

Composite agreement: The conditionality of a real estate purchase agreement alone does not require the notarization of another envisaged agreement linked to the purchase agreement

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If a real estate sale and purchase agreement, which has to be notarized pursuant to statutory law (§ 311b BGB), „stands and falls“ with another related agreement, the other agreement needs to be notarized as well based on that fact alone according to German case law. With its topical decision of 29 January 2021 (docket number V ZR 139/19) the German supreme court (Bun-desgerichtshof) softens this rule considerably.

Previous legal situation

The notarization requirement for real estate sale and purchase agreement is being extended beyond the letter of the law to such acts and agreements, upon which the real estate sale and purchase agreement is conditional in a legal sense. This interconnection is – alternatively – referred to as either „composite agreement“ or „unitary agreement“. In such cases, the omission to notarize the other agreement leads to the nullity of the entire inter-connected unitary agreement due to lack in form.

Decisive for the assumption of a unitary agreement is only the interdependency of the real estate sale and purchase agreement with the other agreement and not vice versa. The respective intention to connect the agreements is derived mainly from the disclosed intention of one party to make the legal fate of the real estate sale and purchase agreement dependent on the legal fate of the other agreement and the non-objection to such connection by the other party. This interdependency does not necessarily require an automatic mechanism. The pure reservation of legal remedies to walk away from the real estate sale and purchase agreement after its closing could already pose the risk, that a unitary agreement can be assumed.

The topical decision by the supreme court (Bun-desgerichtshof)

In its topical decision the German supreme court scales back on the facts that identify a unitary agreement and lead to the extension of the notarization requirement also to the other agreement. If a real estate sale and purchase agreement, which needs to be notarized, is subject to a condition – which is notarized as well – of the conclusion or permanent validity of another agreement, this shall not in itself lead to the assumption of a unitary agreement, which then would need to be notarized in its entirety. Such a composite agreement could only be assumed, when parts of the other agreement should also become content of the real estate sale and purchase agreement.

The supreme court reasons with the original derivation, that the notarization requirement is applicable to „the entire content of the covenant of the real estate agreement“. Declarations not containing material legal content like informations and motives disclosed before conclusion shall not require notarization. Only if the parties have the intention to connect both agreements also with regard to their contents, a unitary agreement shall be assumed, which requires notarization in its entirety.

Effects on practice

The decision by the supreme court, especially as summarized in its first head note, is at least a significant differentiation of the current legal situation and contributes to more legal clarity. It likely opens up opportunities for a more balanced and reasonable, respectively more „fair, approach, especially in cases, where the transactions are already completed, however, the other agreement was not notarized.

Smaller is probably the gain of knowledge regarding future assessments, whether other agreements should be notarized as well besides the real estate sale and purchase agreement. In most cases the intention to interconnect will not only aim at any kind of agreement but rather at a certain content of such agreement. Therefore, the differentiation between a content, which is linked in a legally relevant manner and a pure motive is a theoretical undertaking, which might prove difficult in practice and where segues could be blurred.

According to the topical decision by the German supreme court possible connected content has to be made part of the real estate sale and purchase

agreement. However, an implementation in the same document is often not feasible, at least not advisable in cases where the other agreement is to be concluded with a third party. Alternatively, the linked content must comply with form requirements by virtue of separate notarization as it has been practiced before. As the differentiation between a pure conditionality on the one hand and content, which shall be an integral part of the real estate purchase agreement on the other hand, will likely lean toward the latter, it stands to reason that in cases of doubt one should continue to notarize the other agreement in the future.

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. Wolf zur Nieden on +49 221 33660 744 or by email to wzurrieden@goerg.de. For further information about the author visit our website www.goerg.com.

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