LEGAL UPDATE
Real Estate Law
Cologne, 08 April 2020

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Possible effects of the *"Corona pandemic"* on contractually agreed performance periods and due dates in commercial leases and real estate purchase agreements

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The current *Corona pandemic* is known to lead to considerable restrictions in daily life. The real estate industry is also facing numerous challenges that need to be tackled together in the interests of all parties involved. For example, current developments can sometimes lead to considerable difficulties for the respective contracting parties in meeting contractually agreed deadlines in commercial leases and real estate purchase agreements. Prohibitions to enter construction sites, quarantine measures and Corona-related delays in delivery as well as other obstacles that are simply not foreseeable at present may result in contractually agreed completion and handover dates or so-called *Long-Stop-Dates* being exceeded.

The exceeding of a contractually agreed date for a certain performance is sanctioned in most contracts with claims for damages, contractual penalties and/or rights of withdrawal or termination in favor of the other party. However, in view of the *Corona pandemic* and the current exceptional international situation, this could lead to unreasonable results in some cases because the parties simply did not take such a far-reaching global crisis into account when concluding the contract. The question therefore arises, among other things, as to who should bear the risk and consequently also the costs of Corona-related delays and what options are available to the parties.

In summary, this can probably be answered as follows for most cases of exceeding of completion and handover dates:

- If the parties have agreed on a so-called *force majeure* clause, the party favored by it will in any case be able to invoke the force majeure clause if it is unable to meet its contractually agreed performance obligation precisely because of the *Corona pandemic*.

- Corona-related delays in the handover of rented objects or the completion of yet to be constructed purchased objects or the elimination of defects do not generally constitute an impossibility to perform under § 275 para. 1 German Civil Code (hereinafter: BGB), i.e. the obligations remain in force in principle.

- Claims for damages and contractually agreed contractual penalties shall be considered in the event that agreed completion and handover dates are exceeded as a result of the *Corona pandemic*, provided that these claims were agreed irrespective of any fault on the part of the contracting partner. If, on the other hand, fault is a necessary aspect according to the agreement reached, such claims for damages and contractual penalties will probably be ruled out. With the same justification, legal claims for damages according to the law of obligations of the BGB are also to be rejected.

- Termination and withdrawal rights shall exist if contractually agreed completion and handover dates are exceeded, if these were agreed without regard to fault. If, on the other hand, the contractual agreements stipulate fault as a prerequisite, such rights are excluded if the deadline is exceeded solely due to the *Corona pandemic*. If the parties have not agreed on any rights of termination or withdrawal applicable in this context, such rights can usually only be exercised after a reasonable grace period previously set for the contractual partner has expired without a remedying result.

- If a contractually agreed *Long-Stop-Date* is exceeded as a result of the *Corona pandemic*

and the associated restrictions, it can generally be assumed that the withdrawal right linked to the exceeding of the *Long-Stop-Date* will arise. However, depending on the contractually agreed risk distribution and in view of the relevant condition, which is not fulfilled in due time as a result of the *Corona pandemic*, a different assessment may be possible.

It should be noted, however, that each individual case always requires a separate assessment, which may also be different.

Corona pandemic as *force majeure* in the sense of so-called *force majeure* clauses

So-called "*force majeure* clauses" occasionally included in purchase and lease contracts regulate the distribution of risk in cases of *force majeure*. The decisive factor for their applicability in the present case is whether the outbreak of the respiratory disease Covid-19 (Corona virus disease 2019, in short: Corona virus) and the associated consequences constitute a case of *force majeure*. This is to be assumed in any case if the clauses expressly provide for the classification of epidemics, pandemics, plagues and quarantine orders as *force majeure*. Since the World Health Organisation (short: WHO) classified the outbreak of the respiratory disease Covid-19 as a pandemic on 11 March 2020 and the German Robert Koch Institute (short: RKI) also agrees with this assessment, it can be assumed that a case of *force majeure* within the meaning of such a clause exists.

However, even if the *force majeure* clauses do not explicitly mention such cases, there are good reasons to consider the *Corona pandemic* and the associated restrictions as a case of *force majeure*. *Force majeure* is predominantly understood as an external, involuntary and unavoidable event that has no operational connection and cannot be averted by extreme care (BGH, ruling of 16 May 2017 – reference number X ZR 142/15). The outbreak of the *Corona pandemic* and the massive adverse effects resulting from the measures adopted both nationally and internationally are likely to constitute such an event within the meaning of the aforementioned definition of *force majeure*.

Of course, a contracting party can only invoke such a *force majeure* clause if its individual performance obligations have not been met precisely because of the Corona-related restrictions. In the event of a delayed handover of rented space, for example, it must be checked whether the delay occurred precisely because of the consequences of the corona virus and is not due to other causes.

Finally, it is always advisable to check whether the *force majeure* clause has been validly agreed; in particular, special attention should be paid to the question of the validity of such clauses under the aspect of a qualification as general terms and conditions. This is because numerous *force majeure* clauses have been classified as ineffective by case law for respective reasons in the past.

If a corresponding *force majeure* clause has not been agreed upon, the other content of the contractual stipulations is decisive and in the absence of an applicable legal observation, one must turn to the general legal regulations.

Exceeding completion and handover deadlines

In lease agreements and real estate purchase agreements, the parties regularly agree that the landlord or the seller has to fulfil (completion) obligations by a certain date. In lease agreements, this is usually the date on which the landlord has to hand over the completed lease property to the tenant (so-called *handover date*). In real estate purchase agreements, on the other hand, the parties to the agreement often agree that the seller must complete the object of purchase by a certain date (usually when acquiring a building that is still to be constructed) or must remedy defects or carry out other (structural) measures.

No impossibility to perform according to § 275 para. 1 BGB

Non-compliance with the agreed handover or completion date as a result of the *Corona pandemic* does not normally constitute a case of so-called impossibility to perform (her after short “impossibility”). The existence of impossibility would release the landlord or the seller from their obligation to hand over the rented object respectively complete the object of purchase or to remedy defects in accordance to § 275 para. 1 BGB.

However, in view of the *Corona pandemic*, the handover, completion or rectification of defects is only temporarily impossible, as a reduction in the restrictions resulting from the *Corona pandemic* can be expected, at least in the medium term, up to a point in time where these restrictions are lifted altogether. All measures imposed so far are temporary and a return to normal everyday life can be expected - hopefully in the near future. The assumption of impossibility according to § 275 para. 1 BGB, however, requires the permanent impossibility to provide the service.

An exception can at most apply to so-called absolute fixed-date transactions. In such cases the punctual fulfilment of an obligation is of such essential importance for the contractual partner that, in the event of non-fulfilment, he has no interest whatsoever in the performance at all. However, the typical obligations in lease or real estate purchase agreements described above should not, as a rule, constitute such an absolute fixed-date transaction.

Claims for damages and contractual penalties

A more differentiated answer is to be given to the question of whether the Corona-related exceeding of handover or completion dates leads to claims for damages or contractual penalties by the tenant or purchaser.

If a lease or real estate purchase agreement provides for a claim for damages or a contractual penalty in the event of fault on the part of the landlord or seller, a claim for damages and a contractual penalty is likely ruled out if the agreed handover or completion date is exceeded as a result of the *Corona pandemic*. This is because the landlord or seller is not responsible for exceeding the agreed deadline, which is solely due to the *Corona pandemic* (e.g. due to Corona-related bans on entering construction sites, quarantine measures or delivery delays that cannot be otherwise remedied). Therefore it must be examined carefully whether the reason for exceeding the agreed deadline is actually due to the Corona pandemic, or whether it is due to inadequate planning or contract execution.

However, many contracts provide for the payment of a contractual penalty if the agreed handover date or completion date is exceeded, without fault being expressly required. With such clauses, it must always be checked first of all whether they are valid at all (especially from the point of view of the law on general terms and conditions).

In addition, however, the question also arises as to whether such no-fault claims also apply in the event of missed deadlines as a result of the *Corona pandemic*. The first reason for this is that the landlord or seller is likely to have regularly assumed the risk of timely fulfillment of his obligations in the respective contractual provisions. Against this background, it is also questionable whether the landlord or seller can demand an adjustment of the contract from his contractual partner with regard to the contractual penalty in accordance with the principles of frustration of contract (in Germ an legal terms a “disruption of the basis of the contract” basis pursuant to § 313 BGB. It is true that the *Corona pandemic*, the ensuing restrictions and measures ordered by the authorities are likely to constitute an unforeseeable serious change/disturbance of the basis of the contract.

However, a claim for contractual adjustment pursuant to § 313 BGB further requires that the disruption does not already fall within the sole risk area of the contracting party invoking the concept of disruption. According to the above explanations, contractual agreements under which a landlord or seller is obliged to pay a contractual penalty regardless of fault are usually regulations under which the landlord or seller alone bears the risk of exceeding the agreed deadline. This risk has materialized precisely when the contractual penalty is incurred solely by exceeding the deadline and regardless of fault.

However, this is always an individual case decision. In this respect it is always decisive whether the clause alone transfers the risk of exceeding the deadline to the landlord or seller. Should this risk not fall solely within the sphere of the landlord or seller in an individual case, an adjustment of the relevant regulation according to § 313 BGB might also be considered. Such an adjustment could be that the agreed handover or completion date is to be postponed accordingly.

If the respective contract does not expressly provide for a claim for damages or a contractual penalty, such a claim will probably be excluded altogether. This is because, on the basis of the regulations of the general law of obligations, the landlord or seller is not even in default if the agreed date is exceeded, since

the debtor is not in default pursuant to § 286 para. 4 BGB if the performance is not rendered due to circumstances for which he is not responsible. In this case, a statutory claim for damages cannot be justified either.

Termination and withdrawal rights

Finally, the question arises as to whether there are rights of termination or withdrawal due to the exceeding of handover or completion dates as a result of Corona-related delays.

Lease agreements regularly provide for rights of withdrawal or termination for the tenant if the landlord does not hand over the leased item on the agreed handover date. Purchase agreements usually provide for comparable rights of withdrawal within the framework of so-called "*Long-Stop-Dates*" (see below under "*Contractually agreed so-called "Long-Stop-Dates*").

If the contractual regulations provide rights of withdrawal or termination in the event of fault on the part of the landlord, there should be no right of withdrawal or termination if the agreed handover date is exceeded as a result of the *Corona pandemic*. This is because - as already explained – in such case the landlord is not responsible for exceeding the agreed date which is solely due to the *Corona pandemic* (e.g. due to Corona-related bans on entering construction sites, quarantine measures or delivery delays which cannot otherwise be remedied).

If, however, the right to withdraw or terminate the contract exists regardless of fault if the handover date is exceeded, there are several indications that the tenant is also entitled to withdraw or terminate the contract if the agreed handover date is exceeded, assuming that the provision in question is effective (particularly regarding a possible invalidity as general terms and conditions).

The exercise of such a contractual right to step away from an agreement by the tenant should not normally be contrary to good faith in the sense of § 242 BGB. In our opinion, this applies in any case in the event that the right of termination or withdrawal has been agreed regardless of fault. In such case, only the risk unilaterally imposed on the landlord by the contracting parties has materialized. However, this must always be assessed on a case-by-case basis. It is therefore quite conceivable that it may result from the contractual agreements that exercising the right of termination or withdrawal is contrary to good faith. In this case, the tenant would not be able to withdraw from the contract solely because the handover date has been exceeded due to the *Corona pandemic*.

If no right of termination or withdrawal has been contractually agreed, the question of such a right to step away from an agreement is governed by the provisions of the general law of obligations. According to these provisions, if the agreed handover date is exceeded, the tenant should in any case be entitled to withdraw from the contract pursuant to § 323 BGB if he has previously set the landlord a reasonable grace period for performance in vain.

The special circumstances of the current situation are to be taken into account when determining the appropriateness of the deadline. The setting of such a grace period is not necessary only if the contract specifies a precise handover date and the tenant has bound the continuation of his interest in performance to the timeliness of the performance, i.e. the timely performance is so essential for the tenant that the contractual agreement should stand or fall with the timely performance. As a rule, this is unlikely to be the case, so that in the absence of corresponding contractual provisions, it is usually necessary to first set an appropriate grace period in vain.

Contractually agreed so-called "Long-Stop-Dates"

In particular real estate purchase agreements regularly contain agreements on so-called *Long-Stop-Dates*. These are agreements under which one or both parties can withdraw from the purchase agreement if the purchase price due date has not been met by a certain date (the so-called "*Long-Stop-Date*").

At present, it cannot be assumed that the restrictions imposed by the *Corona Pandemic* will lead to a delay in the classic purchase price due date requirements (registration of a priority notice, provision of the cancellation approvals of the mortgages, provision of the waiver declaration of the municipality regarding the municipal pre-emptive right).

However, there is a risk that the *Long-Stop-Date* may be exceeded if the parties to the contract have agreed, for example, on the completion of the object of purchase, the implementation of construction measures or the rectification of defects as a precondition for the due date of the purchase price. Depending on the selected *Long-Stop-Date*, such measures may currently run the risk of not being fulfilled within the selected *Long-Stop-Date* due to bans on entering construction sites, quarantine measures or Corona-related delivery delays which cannot otherwise be remedied.

In this respect, there are also some initial indications that the right to withdraw from the contract, which exists at the end of the *Long-Stop-Date*, is valid irrespective of the *Corona pandemic*. In individual cases, however, it is also quite conceivable that the seller may have a claim against the purchaser for adjustment of the *Long-Stop-Date* (e.g. in the form of a postponement of the date) if the contractual provisions underlying the *Long-Stop-Date* and the obligation in question suggest that the parties would have made a different arrangement if they had known the current circumstances and the right of withdrawal or the obligation underlying the right of withdrawal is not unilaterally attributed to the seller's sphere of risk.

Also under this aspect the contractual regulations must be assessed and interpreted in each individual case.

Conclusion

The *Corona pandemic* may currently pose major challenges for the parties to lease and purchase contracts. The legal consequences of exceeding contractually agreed dates and deadlines and the resulting alternative courses of action of the contracting parties must always be assessed on a case-by-case basis, as they depend above all on the specific content of the regulations and the contractual distribution of risk.

In any case, measures should not be taken prematurely in order to avoid the risk of loss of rights and claims for damages by the other party due to breach of duty. Finally, not least because of the considerable legal uncertainties, it is advisable to find (provisional) solutions which are in the best interests of both parties.

In the case of contracts that are currently being negotiated and concluded, the risks described above should be taken into account as far as possible and, for example, longer periods should be agreed and/or the legal consequences of exceeding them should be regulated with a view to the current situation.

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Dr. Damian Tigges on +49 221 33660 788 or by email to dtigges@goerg.de. For further information about the author visit our website www.goerg.com.

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