships, the relevant shareholding ratio is now 90%. It is irrelevant whether a shareholder acquires a relevant shareholding. The current five-year time limit in the provisions of the Real Estate Transfer Tax Act was extended to 10 or even 15 years. Before, real estate transfer tax was levied if at least 95% of the shares in the assets of a real estate-owning partnership were transferred to new partners within five years. The basis of assessment for RETT remains the total value of the real estate.

The fact that the shareholding thresholds have been lowered from 95% to 90% and the holding periods have been extended from five to 10 or to 15 years is not unproblematic for tax-systematic and purely practical

reasons. These regulations lead to considerable additional work for taxpayers and the tax administration, particularly due to the complexity of the transitional regulations. In the case of corporations, it no longer matters whether the purchaser acquires a relevant shareholding. As a result, this means that even the acquisition of a small share in a corporation would trigger RETT calculated on the basis of the value of all real estate assets of the corporation. Finally, group restructuring has become more and more difficult.

Nevertheless, share deals can remain economically attractive. This is partly attributable to the steady increase in real estate transfer tax rates.

### Income tax

The German income taxation of the PropCo is as follows: If the PropCo is a foreign corporation which owns domestic real estate assets, then it will generally be subject to limited income taxation in Germany on returns from its German real estate investment according to the German Corporate Income Tax Act provided that it is resident outside Germany.

Residence is primarily determined on the basis of the location of the

registered office and the effective place of management for the PropCo. If the effective place of management and/or the registered office is located in Germany, the PropCo will be subject to income taxation in Germany on its worldwide income and capital gains.

Pursuant to the German General Tax Code (AO), the effective place of management is defined as being the centre of the commercial executive management. This is the place where the day-to-day activities are managed and where the key decisions are made. To avoid being subject to taxation in Germany on worldwide income and gains it is therefore crucial that the effective place of management is actually in the state where the PropCo is incorporated. The management of the PropCo should assemble at regular intervals to take its decisions, on financing, sale and purchase of properties and capital distributions, and an adequate (written) record of the meeting should be made. In places like the Netherlands, Luxembourg, Jersey or Guernsey a number of professional service firms help to assist in such matters, including offering professional directors for the respective PropCos.

The appointment of an independent German asset manager firm would still be possible without necessarily impacting residence status.

The PropCo (if resident outside Germany so as to be a limited taxpayer as described above) is subject to German corporate income tax with regard to their income from sources in Germany. This means that the income in connection with the real estate asset is taxable in Germany. The income (less allowable deductions for certain expenses) will be subject to German corporate income tax at the standard rate of 15% plus a solidarity surcharge of 5.5% of the corporate income tax, which results in an effective tax rate of 15.825%. An income tax return must be filed once a year.

Subject to any applicable double tax treaty being reviewed in detail, Germany is likely to be entitled to levy tax on the income of the PropCo. To avoid double taxation, the relevant double tax treaty will need to be reviewed to see if it allows for crediting the German corporate income tax against any foreign income tax which is levied on the income of the PropCo received from the real estate assets located in Germany.

### Trade tax

According to the German Trade Tax Act, a foreign resident PropCo is subject to German trade tax only if it has a permanent establishment in Germany (eg a fixed place of business). According to German tax law, a fixed place is characterised by a certain degree of permanence. The PropCo therefore must not have its own employees, office rooms or any other fixed establishments in Germany; provided this is observed, it should be possible to avoid the application of German trade tax.

The German interest deduction barrier (*Zinsschranke*) limits the deductibility of interest expense over interest income (net interest expense) to 30% of an entity's earnings before interest, taxes, depreciation and amortisation (EBITDA). Interest in this sense includes all interest payments, receipts and accruals, whether to or from a shareholder, a related party or a third party (such as the financing bank). The rationale of this rule is that the German government wants to avoid misuse of structures that seek to decrease the company's profit basis through high interest expenses. However, there is an annual threshold of net interest expense of the entity of up to €3 million, ie below this

threshold the interest deduction barrier rule does not apply. Therefore, assuming the funding of the PropCo consists of senior (bank) debt and (junior) shareholder loans, the interest deduction barrier plays no role for so long as the overall net interest expenses of the PropCo are below the threshold of €3m. Example: asset value is €20m, bank lends at 50% LTV for 4% p.a. creating annual interest expense of €400k. The remaining €10m is basically funded by shareholder loans at 9% p.a. creating annual interest expense of €900k. The overall interest expenses are €1.3m < €3m, ie interest is still fully deductible despite interest barrier rule.

### Withholding tax

German withholding tax on cash repatriation: Provided that the PropCo does not have its effective place of management in Germany (ie is not resident in Germany), there should not be a German withholding tax obligation at the level of the PropCo.



**Taylor Wessing pursues a comprehensive advisory approach in real estate law, with a clear focus on transactions.**

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## The purchasing process

A German asset deal transaction and its notarisation differs in some significant details from the model used in many parts of the world due to peculiarities of the German legal system.

### Letter of intent

Initially, vendor and purchaser will enter into a letter of intent regarding the purchase of a property (subject to due diligence). The letter of intent usually contains the purchase price, details of the property to be purchased, timetable for the due diligence and execution of purchase agreement, exclusivity and nondisclosure. Apart from the regulations on exclusivity and nondisclosure and potentially a related penalty in case of violation, the letter of intent is not binding.

A purchase agreement requires notarisation in order to become binding. If the parties do not include all commercial terms in the notarised deed, the deed would be invalid and the transaction would fail unless the registration in the land register becomes completed.

### Due diligence

Following the signing of the letter of intent the purchaser carries out a legal and a technical due diligence, which potentially includes environmental and sustainability issues. The purchaser might also arrange for a detailed commercial and financial due diligence. In particular, the legal due diligence covers a desktop analysis of the real property (land register status, title plans, previous real estate purchase agreements, construction agreements), public law (building permits and zoning, public easements, environmental matters), and lease agreements.

### Purchase agreement

During the due diligence phase either party circulates an initial draft of the purchase agreement. Ideally, this is done by the purchaser's lawyers as

they can already reflect upon their findings of the due diligence. Once initial markups of the draft purchase agreement are exchanged, the parties enter into negotiations and subsequent redrafting. Finally, the parties will notarise the purchase agreement.

Some key regulations relating to such a deed are as follows:

- **Requirements for due date of the purchase price:** Certain conditions have to be met before the notary confirms that the purchase price is due and payable. Among others, the city in which the property is located has to waive its preemption right and the notary will have to receive documentation from the vendor's bank, by which land charges securing the vendor's loan can be deleted. Usually a priority notice of conveyance, becomes registered prior to the notary's payment notice.
- **Priority notice of conveyance:** Since the vendor could theoretically sell the property more than once, the purchaser needs to be secured by a priority notice, which is registered in the land register in order to demonstrate to any third party that the property

has already been sold. Upon payment of the purchase price the notary will arrange for the transfer of ownership, which will only take place once the purchaser is registered as owner of the property. For the period between signing the purchase deed and registration of the new owner the priority notice secures the purchaser's legal position as future owner. It will be deleted once the purchaser has become the registered owner or the transaction becomes abortive.

- **Power of attorney to charge property:** As outlined above the purchaser will have to pay the purchase price before the transfer of possession of the property. Often, it can only pay the purchase price if bank financing is in place. The bank always requires a security by way of a land charge, which also becomes registered in the land register. Since the purchaser has not yet been registered as owner when it pays the purchase price, it will have to get the vendor's consent in order to arrange for the land charge. For this purpose the vendor, under the purchase agreement, authorises the purchaser's bank to register a

land charge prior to the payment of the purchase price.

- **Warranties, guarantees and obligations:** Subject to the findings of the due diligence and the parties' respective market strength the parties agree upon a catalogue of representations and warranties. If an issue is very important it might even become a payment condition.

### Transfer date

Upon full payment of the purchase price all risks and benefits arising from the property shall pass on to the purchaser, ie the purchaser will collect the rent and pay all costs relating to the property as of the transfer date. From the investor's point of view this is the crucial date.

### Transfer of ownership

Transfer of ownership takes place upon registration of the purchaser as new owner in the land register. This is rather a formal act initiated by the notary, which in general occurs some weeks after the transfer date. Upon transfer of ownership the lease agreements shall automatically pass on to the purchaser pursuant to statute. Since the transfer of possession occurs prior to this date the parties will treat the leases as if

they had already been transferred upon the payment of the purchase price.

### Post closing

Once the purchase price is paid the purchaser enters into the post-closing phase. At this stage (at the latest) the purchaser will have to arrange for new insurance to be placed as well as for a new asset management and property management (and related reporting) to be put in place. In practice, this is taken care of prior to completion as the bank's requirements will have to be met in this respect.

### Costs

As a rule of thumb you may calculate to spend 12 to 15% of the purchase price on costs. This involves the real estate transfer tax of 3.5 to 6.5% (depending on in which federal state the property is located in Germany), notary fees (for notarisation, the priority notice, creation of land charges, transfer of title, etc.), court fees (for registration of priority notice, land charges, transfer of title, etc.), brokerage commission (roughly 2 to 4%), legal and other fees (eg for technicians, environmental experts).



## Financing the asset

An investor may wish to finance the acquisition and/or development of a property by raising debt, either at the time of acquisition or by way of a refinancing, following the acquisition of a property.

We advise banks as well as investors on national and cross-border real estate financings. By working closely with our tax law colleagues we are also able to realise major portfolio transactions quickly and efficiently.

We have been advising national and international banks, investors and sponsors for many years and have a deep understanding of the differing needs of both lenders and borrowers. Besides the classic legislation on loans and the securing of loans, we also assist with structured financing (such as mezzanine financing and mortgage backed securities) and with the structuring of leasing arrangements.

### Typical lender requirements

We advise both banks and investors on the financing of commercial and non-commercial real estate

portfolios. Our documentation covers the current needs of the market and it is possible for us to finance large portfolios at short notice. We are familiar with both the German and the London market standard loan documentation. If a loan pertaining to a German asset is governed by English law, we will work hand in hand with our English colleagues.

When looking at financing the acquisition of real estate in Germany, a lender will typically expect the following criteria to be met:

- The property to be owned by a ring-fenced special purpose

vehicle (SPV) which is able to grant full security, including an enforceable mortgage over the property, in favour of the lender.

- The lender's expectation is that the SPV would not have any other creditors, other than the investors, and that investors' debt would be subordinated/postponed to the lender's debt.
- In most cases, the lender would expect to take security over the entire issued share capital of the SPV, whether the SPV is incorporated in Germany or offshore.
- A loan agreement would be entered into between the SPV and the lender, which would include a number of undertakings which the SPV must comply with in relation to how to manage the property, the rental income received from the property, and the operation of the SPV itself.
- A lender would expect to have some control over the rental income received from the property to ensure that this rental income is first applied in payment of interest under the loan. This can be done by granting security and signing rights to the lender in respect of

the bank account into which rental income is paid, or, if a managing agent collects the rent, by obtaining an appropriate duty of care undertaking from the managing agent.

- Lenders will typically require a number of other conditions to be satisfied prior to making available the loan, including the receipt by the lender of a satisfactory valuation, building survey, insurance, and report on title/certificate of title, as well as board resolutions, directors' certificates and legal opinions.

#### Security interest

The most common security taken over property is a land charge (*Grundschild*), which is similar to a mortgage. The underlying deed requires notarisation and only comes into force upon registration in the land register. The implementation is done by the notary. Generally, the purchase price is only due when the cancellation of existing encumbrances on the register (eg the land charge in favour of the seller's financing bank) is secured by the notary. The notary ensures that the seller does not receive the purchase price before all these debts have been paid.



**They work to tight deadlines in an efficient and professional way, according to another client.**

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### Co-investments

Many investors will look to share risk on major investment and/or development projects and as such, joint ventures and other corporate structures are common in Germany. Advice may be required on co-investments like joint ventures and mezzanine loans as well as on shareholder agreements including non-voting rights structures.

In some circumstances, mezzanine lenders may seek to require their debt to be serviced at the same time as senior debt, or, for example, agree that mezzanine payments are postponed and made upon the sale or refinancing of the asset. The latter approach is akin to a joint venture model.

A mezzanine lender will typically expect to take second ranking security over the property, and will require that an intercreditor deed or priority deed is agreed with the senior lender in order to document any enforcement rights the mezzanine lender may have.

Alternatively, additional equity or finance could be sought with a joint venture partner, and this could be brought into the acquisition structure at a level which sits above the level into which debt is introduced. This

would be achieved with the input of our corporate tax teams to ensure that the proposed structure is tax efficient and the intention of the parties is adequately documented through a joint venture agreement or otherwise.

### Development finance

Under a facility which also provides for funding to finance the development of a property, the basic requirements of a lender are the same as for an acquisition facility, but a lender would also expect the following:

- An independent project monitor appointed by the lender to verify that the development will be completed on time and on budget, and to sign off on invoices to be paid by drawdown of tranches of the loan.
- Approval by the lender of the professional team appointed to complete the development and collateral warranties to be provided to the lender from that professional team.
- Review and approval of any planning consents and pre-let agreements put in place and sign off on any rights of light issues that may arise pursuant to the

development.

- If relevant, provision by the lender of an interest roll up facility to service interest on the loan during the development phase.
- The lender would also expect the borrower to sign up to a number of other development specific covenants and undertakings.



**Comprehensive economic understanding with regard to the impact of the negotiation results; nevertheless pragmatic approach and comprehensive knowledge of the realistic feasibility.**

Legal 500 2023

## Managing the asset

**Real estate assets have a natural life cycle and the assets need to be nurtured throughout that cycle to maximise the return for investors. There are a number of aspects which are important to managing any building.**

### Attracting the right tenants

For most landlords, the key will be to ensure the covenant strength of the proposed tenants. If the covenant strength is not sufficient, questions will arise regarding how it can be boosted potentially by rent deposits, parent company or bank guarantees (usually three to six monthly rents). In return, the market will dictate what package the landlord will need to give to tenants, ie by way of rent free period or other incentives.

By way of background: If the owner of a property falls short of cash and the rental income is not sufficient to serve the loan, eg because tenants fall away or reduce the rent, the financing bank could initiate enforcement measures based on the land charges registered in their favour. Subsequently, the property might be

sold by way of public auction or the bank could ask the court to install an official receiver. However, in practice this rarely happens in Germany as the banks are hesitant to assume the risk of managing the property and make such a worst case scenario public. Hence, the banks will frequently look to write off their engagement to a certain extent, keep the borrower and ask the borrower to try the turnaround.

### Allocating liability

In Germany it is quite common in commercial leases that the maintenance and repair obligations of the roof and structural part (*Dach und Fach*) of any property is the responsibility of the landlord, whilst the rest of the property's



maintenance and repair would be the responsibility of the tenant. This split of obligations is called a 'double net lease'. It may be regulated in the lease that the landlord may carry out the works beyond roof and structure but then charge this back to the tenant. In addition, the reimbursement regarding maintenance and repair as well as decoration repairs is capped in connection with common spaces.

Moreover, the landlord might not be able to shift all ancillary costs to the tenants. In general, any tenant will have to pay to the landlord on top of the principal rent ancillary costs.

The tenant will have to pay a monthly ancillary costs prepayment which will be reconciled after the end of the year. During the course of due diligence, the investor will have to carefully assess the amount of ancillary costs, which cannot be shifted to the tenants. Moreover, residential tenants are widely protected by mandatory statutory law under which the recoverable ancillary costs are further limited.

As part of its Climate Action Programme 2030, the German federal government has introduced a fixed price for carbon dioxide emissions in the transport and real

estate sectors as from January 2021. The price per metric ton of carbon dioxide emitted as heating or fuel emissions (CO<sub>2</sub> and CO<sub>2</sub> levy) was set at an initial price of EUR 25.00 per metric ton of carbon dioxide and will gradually increase. Without an agreement with the tenant, this levy cannot be passed on to the tenant as part of the ancillary costs.

### Flexibility

In the current economic environment, flexibility has become increasingly important to tenants but also to landlords. Leases have become shorter and may include break options as tenants tend to require more flexibility on exit. Investors should always check how marketable premises are and how they can be used going forward, if a specific tenant relocates.

Lease terms between five and 10 years are common in Germany. Shorter or longer terms are less common. Therefore, if a business takes on a lease with a longer term, it may be able to negotiate incentives such as rent free periods or fit out/ refurbishment allowances.

In Germany, tenants are often granted unilateral options to extend the lease upon expiry. Whether or not

such options are granted by landlords will be subject to the commercial negotiations. However, there is always a mandatory statutory termination immediately following a 30 year lease term.

### Collecting rents

If a commercial tenant continuously fails to pay rent the landlord has the following options:

- The tenant is usually asked to provide a bank guarantee as a rental security, which typically covers the amount of three to six months gross rent.
- If a tenant does not then pay the rent the landlord may draw on the bank guarantee and ask the tenant to 'top up' the bank guarantee to its previous/original amount again.
- If the rent in arrears exceeds the equivalent of two monthly rental instalments, the landlord may terminate the lease with immediate effect and sue for possession. Moreover, it can ask for damages in the amount of rent that would have been payable until the end of the regular lease period. The landlord is, however, obliged to let out the premises anew without undue delay. If the



**The team is professional, meticulous and reliable. In addition, the tasks are completed in a brief period of time. The work results are impeccable at all times.**

Legal 500 2023

landlord does not find a tenant who pays the same rent as the existing tenant, he may ask for the difference in rent for the remaining lease period.

- The landlord may only initiate enforcement measures if it obtains a binding judgment, which can sometimes take years. Alternatively, if the landlord succeeds in showing that the tenant is about to relocate, it might seek an interlocutory injunction freezing the tenant's accounts. However, this is only granted in rare cases.
- Under German statutory law the tenants' fixtures and fittings are pledged to the landlord thus serving as another security; parties may deviate from this rule. Care must be taken though as such assets do not necessarily belong to the tenant and also might not be valuable, for example in the case of lettings for the purpose of office use.

### Managing rent reviews

Typically, commercial leases in Germany include an indexation clause which increases or decreases the rent according to the development of the German

consumer price index (CPI).

Indexation requires a term of at least ten years binding the landlord. The indexation can amount to the full CPI-change or a share of it (eg 80%), it may comprise a threshold percentage change amount after which indexation takes place and it may include an indexation free period.

In the retail sector a turnover rent is frequently found, in particular in shopping centres and factory outlet centres. Such clauses usually include a provision of evidence of the turnover (eg auditor's statement), which gives the landlord an insight into the business of the tenant.

### Management Agreements

We work closely with surveyors in managing property assets throughout the cycle of the letting. We advise on asset, property and facility management agreements and make sure that the respective agreements comply with the financing bank's requirements (duty of care).

### Green Lease

A green lease is a type of lease agreement that includes provisions for energy efficiency and sustainable practices in the operation and



**Comprehensive knowledge of commercial real estate law.  
A highly competent team with excellent service orientation.**

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maintenance of a building or property. These leases can include provisions that hold both parties responsible for implementing and maintaining sustainable practices during the term of the lease.

In drafting green leases, it is essential to clearly define the responsibilities of both parties and to ensure that any energy efficiency or sustainability goals are measurable and achievable. Additionally, it is important to include provisions for regular monitoring and reporting of energy consumption and sustainability efforts to ensure compliance with the terms of the lease.

From a legal perspective, green leases can also be an effective tool for landlords and tenants to mitigate their environmental impact and to comply with regulations and legislation related to energy efficiency and sustainability.

We have many years of experience in drafting Green Leases and take any changes in legal regulations into account every step of the way.



**An international and interdisciplinary team with excellent negotiation skills.**

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## Refurbishing the asset

Whether you are looking to purchase a high-end residential property or invest in a commercial property, the purchase of prime property may often result in extensive development, renovation or refurbishment.

It is important to have a lawyer with expertise in the construction markets. We have a sizeable and experienced construction team ready to advise on all issues.

### Contractual structure and insurance

There are various standard contracts which are frequently used for construction projects in Germany. However, under German law such standard forms are qualified as general terms of business (*Allgemeine Geschäftsbedingungen*) and are subject to various restrictions especially with regard to limitation of liabilities. Therefore, when standard contracts are used it is very important that the parties individually negotiate and agree on variations within the relevant provisions so as to sidestep the restrictions.

The following issues should be taken into account on a development/refurbishment:

**Bonds** – in German construction contracts, the contractor is required to provide a performance guarantee or performance bond from a German bank or insurance as security for the fulfilment of its obligations in general amounting up to 10% of the remuneration. In exchange of the performance guarantee, the contractor usually has to provide for a warranty bond in an amount of 5% of the contract price to be issued upon acceptance of the plant or building for the duration of the warranty period.

**Defects** – with regard to defects in material and/or workmanship, German statutory law provides for different remedies. As a first step the



employer is entitled to rectification of any defect by the contractor by repair or replacement. As a second stage, the employer is entitled to choose either to (i) claim damages, (ii) rectify a defect itself or through third parties and claim any cost incurred from the contractor, (iii) rescind the contract or (iv) reduce the contract price accordingly. The statutory warranty period for buildings and industrial plants is five years upon acceptance. Most construction contracts provide for limitations of these rather wide statutory remedies.

**Insurance** – it is common in German construction projects for either the employer or the contractor to provide Construction All Risk Insurance covering any damage to, or loss of the plant or building, or any component or materials. Usually, the employer is co-insured under such policy and a waiver of subrogation rights is issued.

German construction contracts usually require the contractor to further provide (i) a Commercial General Liability Insurance covering public liability, property damage and financial losses of third parties; and (ii) (where the contractor is also responsible for the design elements) a professional liability insurance covering defects in design.

### Permissions and approvals

Generally, each construction project in Germany requires a building permit under the German Federal Building Code or a permit under the Federal Immission Control Act.

Clients need advice with regards to all issues arising in the context of regional planning, zoning and building law. We advise on the status of plots under the aspect of planning law and represent our clients in building permission proceedings and within the framework of municipal zoning.

### Managing disputes

Additional provisions in contracts on alternative dispute resolution methods such as mediation have increased extensively over the past few years. We usually recommend appointing an independent expert to advise in the case of purely technical or commercial issues. It is in both parties' interests for these to be resolved sooner rather than later so that the progress of the works is not affected or delayed, eg disputes on the entitlement of the contractor to request change orders or variation requests.

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**One client notes that, when dealing with the firm, "fast and accurate responses are given," and that "service levels provided by the team members are very high."**

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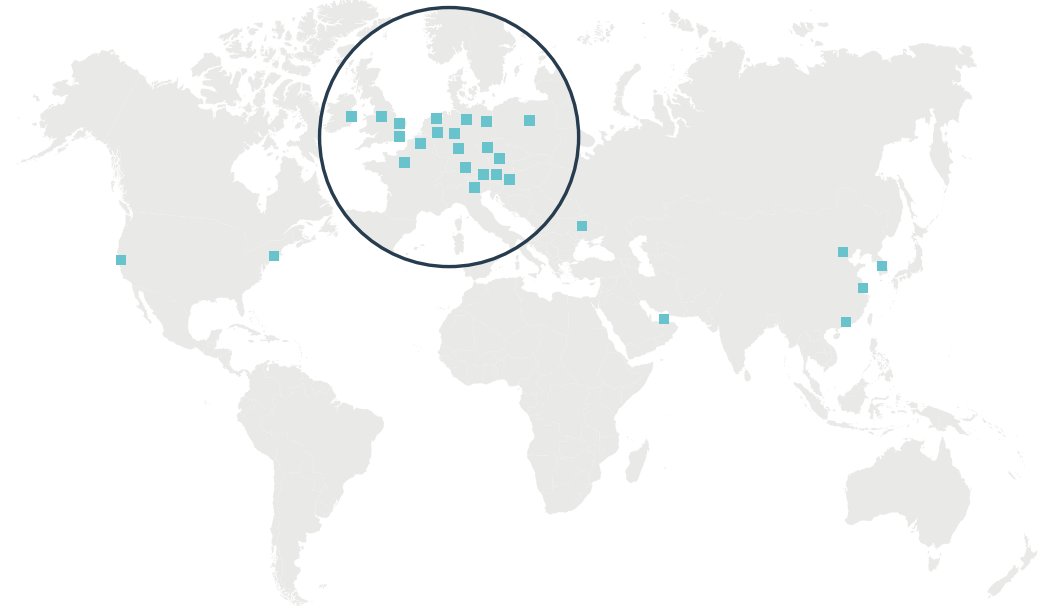


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## | Key contacts

We would be delighted to discuss your legal needs in confidence with you. Please contact us for further information.



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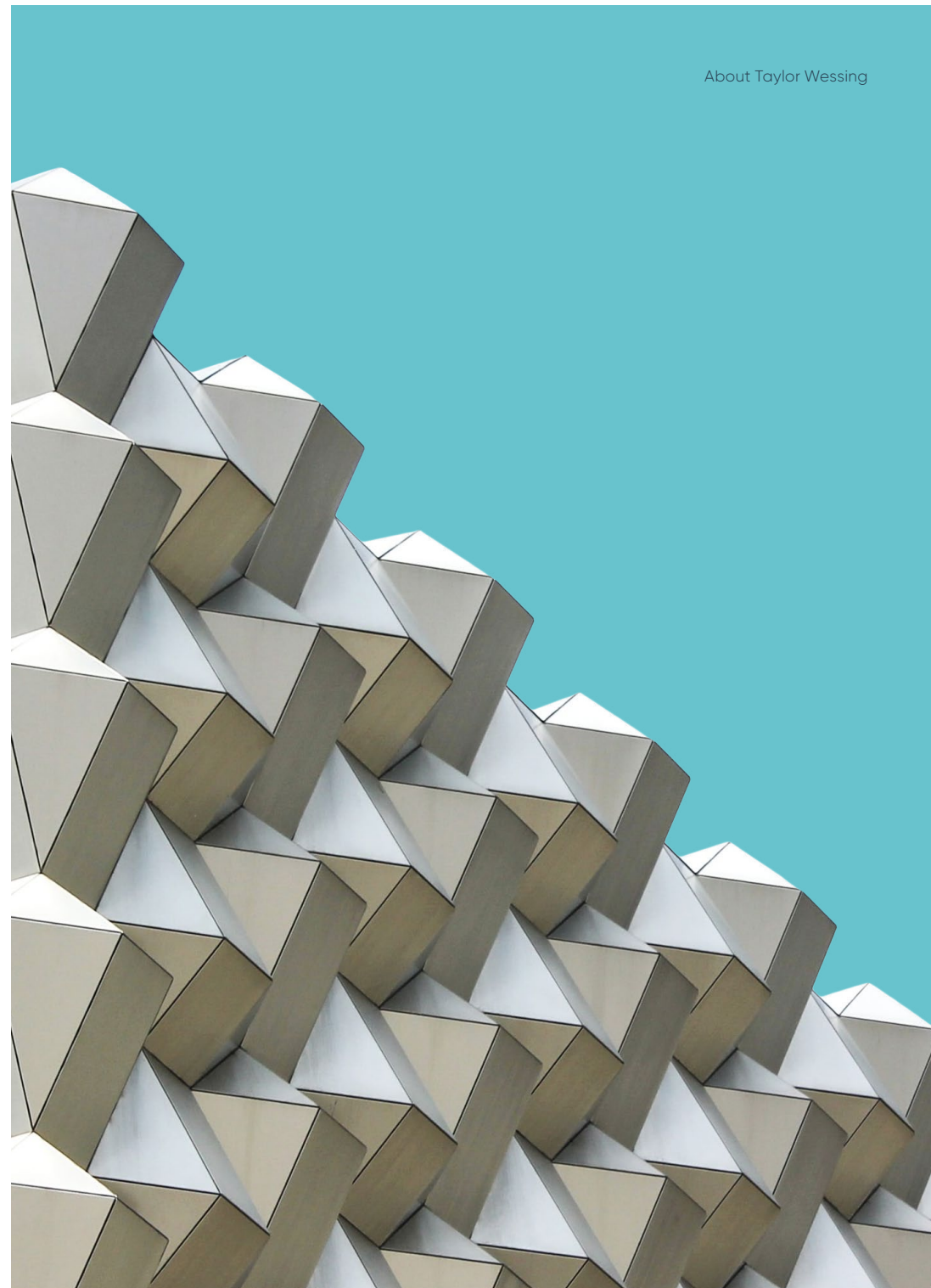


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