

Buildings on third party lands (*Superaedifikate*) and Construction Right (*Baurecht*)

Separate ownership of property and the building thereupon as an exception in the Austrian Real Estate Law

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As opposed to the English lease model – separation of ownership of the building and property – the Roman law principle, *superficies solo cedit*, was adopted in Austria. This means that in Austria the owner of real property is principally also the owner of the building. Should a building be constructed on land owned by third parties, and notwithstanding any other agreements, then the owner of the real property becomes the owner of the building as well. Of this principle there are two important exceptions that make it possible in Austria for legal ownership of real property and the building thereupon to be in different hands. On the one hand, this is Building on Third Party Land (superstructure) and on the other hand the Construction Right pursuant to the Building Law Act 1912, which both make a separation of ownership of building and real property possible. Both forms have gained in importance on the Austrian business scene.

1. What do Building on Third Party Land (*Superaedifikate*) and Construction Right (*Baurecht*) have in common?

Superaedifikate and *Baurecht* have substantial differences, and these are crucial for deciding if a *Baurecht* or a *Superaedifikat* would be more appropriate in the present case. The similarity is that the real property owner does not sell the property, but provides it for compensation for a certain amount of time (long-term) to an investor, who constructs a building on the property.

2. What are the positive aspects of this from the real property owner's point of view?

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

- The real property owner is **not permitted to sell** the property due to a provision binding the owner to the property, e.g. a company statute, a foundation provision or a testamentary provision.
- The real property owner would be permitted to sell the property but chooses **not to out of principle**. Often, churches or nobility choose not to sell their properties for this reason.
- The real property owner does not want to trade the investment in the property with alternative assessments (like e.g. stock) and primarily would like to generate an **increase in the property value**.
- As always, **fiscal** considerations could be decisive.

3. From an investor's point of view, what can be said for or against constructing a *Superaedifikat*?

For an investor, aiming to construct and manage a building on a real property, the following can be said **for** separate ownership:

- If the real property owner is not permitted to sell or does not choose to sell, then the realization of the project is not possible any other way.
- The material advantage for the constructor/manager of the building would be that s/he could **be spared having to purchase** the real property and only would have to pay compensation for use for the temporary usage of the property.
- In the **industrial** sector, ownership of real property normally is not essential for the mere management of a building (e.g. construction of a factory).

The building investor must consider if the investment in the building (on third party land) can be **financed by banks** and if a successful **realization** and use of the building by (temporarily) selling or leasing the building is possible on the market. Both mainly depend on the legal arrangements of the contractual agreements and the statutory provisions behind them.

4. Which are the major differences between *Baurecht* and *Superaedifikat*?

- For the construction of a *Superaedifikat* it is necessary to reach an agreement with the real property owner before beginning construction. If a building has already been constructed, a *Superaedifikat* **cannot be created ex post**. On the other hand, a *Baurecht* agreement can be reached **before and after** constructing a building.

- **A law concerning building law (Building Law Act, last amended 1990)** regulates the rights and duties of real property owners and the entitled constructors. After that the *Baurecht* can only be agreed on for a time period between 10 and 100 years. A premature termination of the *Baurecht* agreement is essentially only possible in case of default of payment of the interest rates for construction. On the other hand, a special law concerning the *Superaedifikat* does not exist and therefore the development leeway that both parties have is considerably larger. As to the **duration of use**, according to jurisdiction, the use of a *Superaedifikat* must be shorter than the natural life duration of a constructed building.
- The *Baurecht* arises from the entry into the land register. The prerequisites for the registration are checked by the Land Register Court. The *Baurecht* is a so-called real right (*dingliches Recht*) which remains valid and can be mortgaged independently and completely transparently no matter who is the respective owner of the real property. In contrast to this, a *Superaedifikat* does not arise until construction, there is no confirmation by a court of justice that the *Superaedifikat* in fact has been constructed. 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.

In this connection, some attention must be given to the Austrian land register, which plays a central role in the Austrian Real Estate Law. The basis is a complete compilation of Austrian properties, which are entered into the land register and are publically accessible via internet. On the basis of the land register, the ownership conditions of the real property are mirrored in this Austrian land register (again publically accessible). Equally, all the rights and liabilities concerning the property can be gathered from the land register. This is an expensive system that Austria allows itself to afford. The advantage is that the ownership conditions and liabilities on all of the properties in Austria are quickly and bindingly ascertainable. What has been entered into the land register is valid, which means that everyone can trust the entries in the land register. In general, Austrian property acquisition is based on the principle that the property right is acquired with entry into the land register.

- In the Building Law Act it is intended that the ownership of the building is transferred to the real property owner **after expiration of the designated time** (between 10 and a maximum of 100 years) and the real property owner must pay compensations to the building owner in the amount of 25% of the existing building value. This regulation is not mandatory so that various options are possible, just like with the *Superaedifikat*, where no statutory parameters exist. Depending on the parties' interests and negotiating position, it can be agreed that for example a higher compensation than the 25 % stipulated in the Building Law Act (at disposal) be paid, as well as a compensation-free transition or also a demolition obligation can be agreed upon.

- From a **fiscal** point of view, it is essential that at *Baurecht* establishment the land transfer tax and fees for the entry into the land register are due, while for the establishment of a *Superaedifikats* significantly lower fees for the usage agreement are incurred.

5. Practical experience

- The hopes that had been tied to the amendment of the Building Law Act of 1990, that, unlike the possibility up to this point of granting all real property owners the option to conclude a *Baurecht* agreement, have been frustrated so far. The reason for this is, on the one hand, that the Building Law Act offers little flexibility, and that, on the other hand, the land transfer tax for the conclusion of a *Baurecht* agreement is considered too high. Therefore, as before, the *Superaedifikat* is given preference in practice.
- *Superaedifikat* solutions, which only are to be considered if no building has been constructed, have, in contrast to *Baurecht* solutions, the disadvantage that the acquired right is **less secure and transparent**. Should the building owner use outside financing, then the owner would probably receive better conditions (considerably) with a *Baurecht* than with a *Superaedifikat* solution.
- Austrian **private** investors have reservations regarding *Baurecht* and *Superaedifikat* solutions because ownership, according to the Austrian principle, is considered to be unlimited ownership of real property and the building(share) thereon. It can be assumed that a change of opinion will take place, following the trend of time. Due to the rise of mobility, more real estate is purchased and sold in the private sector than ever before and a larger market for temporary ownership of the building(shares) will arise. The **commercial sector** knows less reservations and with many foreign investors do not exist at all. Overall, it can be assumed that the importance of *Superaedifikat* and *Baurecht* will continue to rise in Austria, and which meaning has expanded considerably in the past years due to the expanding Austrian real estate market. The Austrian legislator could contribute to this, if vocations from experience and science were implemented at least in part.