

Leasehold: what is new in Austria and neighbouring jurisdictions

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In Austria, the owner of land is in principle also the owner of the building on the respective land (*superficies solo cedit*). In the case in which a building is constructed on land owned by third parties, and notwithstanding any other agreements, the owner of the land in question becomes *de jure* the owner of the building as well. Having said this, there are two major exceptions that make it possible in Austria for legal ownership of land and the building thereupon to be in different hands. One exception is what is called building on third party land (*Superaedifikat*) and the other is named construction right (*Baurecht/leasehold*) pursuant to Building Law Act 1912, which both make a separation of ownership of building and land possible. The *Baurecht* structure in particular is becoming more and more popular.

Building on third party land (*Superaedifikat*) and construction right (*Baurecht*)

The *Superaedifikat* and *Baurecht* have substantial differences, which are crucial for deciding which of those two legal instruments should be used. However, as mentioned above, the similarity is that the landowner does not sell the land, but provides it for compensation to an investor for a certain amount of time (long-term), who constructs a building on the land.

- The *Baurecht* arises from the entry into the land register. The *Baurecht* is a so-called right in rem over immovable property (*dingliches Recht*), which – no matter who is the respective landowner – remains valid and can be mortgaged independently and completely transparently.
- In contrast to this, a *Superaedifikat* arises only with the construction of the building. Although the legal position of the *Superaedifikat* owner can be improved by deposition of documents into the land register, an equally strong and direct position emerging from the land register and the easy mortgaging possibilities that a *Baurecht* owner has will not be achieved.

- Furthermore, the Building Law Act rules that the building is transferred to the landowner after expiration of the designated time (between a minimum of ten and a maximum of 100 years) and the landowner must pay compensation to the building owner in the amount of 25 per cent of the existing building value. This regulation is not mandatory, so various options are possible.
- Regarding the *Superaedifikat*, no statutory parameters exist that impose the transfer to the landowner after the expiration of the designated time. Nevertheless, after the expiration of the designated time of the *Superaedifikat*, the landowner also becomes the owner of the building.

What are the positive and/or negative aspects of the *Baurecht* from the landowner's point of view?

The owner of the land could be interested in providing the property for use for a certain period of time, but not cede ownership for a number of reasons. The following motives are conceivable:

- The landowner is not permitted to sell the land due to a provision binding the owner to the land, for example, a company statute, a foundation provision or a testamentary provision.
- The landowner would be permitted to sell the land but chooses not to as a matter of principle. Often, churches or the nobility choose not to sell their land for this reason.
- The landowner does not want to trade the investment in the land with alternative assets (eg, stock) and primarily would like to generate an increase in the value of their land.
- Furthermore, the landowner could speculate to obtain the building constructed after the expiry of the contract for an advantageous price or even for free.
- As always, fiscal considerations could be decisive.

The main disadvantages for the landowner are:

- First and foremost, the landowner generally cannot simply get rid of the *Baurecht* for no reason and therefore he/she is not free to use the property as he/she would like to (eg, to construct a building or use it for other purposes).
- Besides, it is evident that the landowner would not obtain the same amount by implementing a *Baurecht* as he or she would by simply selling the land. Having said that, depending on the compensation the building right's owner would have to pay and the time period of the *Baurecht* agreed upon, it is possible that the landowner ultimately earns more from the *Baurecht* (than he or she would get from the sale of the land).
- Finally, a landowner would always have to take into consideration the substantial amount of time for which a *Baurecht* is usually implemented (as mentioned before: a minimum of ten years and a maximum of 100 years). Even though the minimum duration is less than in other European countries (eg, in Switzerland, the *Baurecht* has to be implemented for at least 30 years) it is nearly impossible to assess the market situation for such an amount of time (up to 100 years) in advance. Moreover, there is always the risk (which cannot be mitigated by, for example, contractual provisions in any case) that the building right's owner becomes insolvent. This could lead to a situation in which the landowner is confronted with a developed property, but the building cannot be sold or used (eg, because of a lack of investment by the building right's owner). In this case, the landowner would have to bear the costs to tear down the building with no compensation.

What are the positive and/or negative aspects about the *Baurecht* from the point of view of the investor/the (soon to be) owner of the construction rights?

For the relevant investors (the ones who wish to obtain the construction rights), the following aspects regarding the question of why they should/could invest are conceivable:

- On the one hand, there are some landowners who would not be willing and/or not be permitted to sell the property.
- In addition – and this is widely conceived as the major advantage of the *Baurecht* – the initial costs for being able to build are

normally much lower than the costs that would arise if one had to buy the respective land. Nevertheless, it should be noted that depending on the actual compensation the investor would have to pay to the owner of the land regarding the total duration of the *Baurecht*, the usage of this legal instrument can also be more expensive than the acquisition of the land.

- In the industrial sector, ownership of land normally is not essential for the mere management of a building (eg, construction of a factory).
- In comparison to a *Superaedifikat*, a *Baurecht*-project (when the other parameters are fine) can normally be financed by banks. This mainly depends on the legal arrangements of the contractual agreements and the statutory provisions behind them.

The main downside for the investor is obviously that generally after the termination of the *Baurecht*, the investor loses his or her ownership of the building (in exchange for relatively little compensation). In this regard, it has to be noted that this disadvantage must be looked at: (1) considering the usually long term of a *Baurecht*; and (2) keeping in mind that the investor and respective owner of the land can agree upon, for example, fixed compensation for the building higher than the one stipulated by law.

Current developments

It seems that in Austria, especially in its capital Vienna, the *Baurecht* is becoming more and more popular. Some politicians want the City of Vienna to follow the example of the Catholic church and to stop selling larger pieces of land, but instead give out *Baurechte*, as this would mean that the city does not lose its proprietorship. In Vienna, there are some examples of larger projects that were handled using the *Baurecht* instead of selling (eg, the Otto-Wagner-Areal).

Although, seemingly, the tendency is heading in the direction of giving out more *Baurechte*, apparently the city is yet to follow this mindset. To make the *Baurecht* even more attractive, the lawyers', landowners' and legislators' contribution is needed. To reach this goal, the rights of a building owner must be (even more) like that of a 'normal landowner'. Furthermore, it seems to be necessary to motivate the building right's owner to invest in the building; this goal can be reached if the building right's owner:

(1) has the obligation to invest; and/or (2) can benefit from the value of the building when the *Baurecht* ends (ie, get higher compensation).

The situation in Germany and Italy

Germany

Even though the German equivalent to the *Baurecht*, the so-called *Erbbaurecht*, has a lot in common with the one described above, there are some important differences.

In contrast to Austria, where the *Baurecht* can only be established for a maximum of 100 years, in Germany there is no limitation of time periods; therefore, the possibility of an ‘eternal hereditary building right’ exists.

Apart from that, whereas in Austria a successful contestation of the contract (with which the *Baurecht* was implemented) generally leads to the forfeiture of the *Baurecht* (ie, the separation of ownership of the building and the land ends), in Germany

this is not the case. Having said that, in both jurisdictions, the building right’s owner loses his/her *Baurecht/Erbbaurecht*.

Italy

Some kind of *Baurecht* also exists in Italy – *il diritto di superficie* – which is regulated by the Italian Civil Code.

In Italy, similar to the German *Erbbaurecht* and contrary to the Austrian *Baurecht*, there is no limitation of time periods for the *Baurecht*.

Furthermore, in Italy (with the exception of the northern parts of the country, which were once Austrian territory) land ownership can be transferred simply by making an agreement (principle of consensus or *principio consensualistico*), whereas in Germany and in Austria the transfer of land only becomes effective with the registration of the transfer in the land register. This also applies to the acquisition of a *Baurecht*.

What if the land term expires in China?

CHINA

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Recently, homeowners in Wenzhou City, Zhejiang Province were requested by the local land and real estate authority to pay a land premium equal to one-third of the price of their respective homes to renew the term of the land-use right. Homeowners in China are now forced to realise the brutal reality that they may be obliged to pay additional land premiums after the expiration of current land use, which is 70 years in general but in extreme cases less than 70 years. This has aroused widespread concerns and debate in public.

China has promulgated a series of laws and regulations to regulate and administrate the renewal of the granted land-use right for residential housing, including the Property Law of the People’s Republic of China (the ‘Property Law’),¹ the Urban Property Administration Law of the People’s Republic of China (the ‘Urban Property Administration Law’),² and the Interim Regulations of the People’s Republic of China Concerning the

Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas (the ‘Interim Regulations’),³ which provide:

- The term of land granted for residential land is 70 years, the term of land granted for industrial use is 50 years, and the term of land granted for comprehensive and other purposes is 50 years.⁴ Upon the expiration of the term of use, the land user has the right to apply for its renewal, but the land user is required to enter into a new land grant contract, pay the land-use right grant premium and undertake registration.⁵
- Article 22 of the Urban Property Administration Law states that ‘[w]here the term for the use of land specified in the land grant contract expires, and the land user needs to continue the use of the land, the land user shall apply for an extension of the term no later than one year ahead of the expiration. Such an application shall be approved excepted for the land reclaimed