



Hogan
Lovells

Project development

EDITION

2015

Contents

Project development at Hogan Lovells	1
Conception/planning/certification	3
Public law	3
Green building/certification systems	3
Planning and project steering and management contracts	4
Financing/structuring	5
Tax law	5
Real estate financing	6
Joint venture agreements	6
Acquisition/construction/leasing and sale	7
Acquisition and sale of property during or after completion	7
Building contracts	7
Leasing contracts	7
Marketing/property and asset management portfolio	9
Marketing and brand security	9
Brokerage contract	9
Property and asset management contracts	10
Your key contacts in Germany	11
Our offices in Germany	13

Project development at Hogan Lovells

Approximately 30-40% of the sales area in Germany (approx. 122 sqm) have to be revitalised in the near future according to a report done by IVG Research in June 2011. Rehabilitation costs are estimated at 9.5 to 12 billion Euro (source: the trade newspaper of the German real estate industry "Immobilienzeitung" of 16 June 2011). The situation is similar in other asset classes.

Real estate project development is a complex and multidisciplinary process which consists of a number of phases and aspects – from the conception and analysis to the purchase of real estate, financing, construction, marketing and leasing and sale. Comprehensive and high quality advice in all relevant legal and tax issues is indispensable, especially if the project is intended to attract the interest of investors on the international transaction market.

Our expertise covers:

- All types of project development:
 - industrial locations
 - infrastructure and urban development projects
 - special purpose facilities, such as hotels, clinics, nursing homes, multiplex cinemas, shopping centres, sport arenas
 - residential properties
 - BIDs (Business Improvement Districts)
- The entire value-added chain of project development
 - acquisition of real estate
 - obtaining the building rights including area development planning
 - regulatory issues
 - public procurement law issues
 - environmental issues
 - tax structuring
 - financing

- leasing
- planning and construction phases
- sale and lease-back
- certification
- project sale
- assisting in disputes and warranty processes
- Drafting and negotiating contracts:
 - joint venture agreements
 - profit share agreements
 - project development, steering and management contracts
 - urban development contracts
 - contracts with architects and engineers
 - general contractor and subcontractor agreements
 - leasing agreements
 - purchase agreements (asset and share deal)
 - marketing agreements
 - financial structuring and finance agreements
 - contracts pertaining to certification

Our good market coverage and our presence at four locations in Germany combined with a detailed knowledge of the regional real estate markets and our international expertise make us unique in Germany.

Satisfied customers

Our clients include project developers, real estate companies, public sector institutions and institutional and private investors at home and abroad, capital investment companies, fund initiators, banks, insurance companies and real estate consultants.

For years Hogan Lovells has been advising public and private bodies in all phases of project development. We represent the interests of the parties in various building and development projects and transactions. Should a dispute arise, we will also represent you in litigation and (national and international) out-of-court dispute resolution.

We understand your business

Our clients value the legal expertise of our lawyers and also the fact that we understand their business and their special needs. We know the project development and real estate lifecycle and are thus in a position to give advice which is in line with the business objectives of our clients and which gives them, apart from best possible legal certainty, efficient and pragmatic solutions. Good interdisciplinary cooperation with businessmen and technicians involved in the project is for us a matter of course.

One stop advice

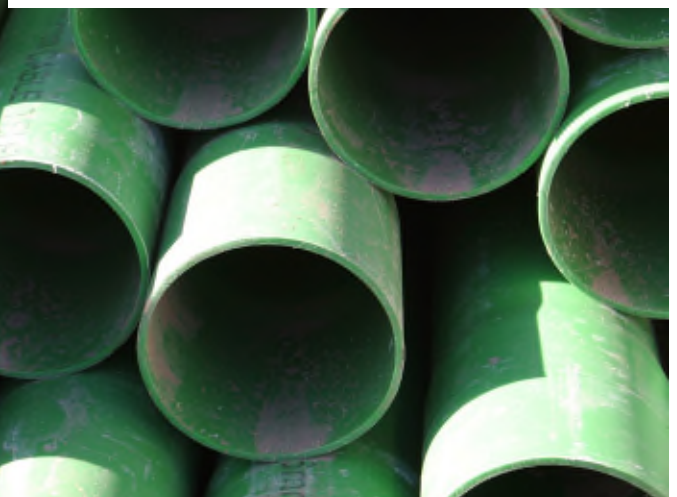
We can provide you with the comprehensive legal advice needed because we cooperate closely with all practice groups in our law firm and – in the case of international projects – with our offices worldwide. Our project development teams not only have experts in commercial real estate law but also colleagues in other fields such as:

- public building and planning law
- infrastructure and project financing
- public procurement law
- banking and finance law
- tax law
- corporate law
- capital markets law
- litigation and arbitration
- compliance



Respectable real estate practice, which is also involved in private construction; mainly project development (...).

JUVE Handbook 2015



Conception/planning/certification

Public law

Our real estate lawyers advise project developers and investors and the public sector on all questions of public building and public procurement law, on environmental law and in regulatory questions on the development, construction and operation of industrial and commercial projects, infrastructure (e.g. railway lines, airports, federal highways and minor roads, long-distance lines) as well as on land-use planning in regional planning and planning approval procedures, and all types of licensing procedures.

The focus is often on construction planning law: What construction development is allowed under current construction law? What town planning agreements should be concluded? Is it mandatory that these agreements be put out to tender? Can local authorities forestall plans with a development freeze? What development measures are necessary? Apart from that, there are regularly other issues in connection with building regulations, in particular with regard to parking lots and clearance areas. And environmental aspects can also have a considerable influence on the success of a project. Here it is particularly important that the activities of project developers and environmental authorities and experts are well coordinated.

Green building/certification systems

Hogan Lovells has a high degree of expertise with regard to certification systems and is actively engaged in the legal committee of the German Sustainable Building Council (DGNB).

Although the term "Green Building" already has a strong influence on competition in the international real estate markets, it has not yet been uniformly defined. "Green Building" usually implies buildings which make efficient use of energy, water and materials, whilst simultaneously reducing adverse effects on health and environment. Throughout planning, construction, operation and maintenance and also redevelopment, particular care should be taken to ensure that construction work uses resources efficiently.

There are presently a number of what were originally national certification systems which evaluate buildings – according to type of building – in terms of their ecological qualities. The various certification systems, such as the DGNB's German Seal of Approval for Sustainable Building, the British BREEAM (Building Research Establishment Environmental Assessment Method) and the US-American LEED (Leadership in Energy and Environmental Design) have different requirements. In order to get certification, the developer has to instruct a recognised auditor to supervise not only the planning phase but also the construction phase of the object in question. He is also responsible for the necessary registration with the certifying agency. And there are also other contractual commitments and influences which should be borne in mind – namely the relationship between developer and certifying agency, developer and planner, planners among each other and in relation to the auditor. A holistic structure is necessary if the coveted certificate is to be obtained. Hogan Lovells advises i.a. developers and investors and also auditors on the drafting of contracts and structuring.

Planning and project steering and management contracts

Our legal advice covers all phases of project steering, project management and planning.

We assist our clients at all stages of drafting and negotiation of planning, project steering and management contracts.

In particular with regard to the content and structure of the project steering contracts, we take particular care to ensure that the duties to advise, coordinate and supervise are tailor-made for the project as the scope of these duties has a decisive effect on the success and price stability of a project. Similarly, in project management contracts, the range of services, the responsibilities and powers within the scope of representation have to be clearly defined. We have extensive experience in such matters.

Standard architect or other planning contracts often have detailed fee agreements, but the specifications are frequently inadequate. As the specifications are of utmost importance for the success of a project, we take special care when drafting such planning contracts.

Planning contracts are sometimes concluded orally or even tacitly, and often it is hard to say whether the work done by the architect was done in order to determine the contractual basis or whether it was already contractually agreed work. If the contract is documented at an early stage, then future conflicts can be avoided

This highly recommended firm for public environmental and planning law consolidated its position (...).

JUVE Handbook 2014

Financing/structuring

Tax law

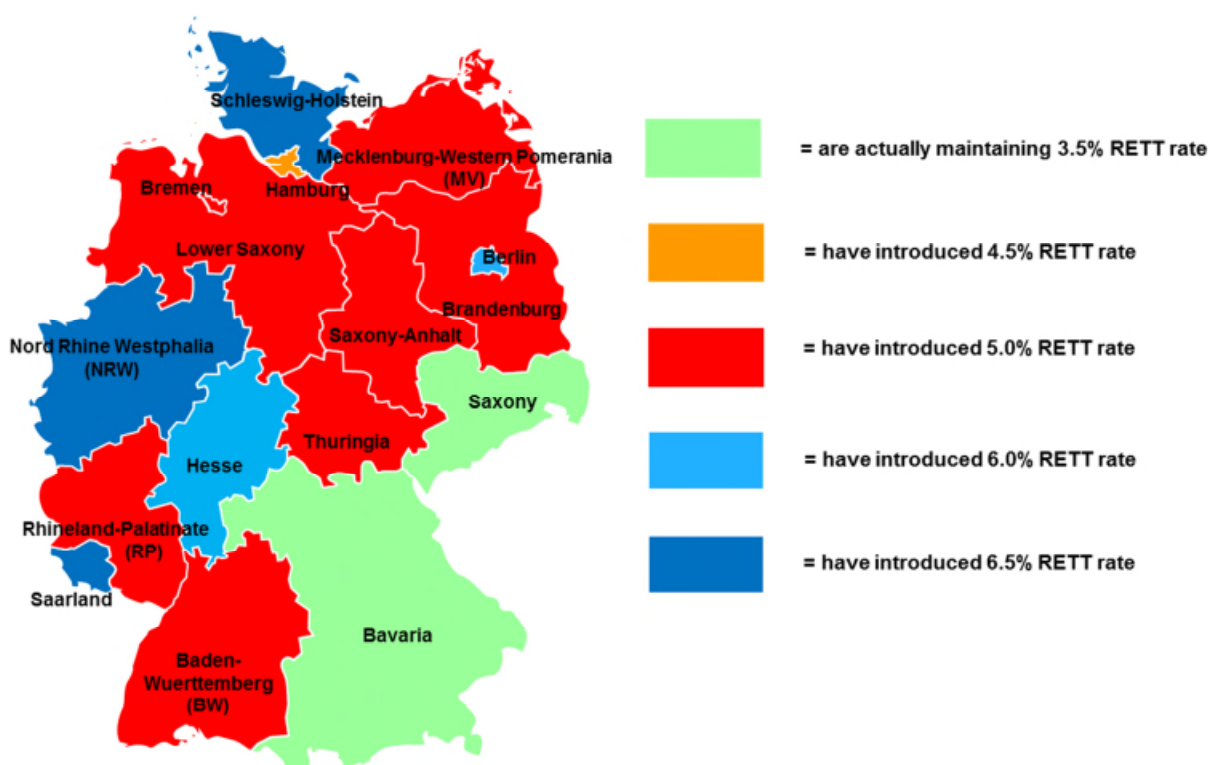
In addition to the financing of the planned project, it is particularly important to consider the financial burden of various taxes. Following the virtually nationwide increase in stamp duty on the acquisition of real estate, projects are sometimes only feasible if tax structures have been optimised. Stamp duties in Germany's federal states are as follows (as at January 2015):

- 3.5% in Bavaria and Saxony.
- 4.5 % in Hamburg.
- 5,0 % in Baden-Wuerttemberg, Brandenburg, Bremen, Lower Saxony, Mecklenburg-Western Pomerania, Rhineland-Palatinate, Saxony-Anhalt and Thuringia.

- 6.0 % in Berlin and Hesse.
- 6.5 % in North Rhine-Westphalia, Saarland, Schleswig-Holstein.

In order to avoid stamp duties, it should in particular be checked at an early stage whether a share deal is a possibility.

Our tax experts have above average experience in the field of tax structuring of project developments and joint ventures.



Real estate financing

Our team which is specialised in real estate financing gives advice on all questions of financing in national and international markets. We work closely together with our finance and tax experts and can thus provide our clients with tailor-made solutions. But we also advise banks on the restructuring and processing of unsuccessful investments. Our services include i.a.:

- comprehensive and structured real estate financing of real estate transactions and project developments
- advice on the conclusion of loan and security agreements, syndications, leasing (in accordance with the German Mortgage Bank Act (HBG) and IFRS/IAS) and securitisation
- real estate and portfolio financing and refinancing
- processing of financing transactions

Joint venture agreements

In the field of project development, joint ventures in particular are in practice quite frequent. It is generally the party with the idea (project developer) and the creditor which join forces to form a company and thus share control, risks and profit. In those areas which are not covered by the cooperation, the respective partners remain legally autonomous and independent. In order to do justice to the interests of the respective partners, a basic agreement should at least deal with the following aspects in detail:

- objective, form and duration of cooperation
- responsibilities at management level (i.e. allocation of rights and duties, delegation and responsibility to the joint venture management, representation, etc.)
- amount of capital (equity, loan) and special obligations of individual partners
- evaluation of contributions of the parties (in particular technologies, trademarks, etc.)
- modalities for resolving differences of opinion (e.g. arbitration clauses, de-escalation mechanisms etc.) and terminating the cooperation (e.g. specifying sales rights, profit distribution, veto rights etc.)

In such constellations we advise both project developers and creditors.



Acquisition/construction/leasing and sale

Acquisition and sale of property during or after construction

Because of our special expertise in the field of real estate transactions and real estate M&A we lead the market in advising, assisting and structuring buying and selling processes of individual and project development properties also during the construction phase both as asset deal and as share deal. Besides advising on the drafting and negotiating of contracts, our advice includes in particular a fully comprehensive due diligence in civil law, public law and tax law on buying and selling, a legal data room management including Q&A processes, and in the case of an exit a legal transaction management as well as the structuring of bidding processes. In addition to a qualified due diligence, this includes the conception, drafting and negotiating of acquisition and sales agreements and getting the approval of the certifying notary public and monitoring the execution of the agreements. We also advise on other purchasing models, hereditary building rights and permanent rights of use pursuant to the German Residential Property Act (WEG) and combinations of the various models. Especially during the project development and construction phases it is necessary to have a data room management if a future sale is planned but also if the property is to be kept in the portfolio. Furthermore, we make sure that contractual safeguards are in place such as hedge accounting for purchase price instalments following completion or the achievement of a certain level of occupancy or ensure that appropriate guarantees and warranty rights have been agreed.

Building contracts

We provide comprehensive advice on the drafting and negotiation of general contractor and subcontractor agreements and contracts for works and services. Especially for complex projects and those which require intensive planning innovative contract models such as, for example, GMP contracts are an alternative. At the drafting stage we pay particular attention to the practicability of a contract. To this end we cooperate closely with the engineers and technicians involved.

We realise that the construction phase is particularly susceptible to conflicts between the contractual partners and that a formalistic insistence on legal positions can jeopardise the success of a project and in particular its chances of being finished on time. Therefore, we use our expertise in alternative dispute resolution mechanisms to find appropriate solutions and to negotiate with the contractual partners. Should that not be possible, we represent the interests of our clients in court and in arbitration proceedings.

Leasing contracts

Only very few projects are concluded without a high level of pre-lettings as important financing element. The requirements of the banks are well-known to us and consequently we are in a position to structure and negotiate a leasing contract which also fully satisfies the financing requirements. These go well beyond complying with the written form requirement. We therefore give our clients comprehensive advice when drafting and negotiating leasing contracts.

An important element of leasing contracts where the properties are still under construction is the building specification. It determines to what standards the leased property has to be constructed and in what condition it has to be handed over to the tenant. All costs and expenditure for qualities/standards which the tenant wants but which are not included in the specification shall in the case of doubt be borne by the tenant. Furthermore, when drafting the contract, we ensure that the purpose of the lease and the usage possibilities given in the various documents (planning permission, project specifications of the general contractor agreement and building specification of the leasing contract) are in agreement.

Further important components of a leasing contract are the provisions on the purpose of the lease, the term of the lease, value guarantee, etc. With a contract which has been negotiated well, it is possible to maintain a degree of flexibility throughout what is usually a long period of commitment.



The real estate team at Hogan Lovells International LLP (...) is characterized by the 'very good service level and good knowledge of the industry'.

Legal 500 Germany 2015

If the leased property is a "Green Building", leasehold improvements should not jeopardise the certification. In order to avoid any issues of interpretation, it is recommendable to contractually agree specific standards. With regard to the rent and operating expenses, it should be checked whether it is possible to get a higher net rent when operating costs are lower. For this reason, the owner should document, in a way which is also appropriate for the tenant, what building materials have been used and what possible savings can thus be made in energy and running costs so that it is possible to explain to future tenants the reasons for the higher basic net rent. HVAC planners and auditors can draw up this documentation. Furthermore,

provisions on maintenance and modernisation should also be included in the lease contract. In principle, upgrading and modernisation is not a requirement of the existing lease agreement. But here too other conditions may be agreed. In commercial tenancies, the tenant often contractually assumes the responsibility for maintenance, servicing and repair to a large extent. It is then incumbent on him to maintain standards. If there is no agreement on quality/standard, then it can only be demanded that functionality is maintained. In order to ensure that the value of the property is retained, the lessor should reserve the right to inspect the property.

Marketing/property and asset management portfolio

Marketing and brand security

In order to sell a piece of real estate well, the common principles of the real estate market have to be observed. In the course of marketing the finished project and also during the on-going project development process we give advice on the conclusion of preliminary agreements (Letter of Intent (LoI)) and exclusivity agreements, confidentiality agreements and other similar agreements.

Furthermore, we support you in copyright and competition law issues, for example, in connection with the copyright law of architects and the protection of distinctive property names or building names and also in marketing successful certifications.

Brokerage contract

In order to be able to sell a property as well as possible, it is often necessary to conclude a brokerage contract. However, if additional advice is needed in connection with real estate, one should bear in mind that the brokerage fee does not usually include any such additional advice and, consequently, additional costs could be incurred for advisory and analysis activities. Furthermore, if a contract is not well-designed, additional costs can be incurred which can be avoided. Care should also be taken when engaging several brokers – similarly when concluding exclusive agreements. With our extensive experience, we can also support you here.

In very complex situations where you have to weigh costs against benefits, the Hogan Lovells team finds a pragmatic and commercial solution.

Chambers Europe 2014



Property and asset management contracts

Economically, it can be attractive to initially keep the property in the portfolio and profit from letting it. In order to maintain the value and the profitability of the property in the long term, it is of utmost importance that the portfolio is managed efficiently. This not only includes attending to physical, financial and legal issues but also includes the concept of usage and letting. In general, an asset and/or property manager is instructed with this task. If asset and property management contracts are drawn up well, the value of the property can be maintained as well as possible and improvement in all areas of the portfolio (tenant structure, material improvements, etc.) can be achieved.

The content of such asset and property management contracts is subject to the contractual provisions of the German Civil Code regarding work and services. When drawing up the contract it is crucial that the services to be provided are described in concrete and in detail. A clear contractual assignment of duties and responsibilities can help to avoid any future disputes on such issues.

It is also advisable to include provisions regarding the basic remuneration and possible additional remuneration in the asset and property management contracts, i.e. provisions which create as motivation. In general, the remuneration is based on the annual net target rent or a certain monthly amount per sqm. The first alternative has the advantage of creating an incentive for letting vacant properties. In addition to the aforementioned remuneration systems there are also other incentive systems. These can be based, for example, on an increase of rental income, an increase of the value of the property, the reduction of vacancy rates or a combination of one or more of these elements. Regardless of which incentive system is agreed by the contractual parties, it is important to give exact details of the type of remuneration, the basis for calculation and the date of payment in the contract.

Particular attention should be given to the allocation of responsibilities and legal powers. In order to be able to fulfil his duties efficiently, the property and asset manager should be granted a degree of autonomy in contractual matters and decision-making processes.



In this context (assignment of responsibilities) the liability of the operator with regard to the property and the assumption of the safety obligation are of major importance. Ultimately, the principle of "ownership comes with obligations" (Art. 14 German Constitution) applies, so that at least within the framework of supervisory and monitoring obligations, even if asset and property management is well chosen, the proprietor can still be exposed to liability. As we advise a great number of investors on the conclusion of property and asset management contracts, on outsourcing of property and asset management and also help industrial companies to recognise and structure operator liability, we have considerable experience and knowhow in this area.

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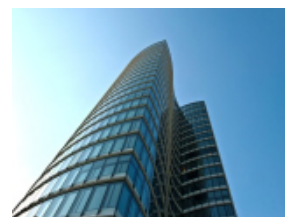


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