

# From Berlin to Rome via Vienna – a real estate shopping tour through Central Europe

**Dr Peter Kunz**

Kunz Schima Wallentin,  
Vienna

peter.kunz@ksw.at

**Dr Thomas  
Seeber**

Kunz Schima Wallentin,  
Vienna

thomas.seeber@ksw.at

**L**egislation that enables low transaction costs and a high level of legal certainty are competitive if transactions can be processed quickly and safely. This article assesses the legislation of Germany, Austria and Italy according to: how quickly and easily transactions can be processed; and the level of legal certainty that can be achieved.

Three countries, one and the same hypothetical transaction: a condominium that is encumbered with a mortgage (for bank A) is to be bought as follows:

- The purchase price will be financed by a bank (Bank B), whose claim is to be secured by means of a mortgage.
- The still-outstanding credit amount of bank A shall be covered using the purchase price.
- For the sample case we assume there is no risk involved in the transaction, there are no easements, and it is supposed to be processed *lege artis*.
- To summarise, the buyer shall become the owner of the property, the mortgage of bank A shall be cancelled or conveyed to bank B and the mortgage of bank B is supposed to be a 'first mortgage'.

## Some theoretical ground work

In both Austria and Germany there exists a land register system that is based on the requirement of a title as well as a special procedure (entry in the land register) in order to acquire property. As a consequence one can rely on the accuracy and completeness of the land register, which in Austria can be accessed throughout the day via a centralised online database covering the entire country. Only some 'obvious' (clearly recognisable) property rights can exist without recording in the land register. One such example would be a neighbour's thoroughfare for which there is no entry in the land register, but which has existed for a long time and is, by nature, clearly recognisable as such.

In Italy, property registers are 'arranged according to people' (the so-called personal

property system). Contrary to the Austrian or German land register, one cannot rely on the completeness of Italy's real estate registers. According to the principle of mutual consent, the property is basically passed on to the buyer upon the signing of the sales contract. However, the seller cannot assign any more rights than he (still) possesses. In case of a double sale, this is a problem.

Therefore in Italy, legal certainty is achieved by means of an investigation – which, most often carried out by a notary, is similar to a due diligence. The notary's investigation has to cover the past 20 years and he has to guarantee a seller's uninterrupted chain of titles and provide information regarding the encumbrances of a property. Only in this way can it be assumed that the current seller is the rightful owner (at least due to acquisitive prescription) of the property to be sold and which mortgages and encumbrances might have to be taken over by the buyer. If such an investigation is carried out by the notary, he is *ex lege* liable for the accuracy of his information.

## Practical application

In Germany and Austria, the real estate transaction described (in simplified terms) is carried out as follows: the escrow agent (lawyer or notary) verifies if the loan of bank A can be paid back using the purchase money and sees that a cancellation deed is made and handed over to him. As regards our sample case, bank A will issue the escrow agent a cancellation deed for its mortgage, which can be used by the escrow agent provided that the outstanding loan money will be paid back.

Moreover, a priority notice of conveyance (in Austria, 'Veräußerungsrangordnung'; in Germany, 'Auflassungsvormerkung') is added to the land register: based on the rank order in the priority notice of conveyance together with the cancellation deed, the escrow agent can guarantee

the buyer – in our sample case – that also in case of a double or multiple sale an unencumbered property is purchased. The cancellation/transfer of the mortgage of bank A and the recording of the mortgage for bank B is usually conducted by the escrow agent, who is also responsible for preparing the contract. Therefore the escrow agent can guarantee that: the seller does not lose his property before the payment of the purchase price is ensured; the purchase money does not reach the seller before the property right has been recorded as agreed in advance; and a 'first mortgage' of bank B is recorded. These terms are included in the escrow arrangement. There is no need for further collateral such as a title insurance.

In Germany, the notary fee is stipulated by law. The fee of an Austrian lawyer – as the one responsible for preparing the contract – can be agreed upon freely.

### Conclusion

In Germany and Austria, transactions can be processed quickly and easily. The degree of legal security is very high. Freedom from encumbrance as well as the ownership situation are evident from the land register. Search results in the land register are binding and can be relied on by the public.

As concerns the further 'usability' of the already recorded mortgage, the legal situation in Germany differs from that in Austria. In Germany, if the loan has been secured by a land charge ('Grundschuld'), the land charge can also be used to collateralise the purchase finance (which saves costs). In Austria, further use of the

mortgage is basically also possible. It can, however, be difficult to put that into practice due to the accessoriness of the mortgage.

In Italy, a binding pre-contract (including contractual penalties) is usually concluded in advance and the investigation described above is carried out by the notary. This examination compares to a title insurance, as the notary guarantees the effectiveness of the notarial deed.

To summarise, the role of the Italian notary compares to that of a closing company/title company, and his compulsory liability insurance is similar to a title insurance. Basically the buyer becomes the owner of the property as soon as he has signed the contract; there is, however, the (theoretical) insecurity that a further mortgage of the seller or a new owner is recorded before the contract is entered in the property register. For this reason, since 2014 an escrow system has been established that protects the buyer in the way that the notary – similar to the one preparing the contract in Germany and Austria – makes sure that the money is not passed on before it can be ensured that the sale has taken legal effect (also with regard to third parties) and the desired rank order of mortgages can be established. So far, however, this escrow system has not been used very often.

In Italy, transactions can also be processed quickly, because the pre-contract is already binding. The actual situation regarding ownership and encumbrances can, however, not be seen from the property register, but has to be investigated by the notary. Due to its well-working notary system, transactions in Italy can also be considered secure.