MAYER·BROWN

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Real Estate Newsletter

Recent Developments, Topics and Decisions

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Nullity of Form of a Reservation Agreement for a Real Property

If a "commitment fee" exceeds a critical limit of 10% of the locally usual broker's commission, a reservation agreement which is not notarized is null and void.

(LG Frankfurt am Main, judgement of 21 December 2017 – 2- 07 O 280/17)

INTRODUCTION: In connection with the sale of real estate, it is common for brokers and sellers to enter into agreements with prospective buyers on the "reservation of real estate" that contain a commitment fee. This can practically lead to an obligation for the potential purchaser to conclude a real estate purchase agreement. Such agreements may thus conflict with the statutory requirement for notarisation of real property purchase contracts. According to § 311 b German Civil Code (*Bürgerliches Gesetzbuch, BGB*) a contract, by which one party undertakes to transfer or acquire ownership of a property, requires notarisation. According to the wording, a contract for the reservation of a property (i.e. the "non-sale" for a certain period of time) would not in itself require notarisation, since it does not contain the obligation to sell or acquire the property.

The rationale of the statutory regulation is to protect the parties to a real property purchase agreement from an hasty action. It should be ensured that the parties to the purchase contract are given sufficient advice by the notary to understand what they agree with each other.

THE DECISION: The property owner and potential buyer entered into a written "reservation agreement" with respect to a real property. In the agreement, the parties agreed on a purchase price of EUR 1,350,000 and agreed on a "commitment fee" of EUR 25,000, which the prospective buyer paid to the seller. The purchase agreement was not notarized, and the prospective purchaser sought repayment of the commitment fee through legal action. The regional court Frankfurt granted the complaint. It explained that the objective of the statutory concept of notarization of real estate transactions would be undermined if a party who had paid a reservation fee was exposed to considerable economic purchasing pressure. This is seen above 10% to 15% of the usual brokerage fee. As a consequence, such a reservation agreement comes close to a right of first refusal which requires notarisation. The consequence is the nullity of the reservation agreement. In the case decided, the local broker's commission amounted to 5.95% of the purchase price, i.e. EUR 80,325.00. 10% of this would have amounted to EUR 8,032.50. Hence, the "commitment fee" of EUR 25,00.00 considerably exceeded this limit. As a result the reservation agreement is null and void.

IMPACT ON DAY-TO-DAY BUSINESS: The legal situation described above does not only apply to reservation agreements between prospective buyers and brokers. It also applies in the same way to agreements between the seller and the prospective buyer. This has been confirmed by the Frankfurt Regional Court in its abovementioned decision. Other courts have decided a maximum limit of 1% of the purchase price to be permissible if both parties are real estate professionals (OLG Dresden, NZM 2017, 451). However, even this threshold was exceeded in the case of the decision of the LG Frankfurt. The decision is to be welcomed, because it corresponds to the rationale of the statutory notarization requirement of real estate purchase contracts. The civil law does not distinguish between knowledge of and experience with real estate transactions. The obligation to notarize applies equally to real estate professionals and consumers. At most, the amount of the commitment fee, which should be sufficient to create an economic pressure or predicament for the prospective buyer, can be questionable. It goes without saying that the threshold for commercial real estate investors is somewhat higher than for private market participants. As long as the courts see these limits at 10% to 15% of the usual broker's commission or at 1% of the purchase price, agreements that exceed these thresholds must be notarized by the parties in order to be legally certain.

Insolvency-related cancellation clauses for construction contracts

The decision of the Federal Court of Justice of 7 April 2016 (Case No. VII ZR 56/15) in light of the new stipulations concerning construction contracts

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INTRODUCTION: On January 1, 2018, inter alia, new provisions in the law governing construction contracts came into force. With § 648a BGB, a new right of termination for cause was incorporated. The question arises as to whether the insolvency of the contractor is an important reason within the meaning of this provision and therefore whether the continuation of the contractual relationship until completion of the work is unreasonable for the client because of the insolvency. Due to the conflicting interests of a client in rapid continuation of the construction project on the one hand and the insolvency administrator's ability to decide on the continuation or liquidation of a construction company on the other hand, the effectiveness of insolvency-dependent solution clauses is under discussion.

THE DECISION: The Federal Court of Justice (BGH) had to decide on the claim under a guarantee due to additional costs in the completion of a building after termination of the building contract by the client based on the insolvency of the construction company. The client terminated the contract based on § 8 VOB/B (right of termination in case of insolvency of the contractor) effectively included in the construction contract. According to § 119 of the Insolvency Code (InsO), agreements by which the enforcement of §§ 103 to 118 InsO is excluded or limited in advance are invalid. § 103 InsO provides for the insolvency administrator's option to terminate or continue a contract. If the client has the right to terminate a contract in the event of insolvency, the insolvency administrator may no longer exercise his option. For this reason, in an earlier decision (BGH judgment of 15 November 2012, Ref. No. IX ZR 169/11), the BGH had already considered an insolvency-dependent termination clause in the general terms and conditions of an electricity supplier to be invalid. In the present case in distinction to this, the BGH has based its decision on the fact that a construction contract can be terminated at any time in accordance with § 649 BGB (§ 648 BGB n.F.) anyway. § 8 VOB/B merely regulates a different legal consequence (billing only for services already rendered and otherwise damages for non-performance of the rest). In addition, the BGH took into account the interests of the parties involved in the construction, in particular the considerable economic effects and the client's need for short-term legal clarity. Finally, the BGH used the legal concept of § 314 BGB (extraordinary termination for good cause in the case of continuing obligations) arguing that, in the case of an application for insolvency, the relationship of trust on which a building contract is based (trust in particular expertise, ability to perform, reliability, etc.) was destroyed so that a continuation of the contract was no longer reasonable.

IMPACT ON DAY-TO-DAY BUSINESS: Both § 8 VOB/B as well as individually agreed insolvency-related cancellation clauses can be effectively agreed in construction contracts. A recourse to the legal concept of § 314 BGB is no longer necessary from today's point of view. Considering this decision into, in any case, an application for insolvency filed by a building contractor itself should constitute an important reason within the meaning of § 648a BGB and entitle the client to terminate the contract even without a special agreement.

No objection pursuant to the security agreement against a land charge only based on its acquisition without the secured claim

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The legal protection of a debtor against a land charge being enforced contrary to the terms of the security purpose agreement does not already apply if the land charge is merely acquired without the underlying secured claim, especially if the agreed realisation event has occurred.

(BGH, judgement of 20 April 2018 – V ZR 106/17)

INTRODUCTION: A land charge grants a claim to payment of a sum of money from the real property, which is due upon termination of the land charge and which is independent – so-called abstract – of any borrowing. If the land charge serves to secure a claim, for example under a loan agreement, the creditor is restricted with regard to the free realisation of the land charge by clarifying which claims are to be secured and under which conditions (above all in the case of certain infringements of the loan agreement by the debtor) by a contractual security purpose agreement. As a result, the creditor is allowed legally less than he is legally entitled to do under the land charge alone. While the land charge is regarded as a right *in rem* registered in the land register vis-à-vis each and every owner, the security purpose agreement is in principle a purely contractual obligation between the specific contracting parties only. Since the Risk Limitation Act 2008, the German Civil Code (*Bürgerliches Gesetzbuch, BGB*) has granted a debtor the right to raise objections under the security purpose agreement vis-à-vis a creditor of a land charge even if the creditor himself has not become a party to the security purpose agreement but has merely acquired the land charge alone (§ 1192 (1a) BGB). The reasoning for this new provision was a on the part of the policy perceived increase of systematically separate acquisitions of mortgages and their assertion and the intention to protect the (contract-loyal) borrower more strongly. From this declared motive of the legislator, some deduced a far-reaching restriction of the effective transferability of land charges. The present judgment provides clarity and certainty in this regard.

THE DECISION: The decision was based on the acquisition of receivables from terminated loans and, among other things, the land charge against the landowner from a savings bank that had been created for the loans. The buyer financed this acquisition by means of a bank loan, for which the acquired land charge was assigned as security. Unlike the buyer, however, the financing bank neither assumed the obligations arising from the security agreement between the savings bank and the owner nor the loan claims against the owner. The financing bank ran the foreclosure sale of the property from the land charge. As a result, the owner unsuccessfully turned against the foreclosure and the failure to take into account the claims registered by him at the distribution date. Among other things, the German Federal Court of Justice (*Bundesgerichtshof, BGH*) stated that the mere assignment without co-acquisition of the secured claim did not result in an objection within the meaning of the law.

IMPACT ON DAY-TO-DAY BUSINESS: It is to be welcomed that the Federal Court of Justice has clearly stated that defences are only those which are directed against the (continued) existence and maturity of the secured claim. These are, for example, defences (i) of non-validity (i.e. non-disbursement of the loan), (ii) of (partial) extinction of the claim before transfer of the land charge, (iii) of the lack of maturity of the secured claim or (iv) of (partial) repayment of the secured claim after transfer of the land charge. At the same time, it is recalled that the agreed realisation event of the land charge must nevertheless have occurred, but that then a separation of the ownership of the claim and the land charge would not impede the realisation and the owner cannot avoid his liability *in rem*.

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Still no facilitation of the transfer of decorative repairs to the tenant

The formal transfer of decorative repairs to an unrenovated apartment is also invalid in the case of a renovation agreement concluded between the tenant and the previous tenant.

(BGH, judgement 22 August 2018 – VIII ZR 277/16)

INTRODUCTION: In its decision of 18 March 2015 (VIII ZR 185/14), the German Federal Court of Justice (*Bundesgerichtshof, BGH*) ruled that the contractual transfer of the obligation to carry out ongoing decorative repairs to the tenant does not stand up to a general terms and conditions content check if the apartment is handed over not redecorated, unless the landlord grants the tenant appropriate compensation for this. The BGH has referred the question of when the rented rooms are (un)renovated to the concrete specification by the case law of the courts of instance as well as what constitutes an "appropriate compensation". With the most recent decision, the BGH adds a further piece to this case law by clarifying that agreements between parties other than the tenants are of no significance for the question of "appropriate compensation".

THE DECISION: At the beginning of the rental period, the apartment was handed over to the tenant not re-decorated, whereby the form rental agreement used by the landlord stipulated that decorative repairs were the responsibility of the tenant. At the end of the rental period, the tenant carried out decorative repairs. The landlord regarded these as defective, had them repaired and demanded reimbursement of the costs. In the opinion of the landlord the aforementioned jurisdiction of the BGH to the ineffectiveness of decorative repair clauses was not applicable to the case at hand, because tenant and previous tenant had met an agreement, according to which the tenant had obligated itself to the assumption of renovation work. The BGH does not share this view.

Even in case of a two-sided agreement between previous tenant and tenant, the principle is unchanged that the appropriate compensation is to be granted by the landlord. A bilateral agreement between previous tenant and tenant is limited in its legal effects to these parties. The agreements concluded between the landlord and the tenant in the rental agreement are therefore per se without influence on their effectiveness. In particular, the landlord could not be deemed to have handed a renovated apartment on the basis of such an agreement.

IMPACT ON DAY-TO-DAY BUSINESS: The decision of the BGH is not surprising. The ruling, however, recalls that the obligation to carry out decorative repairs in residential tenancy law can only be effectively transferred to the tenant in a few constellations and that this – as a tendency – will also to affect commercial tenancy law.

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Rent loss insurance included in the building insurance can be allocated

If the apportionment of the building insurance to the tenant has been agreed, the costs of a loss of rent insured as part of the building insurance as a result of damage to a building can also be apportioned.

(BGH, judgement 6 June 2018 – VIII ZR 38/17)

INTRODUCTION: In residential tenancy law, the possibility of allocating operating costs is limited from the outset to the catalogue of § 2 Operational Costs Ordinance (*Betriebskostenverordnung, BetrKV*). Between landlords and tenants there regularly is a dispute as to whether allocated costs are to be allocated to one of the items listed. With regard to the costs of a rent loss, co-insured in the context of the building insurance, the Federal Court of Justice (*Bundesgerichtshof, BGH*) provided now for clarity.

THE DECISION: The landlord maintains a building insurance which covers the risk of loss of rental income as a result of an insured damage to the building. In the tenant view the portion of the premium attributable pro rata to the risk of loss of rent could not be allocated and the corresponding share of the premium could therefore be deducted from the allocated operational costs. The BGH has opposed this. Other than in case of a separate rent loss insurance, the agreed insured event is a material damage of the building. Therefore, the building insurance altogether qualifies as a property insurance in the sense of § 2 No. 13 BetrKV. Besides, the tenant profits from the rent loss insurance. According to the established case law of the Federal Court of Justice, the tenant who causes an insured event covered by the building insurance by slight negligence is protected against recourse by the insurer. In this respect, an implied waiver of recourse by the insurer must always be assumed. This waiver of recourse also benefits the tenant with regard to a loss of rent that is also insured. Accordingly, the tenant also receives a consideration for the portion of the insurance premium attributable to the co-insured loss of rental income.

IMPACT ON DAY-TO-DAY BUSINESS: The decision provides a welcome clarification for landlords of the extent to which building insurance premiums can be allocated within the framework of the Operational Costs Ordinance.

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Effectiveness of a - at first only alternatively served - regular notice of termination

The German Federal Court of Justice has clarified that a alternatively declared ordinary termination due to default in payment can lead to the termination of a lease if an extraordinary termination without notice by the landlord with reference to the same facts subsequently becomes invalid by a "grace period payment" made by the tenant after receipt of the notice of termination.

(BGH, judgements 19 September 2018 - VIII ZR 231/17 and VIII ZR 261/17)

INTRODUCTION: A residential lease can be terminated without notice if, among other things, the tenant is in arrears with payment of the rent on two consecutive dates. For a regular notice of termination, on the other hand, a "legitimate interest" of the landlord is required, which exists, among other things, if the tenant "culpably violates his contractual obligations not insignificantly". Non-payment of the rent usually constitutes such a breach of contractual obligations. In case of termination without notice for non-payment, the law grants the tenant the possibility to render the termination ineffective by effecting the late payments during the eviction procedure (so-called "grace period payment"). There is no analogous regulation for regular termination. Therefore, it is common practice to combine a termination without notice with a regular termination in the event of late payment by tenants of residential premises. The regional court Berlin had decided in two cases that, with punctual grace period payment, the regular termination was also rendered ineffective.

THE DECISION: The tenants had not paid the rent owed on two consecutive dates. Thereupon the landlords terminated the leases without notice, and – alternatively – regularly. In both procedures the tenants settled the arrears still before complaint raising, i.e. within the period of grace. The regional court took the view, that by the grace period payment only the claim for the premises to be vacated by the tenant and returned to the landlord did not apply anymore. By the fact that the termination without notice is effective upon receipt and incurs the tenancy directly to lapse, the regular notice cannot take effect at all. The Federal High Court of Justice (*Bundesgerichtshof, BGH*) rejected this view. Although the effective termination without notice terminates the tenancy immediately, the "grace period payment" has the effect, however, that the effect of the termination is annulled retroactively as a whole. As a result, the alternatively declared regular notice takes effect. Because the landlord, who declares beside a termination without notice alternatively a regular notice of termination of the tenancy, does not only express thereby that the regular notice is to take effect not only in case of the invalidity of the extraordinary notice. From an objective tenant view, this rather is to be understood that the regular notice is to take effect, if the termination without notice is rendered ieffective retroactively due to statutory provisions like the "grace period payment".

IMPACT ON DAY-TO-DAY BUSINESS: The already standard practice of a precautionary ordinary termination has been confirmed by the decision with regard to the statutory possibility to eliminate the effects of a termination without notice by payment granted to residential tenants.

Overview Real Estate Transfer Tax Rates

Tax

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The following table provides an overview of the current status of the real estate transfer tax rates in the individual federal states (01 October 2018). Changes since the last issue in summer 2018 are marked in bold.

Baden-Württemberg	5.0 %
Bavaria	3.5 %
Berlin	6.0 %
Brandenburg	6.5 %
Bremen	5.0 %
Hamburg	4.5 %
Hessen	6.0 %
Mecklenburg-Western Pomerania	5.0 %
Lower Saxony	5.0 %
North Rhine Westphalia	6.5 %
Rhineland-Palatinate	5.0 %
Saarland	6.5 %
Saxony	3.5 %
Saxony-Anhalt	5.0 %
Schleswig-Holstein	6.5 %
Thuringia	6.5 %

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- Corporate real estate services
- Distressed real estate
- Transfer tax, property tax and assessment challenges
- Real estate litigation

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OUR CLIENTS include real estate institutional investors; pension funds and advisers; private equity funds; opportunity funds; real estate investment trusts; commercial, investment and industrial banks; governments; statutory bodies; insurance companies; real estate holding companies; developers; and multinational corporations.

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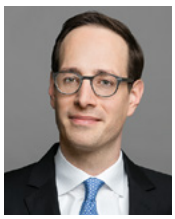

Real Estate Finance

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Selected Experience 2017/2018

Advised the open real estate fund **BERENBERG Real Estate Berlin**, which was set-up by Berenberg Bank as real estate manager and Universal-Investment, on the acquisition of the shopping and district center "Neumann Forum" in Perlin-Pankow from the Hamburg real esate company RI Partners. The "Neumann Forum" has a lettable area of around 26,500 sqm with more than 270 parking. Tenants of the almost fully let property are large retail chains, a privately-owned school, a kinder-garden as well as a retirement home.

In its advisory role for the BVK-Deutschland I-Immobilien-fonds – FMZ fund managed by **Universal-Investment Luxembourg,** the largest independent investment com-pany in german-speaking Europe, the asset and property manager **GPEP** has acquired the Lion 2.0 portfolio. **Bayerische Versorgungskammer** (BVK – Bavarian pension fund for professional groups) is the fund's investor. The portfolio comprises 34 retail properties (16 discount stores, 9 supermarkets and 9 retail parks) was purchased from Habona Invest.

Advised **Natixis Pfandbriefbank** as mandated lead arranger on the EUR 157 million acquisition financing for Eschborn Plaza. Office Aurec acquired the Eschborn Plaza property in Frankfurt for a consortium of Israeli Investors from Commerz Real.

Universal-Investment with GPEP GmbH as portfolio manager on the acquisition of 32 retail stores with a gross lettable area of around 40,000 sqm. Annual rental revenue is around four million Euro. Seller was an institutional fund.

Advised **LaSalle Investment** on the acquisition of a 16,000 sqm commercial building "Am Friedensplatz" in Bonn by way of sale-and-leaseback for a club of investors from Sparkasse Koeln/Bonn. The property serves as local headquarter of Sparkasse Koeln/Bonn.

BNP Paribas on the sale of real estate properties to La Francaise. The properties are located on a construction site in the town of Leutkirch im Allgäu. The project includes 250 luxury cottages covering 25,000 sqm as well as a property with a spa, restaurants, shops and play grounds with around 2,500 sqm.

Advised **Art-Invest Real Estate Funds** on sale of the office building "Am Mozartplatz" in Frankfurt to Park Lane Investors Group for further project development.

Advised **Concarus** on the acquisition of the "Circoleum" office ensemble from the Munich Real I. S. Group. The Circoleum, which has about 21,100 sqm of usable space and 449 parking spaces, is mainly leased by the Fresenius Group.

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