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Real Estate Newsletter

Recent Developments, Topics and Decisions

No Notarisation Requirement for Amendments to Property Purchase Agreements once Conveyance is declared

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Changes to a property purchase agreement after conveyance are possible informally if the conveyance has become binding.

(BGH, judgement of 14 September 2018 – V ZRU 140/16)

Introduction

The German Civil Code (*Bürgerliches Gesetzbuch, BGB*) stipulates the mandatory form of notarisation for a contract which has as its object the obligation to transfer or acquire a property. Defects in form can be remedied by (i) the so-called conveyance (the in rem agreement to transfer) and additionally (ii) the registration of the transfer of ownership in the land register. It is always questionable whether and to what extent subsequent amendments to the purchase agreement also require notarisation prior to the transfer of ownership. For the group of cases in which the conveyance has already been declared, the Federal Court of Justice (*BGH)* last ruled in 1984, following old decisions from the imperial court (*Reichsgericht*), that a later amendment does not require notarial form. The obligation triggering the formal requirement was fulfilled in full and therefore no longer existed. Contrary to the almost unanimous dogmatic criticism in the literature and now – as an appeal instance – also contrary to the decision of the Higher Regional Court Stuttgart (see our Newsletter Spring 2018), the Federal Court of Justice expressly maintained this case law.

The Decision

The decision was based on an agreement on a purchase price reduction through countersigned correspondence in connection with a property developer (purchase) agreement. The purchase agreement contained the conveyance (*Auflassung*) as well as the instruction to the notary to arrange for the transfer of ownership in the land register only upon proof of payment of the purchase price. The seller demanded the remainder of the initial purchase price claiming the invalidity of the reduction due to the lack of notarization, the purchaser considered the agreement to be possible without form and thus effective. The higher regional court had decided in favour of the seller and determined a formal requirement of the change. The BGH, on the other hand, expressly maintained its opinion. According to this opinion, the obligation to procure ownership had not yet expired through performance with the notarised declaration of conveyance in the purchase agreement, but the owed performance had been irrevocably rendered by the seller. Thus, the parties would have set a de facto automatism in motion to bring the change of ownership to registration. However,

No Notarisation Requirement for Amendments to Property Purchase Agreements once Conveyance is declared

- this only applies if the parties' purchase or sale obligations were not subsequently changed or newly established. The practice of declaring the conveyance in the same deed at the time of conclusion of the purchase agreement would not change this either. Instructions to the notary to arrange for the transfer only under further conditions would also only concern the technical execution and would have no effect on the form requirements or their absence.

Effects on practice

On the one hand, the Federal Court of Justice – despite continuing dogmatic doubts about the reasons given by the court – ostensibly creates clarity and determines a clear point in time without focusing on the materiality of the amendments. However, it is more important to note that this old and new absence of form requirements nevertheless has limits, namely whenever the acquisition or disposal obligations are changed or (partially) newly established. Therefore, there will continue to be changes (e.g. in the case of corrections to the object of purchase) in which not only the change must be notarised but also the conveyance must be newly declared or extended. These cases may not be as numerous as subsequent adjustments to the purchase price, which are now judged to be unproblematic. However, it remains to be seen whether and how subsequent private-written changes can be brought into line with the instructions given to the notary in the deed. In addition, the parties themselves would then be subject to many obligations, ranging from notification obligations to the tax authorities to any waiver of pre-emptive rights to be obtained again from the municipalities. For this reason, it may nevertheless make sense in individual cases to notarise the agreement on changes.

Foreign Investment in German Real Estate

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Under the regime of German foreign investment rules („AWV") the German Federal Ministry for Economic Affairs and Energy (the „Ministry") is entitled to review and – in certain cases – even prohibit certain acquisitions of domestic companies by foreign investors if the acquisition affects the security of the German Federal Republic. Over the past years, this blocking instrument has become increasingly important as a political control element, especially in connection with larger, mostly Asian, investments in German companies. Further, this topic has now arrived at the EU-level; on 21 March 2019 the European Union published a regulation (EU regulation 2019/452) establishing a framework for the screening of foreign direct investments into the EU. Against this background, the question arises as to what impact this may have on real estate transactions.

Depending on the type of business of the respective target company AWV differentiates between a „cross-sector" and a „sector-specific" review. The latter one has stricter rules since it is only applicable to target companies involved in certain weaponry- or encryption-related businesses per se affecting German security interests. The general AWV review is the cross-sector review which applies to a direct or indirect acquisition of at least 25% of the shares in any domestic company (10% if the target company operates in the area of critical infrastructure) by a non-EU or non-EFTA company which leads to risks for public order or security of Germany. A sector-specific review applies to a non-German investment of at least 10% of the shares in a domestic company with business in the area of weaponry or IT technology to process governmental classified information which endangers the material security interests of Germany. Therefore, the transactions directly subject to review are share deals.

It is argued that in addition to the above the transfer of the individual assets of a business by way of an asset deal shall be equally subject to AWV review because it is a legal substitute to the captured share deal. Further, certain voices in literature argue that also assignment or transfer of shares or assets for security purposes, in particular as collateral in the course of the transaction financing constitute an anticipated acquisition and shall, therefore, be subject to AWV review. Although AWV expressly only refers to the acquisition of shares and thereby voting rights in a company, it cannot be ruled out that the Ministry tries to get involved in asset deals or financing of transactions. In the latter case, it is unclear whether the „investor" in terms of AWV shall be the financing institute or the purchaser who tries to finance the relevant transaction.

Foreign Investment in German Real Estate

- Immediately it seems rather remote that pure real estate transactions are subjected to an examination according to the AWV. There are, however, certain property classes that can acquire special significance. One might think of land or buildings that are of central importance for the infrastructure (e.g. land suitable for Internet nodes, water supply facilities) or the function of a state (like certain government buildings or buildings in the immediate vicinity of certain state facilities).

In a nutshell, it is advisable to keep an eye on further developments. Investors should be aware of the foreign investment rules and, in the course of a transaction, may seek legal advice to protect against an unexpected unpleasant surprise.

Securing Property Access – Building Encumbrance versus Servitude

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Situation

If a property is not connected to a public road directly and, for legal or actual reasons and it is also not reachable by constructing a private street on the property itself, access through neighboring properties is often required (e.g. for the fire brigade). Oftentimes, the access via the neighboring property is only established by usage or prior arrangements, not by the implementation of binding contractual agreements.

Furthermore, the property owners are often confronted with circumstances in which the access route is secured only by either a building encumbrance (*Baulast*) or by a servitude (*Grunddienstbarkeit*). Although these security options, each considered separately, create far more legal certainty, only one could not be regard as sufficient without the other in providing comprehensive protection for the crossing property owner.

This insufficient protection often only becomes apparent in the context of the sale if the purchaser, as the new property owner, is not empowered to enter the property as previous (contractual) agreements have no effect on him, or if he has to expect measures under German building law up to the prohibition of use of the property. Such measures must be anticipated in particular if conversion or building measures (*Umnutzungs- und Baumaßnahmen*) are intended by the purchaser. For the seller in such circumstances, there is the considerable risk of only being able to achieve a reduced purchase price. In the worst case, the parties may even refrain from the intended transaction.

Provisions under the law

While the servitude is a civil law institute pursuant to the German Civil Code (sec. 1018 seqq. BGB), the construction burden is stipulated in the building code of the individual federal states and is of public law nature (cf. e.g. to the provision in Hessen, sec. 75 HBO).

The building encumbrance is primarily used to establish conditions in accordance with building law, while the servitude provides the property owners with claims among each other.

If the obligation assumed under the building encumbrance is not met (e.g. by obstructing the access road), conditions that are not in accordance with building law occur. However, in this case, the owner of the beneficiary land can only apply to the competent authority for public intervention, but has no direct claims against the disturbing neighbour.

Securing Property Access – Building Encumbrance versus Servitude

In addition, the success of his application to the regulatory authority depends on a so-called exercise of discretion (*Ermessensausübung*). If it comes to the conclusion that the beneficiary is no longer dependent on the building encumbrance (e.g. because access has in the meantime also become possible on another side of the property), the authority will legally refuse to intervene. It may even be obliged to take measures against the applicant itself.

Although these risks exist, it should not be underestimated that a registered building encumbrance often helps a building project to become lawful and protects it from prohibitions of use.

If the encumbrance on a third-party property is to be secured in such a way that claims can be derived directly from it, a servitude is required. This is entered in the land register of the so-called servant property (*dienendes Grundstück*) for the so-called dominating property (*herrschendes Grundstück*). The content of such a servitude can only be an encumbrance which offers an advantage for the use of the dominating property.

If this secured right is thwarted, the German Civil Code provides that the owner of the dominating property is entitled to claims for removal and injunction (*Unterlassungs- und Beseitigungsansprüche*) directly against the owner of the servant property. This possibility of being able to claim directly against the party causing the disturbance brings advantages both in terms of time and economics. If there are no access roads, there is always the threat of a prohibition of use and thus also financial losses.

As a result, property owners are therefore recommended to always secure themselves in two respects, i.e. by registering building encumbrances and servitudes. Only in this way can both the compliance with building law and the right of use be secured effectively and permanently. The former protects the owner against prohibitions of use, the latter mediates the effective enforcement of one's own rights.

This double backup should also be actively practiced by the property owner, since the obligation to grant a servitude cannot be assumed from the approval of a building encumbrance. At best, the beneficiary is temporarily provided with an emergency right of way, the economic advantage of which he has to compensate.

Practical Consequences

A comparison should be made between the actually existing and practiced access to the real property and its legal securing. Once the actual situation has been established, a focused search can be made for any necessary entries in the land register and building encumbrance register. This is because the risk of not being able to identify access situations precisely on the basis of abstract plans often increases if neighbouring properties have been used for a long time under customary law and there is therefore a lack of awareness of the problem for the situation at hand. In the context of real estate transactions, it is advisable to promote a close exchange between technical advisers with local knowledge and legal advisers in order to provide information on the actual access route.

The Waiver of Superstructure Payment in Practice

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Baseline

In practice, when constructing buildings on a property ("Main Property") borders are often built over, intentionally or accidentally, resulting in a building overbuilding onto the adjacent property ("Neighboring Property"). The part of the building having been erected on the Neighboring Property constitutes a so-called superstructure (*Überbau*). The German Civil Code regulates the cases of superstructure in Sec. 912 et seq., whereby these statutory provisions do not cover every case of superstructure.

Superstructure under the German Civil Code

Sec. 912 et seq. of the German Civil Code regulate the so-called "unlawful exculpated superstructure" (*unrechtmäßiger entschuldigter Überbau*). Such superstructure requires that the constructor unintentionally or without gross negligence builds a building across the property border without the neighbor's consent.

Superstructure Payment

In case of an unlawfully exculpated superstructure the owner of the Neighboring Property is entitled to claim a regular payment as compensation for tolerating the superstructure. These regular payments are also called "superstructure payment" (*Überbaurente*).

Waiving of Superstructure Payment

Principally, the amount of a superstructure payment is measured according to the market value of the piece of the Neighboring Property being affected by the superstructure at the time of its construction. However, the owner of the Neighboring Property can waive its right to claim superstructure payments with effect in personam or in rem.

In order to waive the right to claim superstructure payments with effect in rem such waiver must be registered in the land register. With this respect, attention must be paid that the waiver must be registered in the land register of the Main Property and not in the land register of the Neighboring Property.

Waiving the right to claim for superstructure payments means in principle that a right in favor of the Neighboring Property is being abrogated. Hence, in case rights / encumbrances are registered in the land register of the Neighboring Property (e.g. land charges) each beneficiary of such registered rights / encumbrances must consent to the registration of the waiver in the Main Property's land register.

In Practice

In order to validly waive the right for superstructure payments in rem attention must be paid that the waiver is being registered in the correct land register. This is the land register of the Main Property. Furthermore, attention must be paid that – as the case may be – the registration of the waiver requires consents of third parties being beneficiaries of rights / encumbrances registered in the Neighboring Property's land register.

Overview Real Estate Transfer Tax Rates

The following table provides an overview of the current status of the real estate transfer tax rates in t he individual federal states (25 March 2019).

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 %

Tax

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About Mayer Brown

OUR GLOBAL REAL ESTATE MARKETS PRACTICE – a core practice for Mayer Brown comprised of over 200 lawyers – offers international and local knowledge from established teams in real estate markets throughout the world. We manage deals from all sides, and are able to leverage that experience on behalf of our clients. We anticipate shifts in the industry and respond to market conditions with an approach that is both sophisticated and pragmatic. From formation of capital-raising vehicles to acquisitions and sales to transactions involving complex financing and joint-venture structures in multiple jurisdictions, our multidisciplinary team handles matters spanning the industry, including:

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- REIT structuring and compliance
- Joint ventures and strategic alliances
- Fund finance and real estate finance
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- Portfolio leasing and ancillary asset management services
- 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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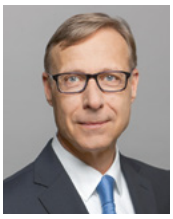

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Selected Experience

Advised **Schroder Real Estate** on the disposal of office building Europa Arkaden I, Bratustraße 9/Europaplatz 2-3, in Darmstadt to Warburg-HIH Invest Real Estate (Warburg-HIH Invest). The multi-tenant property offers rental space of around 8,000 sqm and 93 underground parking spaces. The main tenant is Arkadis with around 4,000 sqm. The consulting, project management and engineering company extended its lease contract by five years at the end of 2017. The total occupancy rate is 91%. Warburg-HIH intends to contribute the acquisition to Immobilien-Spezial-AIF Deutschland Selektiv Immobilien Invest.

Advised **Ares** on the sale of a building complex with 26,600 sqm office and laboratory space and 407 parking spaces in Neubiberg near Munich to SCPI Eurovalys. The property consisting of eight building sections was erected in 2002 and renovated between 2011 and 2015. The purchase price is EUR 59 million.

Advised **Concarus Real Estate Invest**, a company of the May & Porth Group, on the acquisition of the "BahnhofsCenter" in Gelsenkirchen from the Cerberus Group. The property located right near the main station has about 13,000 sqm retail and service space and about 310 parking spaces in a parking garage.

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 Berlin-Pankow from the Hamburg real estate 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 kindergarden as well as a retirement home.

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.

Advised **INTOWN Property Group** in relation to a 43,000 sqm lease agreement entered into with Deutsche Bundesbank with respect to all floors of the Frankfurt located landmark building Frankfurt Büro Center (FBC). This mandate was one of the largest lease agreements in the Frankfurt banking district.