

Delay in Completion because of COVID-19

Legal consequences of delay in completion due to COVID19

- Is it presently allowed to work on construction sites?
- Which legal provisions are relevant in property-development contracts?
- What are the buyer's option in the event of delay caused by the property-developer?

The COVID-19 pandemic not only poses major challenges for our health care system, but also for the whole economy, regardless of the business sector or size of the company. Our law firm is confronted with an increasing amount of questions about the legal consequences of concluded contracts. This is also the case with property-developer contracts, if the contractually agreed completion date for the owed object of purchase cannot be met due to suspension of construction or supply failures in the supply chain.

Is it presently allowed to work on construction sites?

It should be noted that the COVID-19 Ordinance, which is currently in force and prohibits the entering of public places, does not generally prohibit work on construction sites. Normally the personnel must enter public places to reach the construction site. Currently, entering public places for professional purposes is permitted if (i) a minimum distance of 1 meter can be maintained or (ii) appropriate protective measures are taken (e.g. wearing protective equipment such as masks or full-face helmets).

The social-partners for construction have drawn up a mandatory instruction manual (8-point plan) to minimise the risk of infection while working on construction sites. This plan specifies protective measures such as the use of disinfectants and regular cleaning of all facilities on the construction site, adherence to a temporally staggered schedule of work and breaks. Therefore, the SIGE-Plan (safety and health protection plan), among other things, must be adapted and observed by the contractor and his personnel.

Working on construction sites is therefore still possible if certain measures are complied with. Complying with these measures in daily operations on the construction site and massive disruptions in supply chains due to border closures and factory closures nevertheless pose major challenges for the construction business.

It is expected that the contractors will reopen their construction sites, which they have currently partially suspended due to COVID-19, in stages. After all, the construction industry is an important engine of our economic system. Unfortunately it is to be expected that the COVID-19 pandemic will lead to delays in the completion of construction projects and that property-developers will fall behind with their services.

Which legal provisions are typically used in property-development contracts?

The property-development contract is a special type of contract for work and services and establishes a target-obligation. The legal provisions of the General Civil Code (ABGB) apply to the property development contract, which can be amended by agreement. It is therefore always based on the individual case. As a rule, the developer's default needs to be assessed in accordance with the statutory provisions of §§ 918ff ABGB. It must be distinguished between objective default and subjective default. Subjective default requires that the debtor (developer) is at fault.

What options does the buyer have in the event of default by the property-developer?

Normally the buyer has two options in the event of default by the developer according to §§ 918 ABGB: He can accept the late handover by the developer and maintain the developer's concluded contract, or he can exercise his statutory right of withdrawal by setting a reasonable grace period (this period must be long enough and must probably be measured by the restrictions caused

by the COVID-19 pandemic). There are no statutory rights to withdrawal under the BTVG as a result of construction delays.

It is not advisable to withdraw from a property development contract which, according to the BTVG, is processed with the land register security model in connection with an instalment payment of the purchase price. With this chosen form of security, it is obvious that the buyer's claim for performance is secured whereas his claim for repayment is not. It could happen that the buyer is entitled to withdraw from the contract as a result of the developer's default and the developer is obliged to repay the purchase price paid up to that point to the buyer, therefore the developer is no longer able to make the repayment caused by insolvency. In this case the apartments and also the money, apart from a quota in the insolvency, would be gone.

Whether, in addition to the legal consequences mentioned above, compensation for damages suffered by the purchaser following the delayed completion can currently also be claimed against the developer, depends on its fault for the delay in his performance. It should be noted that the wording of the COVID-19 Ordinance does not generally prohibit work on construction sites, as mentioned before. The possibility for the developer to comply with these regulations can only be assessed based on the individual case. The same applies to whether the developer can reasonably be expected to use other suppliers in the event of failure and thus to stop the obstacle (the developer is always affected by the risk of procurement).

Force majeure (Höhere Gewalt), defined as an external and unavoidable event affecting a larger group of people, causes an exclusion of liability and was confirmed by the Supreme Court connected to SARS in 2005. This can therefore also be expected for the CORONA-virus, although it will be necessary to wait for further case law.

The examination of every individual case is indispensable. Questions of whether the measures to combat the CORONA virus (such as stoppage of construction work, closure of plants, border closures, quarantine, failure of supply chains etc.) actually implemented, were causally causing the developer's delay, whether the developer could be expected to adhere to the parameters set up to maintain his construction site and/or whether the developer could perhaps even have averted the delay by exercising reasonable care, or whether force majeure is involved, will matter strongly. A reversal of the burden of proof applies to the developer. In any case, it is recommended to inform the buyer as fast as possible and that the developer provide complete documentation of the incidents for the purposes of proof.

Our experts of the SAXINGER COVID-19-Unit will be happy to advise you in this context.

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We point out that the legal situation can change constantly, but we are on effort to keep the contents up to date.



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