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SHORT NEWS

As per 30 March 2020

Possible Effects of the Coronavirus on Real Estate Law

1. Point at Issue

In connection with current events, the question arises as to the effects and implications of the coronavirus SARS-CoV-2 (formerly 2019-nCoV) (hereinafter ***coronavirus***) on contractual arrangements. The coronavirus, now classified as a pandemic by the World Health Organization (WHO), is spreading more and more in Germany and the consequences are already having a massive impact on everyday commercial transactions. Above all, there is uncertainty due to the increasing number of quarantine cases and official orders. In this context, uncertainties arise in particular as a result of non-compliance with contractually agreed obligations, which we will explain below for the law on contracts for work and services in Section 4, the law on sales contracts in Section 5, the law on contracts with property developers in Section 6 and the lease contract law in Section 7.

Due to the historical uniqueness of the current pandemic, the legal implications of the coronavirus have naturally not yet been clarified by (supreme) courts. The respective legal consequences for the arrangements to be examined must therefore be analysed and assessed under the current legal situation. In this respect, though, it cannot be ruled out that the German courts will interpret the legal regulations differently in the future and that the previous case law - insofar as it is relevant - will be abandoned. It should also be expressly pointed out that different legal treatment may be required depending on the individual case, so that a blanket application of these principles to any type of case without taking into account the respective concrete circumstances is not possible. Without claiming to be exhaustive, we have clarified the current situation (as of 30 March 2020) regarding the coronavirus in the Federal Republic of Germany in Section 3 and presented the legal consequences of non-compliance with contractual agreements in Sections 4 to 7.

2. Summary

2.1 Coronavirus as Force Majeure

A substantiated suspicion of the coronavirus generally constitutes a force majeure matter. In addition, according to the evaluation of the WHO, the coronavirus, which may have an indicative effect, is an epidemic which is already regarded as force majeure in German travel law. In building contracts, section 6 (2) no. 1c) of the German Regulations on the Procurement of Construction Services (VOB/B) shall apply. According to this standard, the execution obligations are extended if force majeure - as in the present case - is a reason for the contractor's impediment. Building contracts based on the German Civil Code (BGB) as well as purchase and lease agreements are governed by the principles of impossibility and disruption and the elimination of the basis of the transaction.

On 23 March 2020, the Federal Government adopted a legislative package to mitigate the consequences of the Covid-19 pandemic in civil, insolvency and criminal proceedings, which passed through the Bundestag (Federal Parliament) on 25 March and the Bundesrat (Federal Council) on 27 March. This includes special regulations for the protection of lessees, consumers and micro-entrepreneurs, particularly in the case of ongoing contracts for energy, water and communications. According to the wording of the draft legislation and the intention of the Federal Government, it is therefore a matter of continuing contractual relationships (continuing obligations) concerning the existence of substantial services, such as basic services, electricity, gas, telecommunications and, insofar as regulated by civil law, water. Companies which conclude building contracts or purchase agreements with consumers cannot rely on this draft bill but only on the principles of impossibility and disruption or loss of the basis of the transaction.

2.2 Absence of Fault

Any claim by the contractor or purchaser for compensation or damages due to the lack of (timely) service performance is likely to fail due to a lack of fault on the part of the service provider, since the official order as a result of the pandemic is issued irrespective of a fault of the service provider. However, for building contracts, there is the special feature of section 6 (3) sentence 1 VOB/B, according to which contractors are obliged to continue even under such circumstances for which neither contracting party is responsible. If the delay lasts longer than three months, both contracting parties have the possibility to terminate the contract (section 6 (7) sentence 1 VOB/B).

2.3 Force Majeure Clause

In the event of coronavirus and force majeure being present, the regulations contained in the contract are decisive for legal classification. If there is a force majeure clause included in the contract, it is easier to invoke force majeure. The force majeure clause governs an agreement between the parties in the event of force majeure. This leaves the parties free to

determine in the contract what constitutes force majeure and what consequences (e.g. termination of the contract, suspension of contractual obligations or termination rights) are to be drawn. The existence of the clause does not, however, entitle in all cases an unlimited exemption from liability. It must be carefully considered in each individual case whether it is reasonable for both parties to adhere to this clause.

2.4 Impossibility of Performance pursuant to Section 275 BGB

If there are no contractual agreements, it can be argued in connection with the disability due to the corona pandemic that the person obliged to perform according to section 275 BGB is released from its contractual obligation and liability due to an objective impossibility, as long as it is not at fault or could have prevented the situation with reasonable diligence. This is because in this case it must be assumed that a situation has arisen which could no longer be influenced by the contracting parties despite sufficient diligence. A performance that is simply impossible to be rendered can therefore no longer be owed contractually. The obligor is then released from its obligation to perform and the contracting party does not have to provide any consideration or payment. This could be raised as an argument, for example, if the obligor of the performance receives an unlimited order from the authority or the prospect of a resumption of the activity. An unreasonableness according to section 275 (3) BGB would also come into consideration if, for instance, all employees are put in quarantine. In most cases, it would simply be unreasonable for the contractor to hire new staff to fulfil its duties.

2.5 Interference with the Basis of the Transaction pursuant to Section 313 BGB

In addition, according to the principles of the frustration of contract (section 313 BGB), it can be argued that a situation exists in which an event has occurred which could not have been foreseen by either party to the contract and could not have been prevented with appropriate diligence. In any case, the performance of the contract must no longer be reasonable to one of the contracting parties. In this situation it may be required to adapt the contract to the presumed will of the contracting parties. Only when the adjustment is no longer possible or cannot reasonably be accepted by one of the contracting parties shall the disadvantaged party be entitled to withdraw from the contract.

The coronavirus itself is not a basis for a commercial transaction. It is rather a question of whether the resulting impairment constitutes an interference with the basis of the transaction. However, disruption and discontinuation are generally not to be assumed in the case of a temporary official order as it is an impairment of performance which could be solved differently, e.g. according to the principles of impossibility.

2.6 Particularities in Lease Contract Law

In lease contract law, the particularity consists in the fact that the commercial lessee is still obliged to pay the rent in full despite official orders and in the case of force majeure, since there is neither a defect in the rented property nor a property-related restriction. The lessee is

not entitled to a rent reduction for this reason. A public-law restriction by the authorities due to the corona pandemic, which obliges the commercial operator to close the business completely or from a certain time onwards, constitutes a business-related circumstance and is within the lessee's sphere of risk. If the lessee reduces his rent without justification, the lessor can terminate the lease.

However, the lease agreement may be terminated if adherence to the lease agreement becomes intolerable for the lessee.

In this context and with regard to extended protection for lessees, a draft bill was also passed to mitigate the consequences of the Covid-19 pandemic in civil, insolvency and criminal proceedings. For leases, the lessors' right of termination should be limited to the extent that they may not terminate the lease for rent debts arising from the period between 1 April 2020 and 30 June 2020, if the rent debts are based on the effects of the COVID-19 pandemic. The lessee must inform the lessor that he is temporarily unable to pay rent due to the COVID-19 pandemic. In the event of a dispute he must also substantiate this to the lessor. In doing so, he may use appropriate evidence, an affidavit in lieu of an oath or other suitable means (such as a certificate of the guarantee of state benefits or certificates from the employer, as in the case of commercial property, the submission of official orders).

According to an authorisation in the draft legislation, the restriction on termination may even be extended to payment arrears that occur in the period between 1 July 2020 to 30 September 2020, if it can be expected that the social life, the economic activity of a large number of companies or the employment of a large number of people will continue to be significantly affected by the COVID 19 pandemic. The obligation to pay rent, however, remains in principle unchanged. The restriction on termination ends upon expiry of 30 September 2022.

However, the lessee whose apartment is not ready for occupancy at the time of the start of the rental period may assert a claim for damages against the lessor. In the event of delays in newly built apartments that have not yet been completed, the latter may even terminate the agreement without notice. The fault of the lessor is not of relevance.

3. Public Recommendations and Information

First, the public recommendations for coping with the coronavirus are presented. The Robert Koch Institute (RKI) currently classifies the following areas as risk areas: Italy, Iran, China: Hubei Province (including the city of Wuhan), South Korea: Gyeongsangbuk-do Province (North Gyeongsang), France: Grand Est region (this region includes Alsace, Lorraine and Champagne-Ardenne), Austria (Tyrol), Spain (Madrid), USA (California, Washington and New York). In this regard, it should be borne in mind that the situation is reassessed on a daily basis, which may require an adjustment of the risk areas. The current situation is as follows:

In all German federal states, it was decided to close nurseries and schools or to suspend compulsory schooling, and in some cases to ban all visits to nursing homes and retirement homes. RKI also informs on its website that cases of infection with the new coronavirus have now been confirmed in all federal states. The authorities are increasingly advocating precautionary measures at first suspicion and advising those affected to stay in quarantine or at home.

With regard to the preventive behaviour of the Federal Republic of Germany, current events even show that numerous major events have been cancelled. Thus it has been regulated up to the present day that events are cancelled and prohibited indefinitely. In the meantime, schools, universities and day-care centres have also been closed in all federal states, and concerts, trade fairs and football matches (mainly affected are the Bundesliga, Champions League and Europa League with substitutes in the form of closed-door matches) and cultural events have been cancelled. An end or a time limit to these restrictions is not yet in sight. According to the RKI, this is a very dynamic and serious situation worldwide and in Germany. In some cases, the course of the disease is severe and even fatal. The number of cases in Germany is currently still rising.

The German Chancellor Angela Merkel initially called on the population on 12 March 2020 to distance themselves physically from each other and to avoid social contacts, and in an address to the German population on 18 March 2020 she strongly reiterated this in order to slow down the further spread of the coronavirus. The Chancellor also suggested that all specific operations that can be planned by hospitals or by patients be postponed to a later date so that hospitals have more capacity to cope with this pandemic. It was also decided on 16 March 2020 to close the borders of the Federal Republic of Germany to non-Europeans and to carry out entry controls at the inner-European borders.

Minister of Health Spahn also publicly called on all returnees from Switzerland, Italy and Austria to go into quarantine even without symptoms.

It remains the rule that all conceivable precautions are taken and that the population prepares for possible scenarios in order to avoid an uncontrolled spread of the coronavirus. The principal's duty of care and the provisions of the Building Site Ordinance (sections 2 (1), 3 (1a) and 4 German Construction Site Ordinance in conjunction with section 4 no. 1 German

Labour Protection Act) oblige the principal to take appropriate protective measures on building sites in favour of the contractor and the employees working there. Despite all precautionary measures, it should be noted here that the RKI (currently) only assumes a substantiated suspicion of infection with the coronavirus if the following conditions are met:

3.1 The person has acute respiratory symptoms of any severity or unspecific general symptoms and has had contact with a confirmed case of coronavirus infection, or

3.2 The person has acute respiratory symptoms of any severity and has had a stay in a risk area.

A substantiated suspicion of an infection with the coronavirus generally constitutes a matter of force majeure. According to the general principles and the case law of the Federal Court of Justice (BGH, 23 October 1952 - III ZR 364/51), the concept of force majeure includes extraordinary events affecting the enterprise from outside which are unforeseeable and which cannot be averted without jeopardising the economic success of the enterprise even if the utmost diligence is applied. In addition to the grounds for excuse of the resulting impediments and events, serious illnesses also apply. The force majeure must, however, be present at the time of non-performance or poor performance.

Based on the WHO's assessment that the worldwide coronavirus infections are now a pandemic, there are good reasons to classify the coronavirus as a matter of force majeure. Pandemics, epidemics and infectious diseases have already been considered as force majeure in German travel law (Local Court Augsburg, judgement of 9 November 2004 - 14 C 4608/03: SARS virus; Local Court Homburg, judgement of 2 September 1992 - 2 C 1451/92-18 cholera).

4. Legal Assessment - German Law on Contracts for Work & Services

4.1. There is substantiated suspicion and the work is not performed.

This is based on the constellation that the circumstances caused by the spread of the coronavirus make it impossible to fulfil a contract. If, for example, the contractor's employees fall ill due to an infection with the coronavirus or are quarantined by official orders and the contractually agreed performance of the client cannot be fulfilled, the following applies:

4.1.1 Force Majeure

The case of a force majeure clause concerns the occurrence of an unavoidable and unforeseeable external event causing damage (objective prerequisite) which can neither be averted nor rendered harmless (subjective prerequisite), even with the utmost reasonable diligence. If the contract does not contain a provision to this effect, the statutory provisions shall be applied.

The initial factor is what the clause itself defines as "force majeure". The question of the existence of an official order plays a central role here. The reason for the impediment to

performance on the basis of official orders must therefore always be included in the assessment of the applicability of a force majeure clause.

If a force majeure clause is stipulated in the contract, it should be examined whether the clause in the contract actually covers the specific impediment to performance (in this case serious illness, pandemic). If this is the case, the further performance obligations are determined according to the provisions there. Section 5.1 goes into more detail on the requirements of an effective force majeure clause.

If this is not the case, then the impossibility or the frustration of contract must be invoked. Frequently there is a clause in the contractual agreements that the parties undertake to negotiate on how to deal with impediments to performance that arise and to find a common solution.

4.1.2 Section 275 (1) BGB – Impossibility

If the performance of the service is prevented by official order, then this is a case of force majeure due to the substantiated suspicion of an infection. Rendering of the service then becomes impossible and impossible services can no longer be contractually owed. The obligor is therefore released from his obligation to perform.

Here the principles of impossibility according to section 275 (1) BGB must be observed. This is an objective impossibility of performance, which leads to the simultaneous exclusion of the consideration. According to section 275 (1) BGB, the claim to the contractually agreed performance is excluded if the performance is impossible for the obligor or anyone else. If, for example, the principal has relied on the performance of the contractor and, if necessary, has adjusted to it economically, this impossibility of the contractor is usually accompanied by claims for damages and additional costs of the respective principal as well as third parties, insofar as these were included in the scope of protection. Since the outbreak of a pandemic - as discussed above - is to be classified as force majeure, it can certainly be assumed that the contractor is not at fault for delays. After all, the existence of force majeure generally constitutes a so-called objective delay. In this case, the client can either agree to a later performance of service or withdraw from the contract by setting a reasonable deadline. In contrast, the principal has no claim for damages against the contractor in case of objective default. This is only different if the contractor is to be blamed for the delay that has occurred (subjective "delay").

However, a general assessment must be strictly avoided. Rather, it depends on the circumstances of the individual case. Particular attention should be paid to cases where the impediment to performance is only temporary. If the impediment to performance is not permanent, there is also no case of absolute impossibility and in this case an assertion of claims for damages can be considered.

According to section 275 (2) BGB, the contractor may also refuse performance if the necessary expenditure is grossly disproportionate to the interest in performance of the

obligee. This case group would be relevant, for instance, if the contractor was forced to hire new staff because the previous staff had been unable to work due to the illness or the quarantine order.

In the event of impossibility due to disproportionate expenditure, however, the contractor must refer to this in any case, as it is a so-called objection (*Einrede*). If he does not raise this objection, he is not released from his obligation to perform. Here too, it depends on whether the contractor is responsible for the situation or non-performance.

Finally, the contractor may also refuse an obligation to perform which is incumbent on him personally if, after weighing up the obstacles to performance and the interest in performance, it cannot be reasonably expected of him, section 275 (3) BGB.

The contractor who is subject to a ban on activities on the basis of the German Protection against Infection Act (IfSG) and who, for example, suffers a loss of earnings due to domestic quarantine (of his employees) without being ill, can also demand compensation for his loss of earnings. In particular, all self-employed persons can claim compensation for the loss of earnings due to quarantine and ban on activities. The Protection Against Infection Act stipulates for these cases how this loss of earnings is to be calculated (section 56 (3) sentences 1 and 3 IfSG). In the case of self-employed persons, the profit from self-employment according to the income tax assessment is the decisive factor. One twelfth of this is regarded as monthly income. Based on the current situation, the Federal Republic of Germany has even decided on a EUR 50 billion aid package.

4.1.3 Section 313 BGB – Interference with the Basis of the Transaction

In addition, a pandemic can also lead to a frustration of the basis of the transaction. This is the case if, as a result of an event due to the changes in the circumstances underlying the contract in this context, one of the parties to the contract can no longer reasonably be expected to adhere to the contract itself whereas the occurrence of the coronavirus does not in itself constitute a sufficient event in this sense.

Rather, the decisive question is whether the resulting impairments can be regarded as an interference with the transaction basis. The basis of the transaction thus only relates to circumstances that interfere with the so-called equivalence interest. This refers to interferences that affect the equality of performance and consideration and do not fall within the risk sphere of only one contractual partner.

This could be assumed in the case of an indefinite administrative order for only one or even both contracting parties, after which the performance of service is disrupted for an initially unlimited period of time. Such an indefinite order would delay the performance of the service for an indefinite period of time so that the contract, once entered into, would no longer make any sense. Otherwise, e.g. in the case of a temporary order by the authority, this is a regular impairment of performance for which contract law provides other solutions such as, for instance, impossibility. If an adaptation of the contract is not possible or unreasonable for

one party, the disadvantaged party may revoke the contract according to section 313 (3) sentence 1 BGB.

The provisions of section 642 BGB, according to which cooperation must be provided, must be observed. If the customer fails to cooperate, the contractor may still claim his remuneration under certain circumstances.

4.1.4 Sections 634 No. 3, 326 (5) BGB and Section 313 (3) BGB – Termination of Contract

There is also the option to terminate the contract due to impossibility (sections 634 no. 3, 326 (5) BGB). For all contracts that extend over a longer period of time (continuing obligations), the contract can also be terminated under the conditions of section 313 (3) BGB.

4.1.5 Building Contracts pursuant to VOB/B

In building contracts based on the VOB/B, any impediments due to force majeure are governed by section 6 (2) no. 1c) VOB/B. Accordingly, the execution deadlines are to be extended appropriately if force majeure is the reason for the impediment. Claims for contractual penalties or compensation for damages due to an extension of the construction period due to circumstances caused by the coronavirus are also excluded here, as there is no fault of the contractor nor should an extraordinary termination be justified in these cases. According to section 6 (3) sentence 1 VOB/B, a special feature is that the contractor is obliged to continue the contract in the event of circumstances for which no contractual partner is responsible. Nonetheless, if the delay lasts longer than three months, the principal has the option of terminating the contract in accordance with section 6 (7) sentence 1 VOB/B. The termination can also be declared before expiry of three months if it is certain that the interruption will last longer than three months.

4.2 There is no substantiated suspicion and the work is not performed

If an employee of the contractor is asked to leave the construction site although the conditions of the substantiated suspicion do not exist at the time of the reprimand (i.e. the employee does not show any symptoms), this generally leads to a default of acceptance by the principal. Only if there are reasonable grounds for suspecting infection with the corona virus are the parties required to take precautionary measures to relieve the employee concerned of his or her work duties and prevent him or her from taking action. The question then arises as to whether the contractor has a claim for delay or damages against the principal for this reason. It also depends on the sphere of risk to which the effects of the coronavirus are to be assigned.

If the contractor wants to become active and the principal does not accept the service for reasons of precaution, it must be determined whether the contractor can replace the employee with another suitable employee. In principle, in the event of impediments, the contractor must do everything that can reasonably be expected of him to enable the works to be continued. If it is possible for him to find a substitute employee for his services, he must also strive for this replacement. Nevertheless, the contractor shall be entitled to have the

circumstances preventing him from carrying out the order taken into account, including illnesses of employees. For instance, if the site manager has already fallen ill (or is suspected to be infected) and can only be replaced after a considerable delay, this must also be taken into account. It is therefore possible that the contractor will be able to argue that he cannot provide a suitable replacement for the site manager concerned. If the contractor succeeds in demonstrating that a replacement is not possible, he may also succeed in demonstrating a time delay.

The burden of presentation and proof for the claims shall be borne by the contractor for all requirements justifying the claim. If, in this case, the contractor asserts a claim for damages caused by delay, he must demonstrate and prove that the action of the principal (the release of an affected employee) led to an extension of the planning period. Above all, the contractor must provide evidence that the claimed delay (or damage) was caused by the delay in performance to which the principal was obliged. Consequently, the contractor must prove the causal chain that leads from the delay in a performance obligation to the circumstances causing the damage (aggravation or impediment) to the additional costs incurred as a result. Only in this case can the extension of the construction period be taken into consideration. However, it is likely to be more difficult to demonstrate and provide evidence of failure in the event of the absence of only one employee leading to an extension of the construction period than in a case where the entire operation fails. If the contractor is able to demonstrate that the absence of the employee has led to a delay, it is also possible in this case to claim the extension.

If, instead, the principal is in default and both the default and the damage can be substantiated by the contractor, the principal shall owe a corresponding compensation in addition to the remuneration in accordance with section 642 BGB. The contractor can thus demand not only the remuneration but also compensation for the consequences of a delay, in particular for the accrued fixed costs due to personnel and/or machine running times which arise from the performance of the delayed action.

5. Legal Assessment - Law on Sales Contracts

Service chains (such as construction delays affecting real estate purchase agreements) offer a lot of scope for interfering with standard operations. Here, delays can extend to the last link in the chain so that the respective seller is already in default with his performance due to delays in the construction of real estate and the associated provision of the object of purchase, although the delay was not even self-inflicted.

5.1 Contractual Agreements, Force Majeure Clause

In the case of the current corona pandemic, a real estate seller is also likely to ask himself whether he can invoke a force majeure clause against the buyer if he is unable to meet his performance obligations because the property, which is still to be built but has already been sold, is not completed on time due to a construction stop. This becomes particularly relevant if a purchase agreement is concluded and the seller is unable to make the property available to the buyer in good time due to a delay in construction and, as a result, the purchase is delayed indefinitely.

The first decisive factor is whether and to what extent the parties have reached (effective) contractual agreements. If the concluded agreements contain special provisions for cases of force majeure, such as a Force Majeure Clause, it must be examined whether this is effective. In addition, the question arises as to how long the buyer is bound by the clause and at what point in time it can be assumed that it is unreasonable to adhere to the clause.

5.1.1 Effectiveness of the Force Majeure Clause

First of all, the content of the clause must be analysed carefully. Particular attention must be paid to whether it contains an exhaustive list of cases of force majeure.

The clause should provide in the purchase agreement (as well as in the contract for work and services) a definition of the cases of force majeure and the conditions for exemption from liability. The clause should also include an exemption from liability for damages, a period of grace and the right to terminate or cancel supply contracts. Should the clause contain the supplement that the performance is only "reserved" in the event of force majeure, the seller must invoke this immediately in order to be released from the performance. However, if these above-mentioned aspects are not regulated in the respective clause, it does not become indefinite for this reason alone. A clause with the following wording, which does not contain a definition, is often used in practice and can be included in the contract as it stands:

"Impediments in the construction of the object due to circumstances beyond the control of the seller, such as force majeure, strike, execution of special requests, extend the term by the duration of the impediment."

(BeckFormB ZivilR, 2. Property purchase agreement with obligation to build, beck-online)

5.1.2 Reasonableness or Unreasonableness of Adhering to the Force Majeure Clause

The party invoking the clause is in principle obliged to prove the existence of a case of force majeure. The force majeure clause releases the parties mutually from their contractual performance obligations for the duration of the force majeure and indemnifies the seller - in a manner permitted under GTC law - from any claims for damages. If, however, the duration of the force majeure is not predictable because, for instance, official orders are issued for an indefinite period of time, many buyers will argue that it is unreasonable for them to wait for the force majeure to subside and they will withdraw from the contract.

In this context, it cannot be determined at what point in time the adherence to a force majeure clause is unreasonable. This has not yet been decided by a Supreme Court and will have to be considered in individual cases in the future. Indeed, it must be assumed that the purchasers of a property have already scheduled a certain date for the acquisition of the property and moving into it for themselves or their lessees and have sometimes already entered into other contractual obligations. Especially in the latter case, buyers are faced with the threat of high financial losses. In this context, each case must be considered on its own merits and it must be decided whether and from what point in time the buyer can argue that adherence to the clause is no longer reasonable.

At any rate, the principle exists that the seller bears the procurement risk with regard to the property sold by him. In serious exceptional cases, such as in the case of force majeure, there may be a right to amend the contract or even a right of rescission due to the loss of the basis for the transaction if it is no longer possible to adhere to the contract.

5.2 Section 275 (1) BGB – Impossibility

As regards the exemption from performance obligations in the law on the sale of goods, the principles of impossibility also apply. If a seller cannot fulfil his performance obligations, it is first of all crucial whether he is released from his performance obligation due to the consequences of the coronavirus.

In this context, it must then be ascertained whether the performance is objectively impossible for him or only associated with grossly disproportionate expenditure. This means that not every delivery shortage or delay due to the coronavirus immediately leads to a default and thus to a liability of the seller. In this case, the exemption from the obligation to perform due to impossibility of performance may be considered. The seller is then, however, obliged to report the impediment and to initiate damage-reducing measures. It is primarily relevant to examine in each individual case how far the obligations of the seller extend and to what extent the seller has also assumed the procurement risk.

Thus, in the event of official orders, it must in any case be assumed that the seller may not take any further action and cannot make the sold property available in time. Official orders lead, as in the law on contracts for work and services, to a delay through no fault of the seller and to acceptance of the impossibility.

Consequently, this means that the seller of a property is released from his primary performance obligations if it is objectively impossible for him to ensure the timely provision of the building to be erected (section 275 (1) BGB). Even if this performance is completely unreasonable, the obligation to perform can be waived (section 275 (2), (3) BGB). Although the (secondary) obligation to pay damages remains unaffected in principle, in the specific case it is not applicable due to the lack of fault. Section 280 (1) sentence 2 BGB excludes a claim for damages in the absence of fault. In turn, the other party who has acquired the property is released from its obligation to pay consideration (section 326 (1) BGB). This then means that the seller is released from his performance obligation and the buyer from his payment obligation. If payments have already been made, they are generally reversed.

5.3 Section 313 BGB – Interference with the Basis of the Transaction and Art. 79 (1) of the UN Sales Convention (CISG)

The concept of interference with the basis of the transaction as codified in section 313 BGB can also be invoked here. The relevant circumstance or misconception must have been so significant that undoubtedly at least one party would not have concluded the contract if it had known or foreseen the absence or frustration of the contractual basis (causality).

Since in circumstances which the parties did not assume at the time of conclusion of the contract, the resulting difficulties in performance regularly lead to unexpected burdens for one party. For this reason, section 313 BGB is also applicable in the case of considerable costs due to force majeure (German Federal Court of Justice NJW-RR 95, 1119; Koller NJW 96, 300 et seq.). Such costs can in any case be assumed if the coronavirus results in the completion of the building being delayed for several years and the purchaser incurs unreasonable costs due to the fact that the property/properties is/are otherwise occupied in temporary accommodation or due to the termination of numerous lease agreements concluded for this property/these properties.

If the buyer can therefore demonstrate and prove that considerable costs have been incurred as a result of the force majeure, he is entitled to demand adaptation of the agreement to the extent that, taking into account all circumstances of the individual case, in particular the contractual or statutory distribution of risk, he cannot reasonably be expected to adhere to the unchanged contract. Correspondingly, if the buyer wishes to withdraw from the purchase agreement, he must demonstrate and prove that an adaptation of the agreement is not possible or cannot reasonably be expected of him. The courts, however, regularly demand high standards with regard to unreasonableness. But restrictions and provisions of a certain period (such as a withdrawal after two weeks or one year) cannot be specified in a general way.

Similarly, Art. 79 (1) of the United Nations Convention on Contracts for the International Sale of Goods (CISG) exempts a party from liability for non-delivery if this is the consequence of an unforeseeable impediment beyond the control of the party.

5.4 Sections 280 et seq. BGB – Damages and Section 323 BGB – Revocation

If, on the other hand, the seller is still able to make the property available, then there is a default. In these cases, the buyer shall be entitled to claim damages in accordance with sections 280 et seq. BGB, the buyer also has a right of revocation according to section 323 BGB. Section 280 (1) sentence 2 BGB does in deed presume a responsibility for the breach of duty, i.e. fault. Evidence should nevertheless be readily provided. It should be noted though that claims for damages can also exist regardless of fault, e.g. if a guarantee promise with corresponding content was made. If the revocation has been validly declared and received by the seller, the reversed transaction of the purchase agreement begins, i.e. the return of services rendered (section 346 BGB).

6. Legal Assessment – Property Development Contracts

The question also arises in the context of property development contracts whether the purchaser of a property can claim damages from the seller and developer or whether the latter is entitled to rights of withdrawal if the construction of the property is delayed due to the coronavirus pandemic.

6.1 Applicability of the Law on Sales and Contracts for Work

According to section 650u (1) sentence 1 (BGB), the property development contract is a contract for the construction or conversion of a house or comparable building and at the same time contains the obligation of the contractor to transfer ownership of the land to the purchaser. The property developer contract is a hybrid of the purchase and service agreement to which the general regulations (see above) apply. In case of material defects in the purchase agreement, sections 434 et seq. BGB, for contracts for work and services sections 633 et seq. BGB apply.

In such a contractual relationship, the property developer (who is usually also the seller of the land and the building contractor at the same time) owes the building as a physical thing as a result of the success of the work contract, with the consequence that he is liable to the purchaser in the same way as a building contractor for buildings still to be erected in accordance with section 634 BGB.

Often a reference date or completion date to be bindingly observed by the developer is specified in the property developer contract. The timely construction of a residential house or condominium is one of the essential obligations (cardinal duties) of a property developer and must be observed by the developer. Thus, if the property developer is in default because the specific agreed completion date has not been met, the purchaser of the property can demand additional damage positions from the property developer in addition to completion. The damage positions include, for example, additional rent payments which must continue to be paid by the purchaser due to delays in the completion of construction, loss of rent (if further letting was planned), additional relocation costs and provision interest. In 2014, the Federal Court of Justice (FCJ, file ref. VII ZR 172/13) even ruled that the purchaser of a property completed late by the property developer was entitled to a fictitious loss of use. However, the respective damage positions must be presented and proven by the buyer.

Only if the delays in construction were actually due to force majeure, as in the case of the coronavirus, would this not result in any claims against the developer. It should therefore be made clear in property developer contracts that the completion date may be postponed due to delays for which the developer is not responsible. In this case, section 275 BGB and section 313 can be applied if the necessary prerequisites are met.

7. Legal Assessment – Lease Contract Law

In lease contract law, the following constellations are particularly interesting with regard to the effects of the coronavirus:

1. The lessee (a business) is obliged to discontinue its operations as of a specific time or even completely due to official orders. As a result, the latter suffers numerous losses of income and further financial damage. Are there claims for rent reduction or a right of termination on the part of the lessee?

2. The lessor cannot make the leased property available to the lessee in good time due to construction delays caused by official orders issued to the commissioned construction company.

a) This results in financial losses for the lessee who trusts in timely collection and has made appropriate arrangements, as the lessee will have to bear hotel costs or compensation payments to third parties during the transitional period. Can the lessee assert claims against the lessor?

b) As a result, the lessor loses rental income and financial losses are incurred. Can the lessor assert claims against the construction company?

7.1 Re 1: The lessee as a business

The commercial lessee - for example, the owner of a restaurant, shop or hotel - cannot demand a reduction in rent from the lessor, even if the operation of the respective business has been restricted by the official measure. A rent reduction according to section 536 (1) BGB can only be demanded by the lessee if the leased property has a defect at the time of transfer to the lessee. And a defect in the leased property is only given if the target quality of the leased property deviates negatively from the contractually agreed actual quality which will not be the case in the event of a pandemic. There is also a restriction based on objective circumstances. If the property is free of defects, the rent reduction or a suspension of the rent is hence not possible. The continuing wave of infection caused by the coronavirus and the corresponding official orders are therefore causing increasing concern among commercial lessees.

The continuing wave of infection caused by the coronavirus and the corresponding official orders are therefore of increasing concern to commercial lessees as public law restrictions and orders by the authorities do not lead to the acceptance of defects in the leased property. The Higher Regional Court of Dresden (OLG decision of 1 June 2017, 5 U 477/17, juris) commented on this:

"Admittedly, restrictions or obstacles to use under public law can lead to a defect in the leased property (...). But this only applies if they are based on the concrete condition of the leased property and are not caused by the personal or operational circumstances of the lessee.

In addition, the lessee must actually be restricted in his contractual use by the public law restrictions and obstacles to use. This precondition is usually only fulfilled if the competent authority has already prohibited the use of the leased property by a legally effective and unchallengeable prohibition; however, a possible material defect in individual cases can also be seen in the fact that a long-lasting uncertainty about the permissibility of the official prohibition of use causes the justified concern that the property cannot be used for the contractual use."

In the present case, the cause lies in business-related circumstances, namely in the fact that an accumulation of several persons in the lessee's rooms or premises, with the associated risk of further spread of coronavirus infections, is to be prevented by means of corresponding official orders to close down the business premises. These business-related circumstances cannot be equalled with the object-related circumstances (FCJ, judgement of 11 December 1991, XII ZR 63/90). A prerequisite for object-related circumstances, on the other hand, would be that the restrictions of use of the specifically leased property have their cause precisely in its condition and relationship to the environment and not in the personal or business circumstances of the lessee which in fact is the case here.

Thus, in the present case, if a lessee cuts or reduces the rent even though he is not entitled to do so, this can lead to rent arrears which legitimise the lessor to terminate the lease without notice or even to terminate it properly. Even in such special times as the Corona pandemic, the lessee is not entitled to a rent reduction if the legal prerequisites are not fulfilled. Even if he claims that his liquidity has been used up or his existence is at risk.

However, it should be noted that on 23 March 2020 the Federal Government adopted a draft law to mitigate the consequences of the Covid-19 pandemic in civil, insolvency and criminal proceedings. The draft submitted by Christine Lambrecht, Federal Minister of Justice and Consumer Protection, contains a large number of facilitations for those lessees who are unable to meet their payment obligations under the lease as a result of the pandemic. According to this draft law, lessees of residential and commercial properties are to be protected against termination. Article 240 of the Introductory Act to the German Civil Code introduces these special provisions for a limited period of time.

For leases, the lessors' right of termination should be limited to the extent that they may not terminate the lease for rent debts arising from the period between 1 April 2020 and 30 June 2020, if the rent debts are based on the effects of the COVID-19 pandemic. In principle, the provision also only covers payment arrears that arise between 1 April and 30 June 2020, as during this period "significant economic distortions" are to be feared due to the corona crisis. This gives lessees and lessees more than two years from 30 June 2020 to settle any arrears of rent or lease entitling them to terminate the agreement. Both the extraordinary termination without notice and the ordinary termination of a residential lease due to such arrears of rent are excluded. The same applies to the extraordinary termination without notice of a lease for land or for rooms that are not residential premises.

A lessee should inform the lessor if the lessee is temporarily unable to pay rent due to the

COVID-19 pandemic. In the event of a dispute the lessee must also substantiate this to the lessor. In doing so, the lessee must present facts that show an overwhelming probability that its non-performance is due to the COVID-19 pandemic. To substantiate its claim, the lessee may use appropriate evidence, an affirmation in lieu of an oath or other suitable means. In order to do so, the lessee may submit proof of the application or a certificate of entitlement to state benefits, employer's certificates or other evidence of income or loss of earnings. Tenants or lessees of commercial properties can also substantiate this by presenting the official order prohibiting or significantly restricting their operation. This currently affects restaurants or hotels, for instance, whose operation is prohibited in many federal states, at least for tourism purposes.

According to an authorisation to issue ordinances included in the draft law, the Federal Government is further authorised to extend the restriction on termination by ordinance without the consent of the Bundesrat (Federal Council) to payment arrears that have arisen in the period from 1 July 2020 and 30 September 2020, if it can be expected that the social life, the economic activity of a large number of companies or the employment of a large number of people will continue to be significantly affected by the COVID-19 pandemic.

The aim of the regulation is to prevent tenants of dwellings, land and premises other than residential premises, as well as lessees, from losing the rented or leased property as a result of accumulated arrears in payments during the period in which, according to current expectations, the COVID-19 pandemic will lead to significant economic losses. The obligation to pay rent, however, remains in principle unchanged. The restriction on termination ends on 30 June 2022, but no later than upon expiry of 30 September 2022 if section 4 (Regulation Authorisation) is applied.

If the lessee, as operator, is itself placed in quarantine, the lessee has compensation claims in accordance with section 56 of the Infection Protection Act, which may include reasonable compensation for the rent to be paid during the quarantine.

Initial point of the consideration of the possibilities of termination by the lessee is also the lease law principle that the lessee can only base an extraordinary termination according to section 543 (1) BGB on important reasons which are given in the person or in the sphere of the lessor. This is not the case here, because the reason for closing the premises and not performing events is not given by the lessor but by an official order. Here, too, the reason for the impossibility of use is not to be seen in the nature of the premises. The prerequisites for extraordinary termination pursuant to section 543 (1) BGB are therefore not fulfilled.

Also a case of impossibility, in which a lease is deemed to have been terminated even without notice, cannot be assumed here, as it is in principle possible for the lessee to use premises for the agreed lease purpose but a restriction was imposed due to certain circumstances. This is the only reason why no operation may take place in these premises for a certain period of time.

Accordingly, this is a case in which the lessee is not able to use the leased property for the

contractually stipulated lease purpose solely on the basis of a public law order.

However, to place the impediment to performance solely in the lessee's sphere of risk could be inappropriate in view of the current situation. Admittedly, there is no defect in the leased property. Yet, just as there is no impediment to the specific operation, it is not to be assumed that there is a defect in the leased object. The commercial premises where the tenant carries on the business will no longer be able to be used due to the official order. The event of force majeure therefore leads to the fact that in the end only the application of section 313 (1) BGB remains. The basis of the transaction is formed by the common ideas of both parties. An adaptation or termination is not possible if the reasons for termination are part of the lessee's area of risk because the contractual risk distribution must remain unaffected by a changed transaction basis. In principle, the lessee bears the risk for the contractually agreed use of the leased property itself. And strict requirements must also be imposed on the assumption of a change in the statutory distribution of risk.

Nevertheless, one can certainly take the view that the current coronavirus pandemic is an exceptional case of an unforeseeable actual development for which the lessee does not (alone) have to bear the risk of use. It is characteristic in these cases in particular that events and gatherings of several persons in a catering establishment are not prohibited to a specific lessee alone but rather generally by official order. The official orders constitute an obstruction and consequently an interference with the basis of the transaction.

The circumstances leading to the prohibition, namely the risk of infection, are thus not only subject to the general entrepreneurial risk of the lessee (illness in the person of the lessee or its staff, etc.), which the lessee must bear himself but affect all commercial operators within the scope of the order. This is thus an exceptional situation. On the other hand, it must be taken into account here that the lessor is also not at fault for the current situation and would suffer losses to a large extent due to a loss of rental income.

The Federal Court of Justice (FCJ, XII ZR 63/90 of 11 December 1991) has, however, decided that an adjustment based on the idea of the loss of the basis of the transaction is out of the question as these regulations are reserved for the scope of application of the warranty legislation on rental defects.

As a result, it can be stated that a termination of the agreement on the lease of the catering facility is conceivable, however, in accordance with the principles of the discontinuation of the basis of the transaction in the event of an official prohibition order, insofar as it is unreasonable for the lessee to pay the rent. It must therefore be assessed precisely whether (1) the parties would have made a different contractual arrangement if they had anticipated the outbreak of a pandemic with the current effects and (2) whether the lessee could reasonably be expected to adhere to the unchanged agreement.

It should be noted that the FCJ for commercial leases has repeatedly emphasised (see inter alia FCJ XII ZR 131/08 v. 03.03.2010) that it is the responsibility of the lessee of commercial premises, as an entrepreneur, to assess the prospects of success of a transaction in the

location chosen by him. For even in times of crisis the principle "*pacta sunt servanda*" (contracts are to be kept) continues to apply unchanged. This decision, however, was not a case of force majeure. The current situation allows for a different assessment of the Supreme Court decision with regard to the corona pandemic for this reason.

Whether the unreasonableness can also be assumed for closures after 6 p.m. or for complete closure must therefore be examined in each individual case. In any case, the new law may provide some protection for the lessee in a crisis situation, if he is not able to pay the rent due to the current corona pandemic.

In addition to main contractual obligations, the parties also have duties of care and protection without explicit regulations. The lessee could then approach the lessor and ask for a temporary reduction of the rent or deferral because the lessor will have no interest in the lessee getting into liquidity problems and having to close down the business. With the corona crisis, the parties have increased information obligations and the lessor must be informed of the official orders.

7.2 Re 2a.: Claims of the Lessee against the Lessor

In principle, it is the responsibility of the lessor to make the leased property available in accordance with the agreement. The lessee then bears the risk of use from the moment the leased property is handed over.

In the present constellations, however, there is the particularity that the leased property cannot be completed on time by the commissioned building contractor and is therefore not ready for occupancy, so that this can result in financial losses for the lessee. Such damage can arise, for instance, as a result of the cancellation of the previous dwelling, the postponement of the planned move-in and the stay in other accommodations for which costs are payable. Often the next lessee is already at the door and wants to move in. If the lessee asserts claims for damages, the question arises here whether the lessor has to bear these or can invoke the principles of impossibility.

If the dwelling is not ready by the moving in date, the lessor is not able to fulfil his obligations from the lease agreement. According to section 535 (1) BGB, the main obligation of the lessor is in particular to allow the lessee to use the leased property during the lease term.

The Local Court of Cologne has decided that if the dwelling is not ready for occupancy at the beginning of the lease, the lessor is liable for the resulting damages (Local Court of Cologne, file ref. 209 C 542/02). The judges at the Local Court also considered a provision contained in the lease agreement that the lease begins on the agreed move-in date, insofar as the dwelling is ready for occupancy or can be moved into, to be invalid. Furthermore, the lease agreement concluded which provided for the handover on a predetermined date, was an absolute fixed business transaction. If the lessee is unable to move into the dwelling on the agreed date, the lessee may reduce the rent by 100 percent until moving in and retain the deposit. However, such a rent reduction is only interesting if the lessee can move into the

dwelling in the foreseeable future. In addition, the lessee may demand compensation from the lessor if the lessee incurs costs for the storage of the furniture or interim accommodation. The relevant factor here is the extent of the impediment. In the context of the current situation, it is unclear to what extent these principles are applicable, as the lessor also suffers damage from the consequences of the coronavirus and official orders.

However, in principle and judged by the legal situation, as long as nothing else is held by the courts, in the event of delays with regard to new dwellings that have not yet been completed, the lessee has the right to terminate the contract without notice. To what extent the lessor is responsible for the situation is also irrelevant in this case. To what extent the lessor is responsible for the situation is also irrelevant in this case since the lessor is liable for the fact that the lease agreement cannot be fulfilled. This circumstance alone substantiates the right to reduce the rent.

Although there are no current decisions on such lease law constellations that deal with the effects of the coronavirus and take into account the disadvantaged position of the lessor, there are still no current decisions. However, there are good arguments in favour of providing protection also to the lessor who is disadvantaged by the official orders and delays. At any rate, the lessor has the right to turn to the contractor for compensation for the damage.

7.3 Re 2b.: Claims of the Lessor against Third Parties

As already discussed in Sections 4 and 6, the lessor, as the owner, can turn to the construction company or contractor to assert its claims. In this regard, reference is made to the statements in Sections 4 and 6.

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