GROOTERHORST
& PARTNER
RECHTSANWÄLTE

NEWSLETTER 04/2011

Dear Readers

our fourth newsletter of 2011 has a focus on topics relating to real estate law: The building right of large-scale retail trade is a Europe-wide matter for legislators, administration and courts. Further questions concerning real estate law deal with the architects' law, guarantees, the right of action instituted by an association as well as judicial procedure.

Contributions from other fields of activity of our law firm include judgement reviews regarding corporate law, labour law, procedural law and the law for companies internationally operating in Germany.

I hope you enjoy reading this issue and I wish you a successful end of 2011 and a good start of the new year 2012.

Yours
Dr. Johannes Grooterhorst
Lawyer

Contents

A. CURRENT NEWS

Legal limits of land-use planning for the large-scale retail trade

In its judgement of March 24, 2011 (C400/09) the European Court of Justice (EuGH) once again sensitized the public and all parties involved in planning large-scale retail trade projects:

Trend: Ever more tighter limits for the large-scale retail trade at the level of land-use planning

1. The German federal states (Länder) have step-by-step substantially tightened up the specifications of land-use planning for the large-scale retail trade over the last years. In the meantime a trend emerges to include in land-use planning binding rules already for large-scale retail trade businesses from 800m² up.

With the introduction of such binding regulations of land-use planning (so-called objectives of regional planning) the ability of municipalities to plan large-scale retail trade projects is restricted further.

Counter-trend: Countermeasures taken by courts

2. With this trend the German federal states (Länder) have in recent times repeatedly encountered legal limits.

The Higher Administrative Court (OVG) Münster (judgement of September 30, 2009 – 10 A 1676/08) and the Higher Administrative Court (OVG) Schleswig (judgement of April 22, 2010 – A MR 4/10) as well as the Constitutional Court (VerfGH) of the state of North-Rhine Westphalia (judgement of August 26, 2009 – Constitutional Court (VerfGH) 15/05) have (in North-Rhine Westphalia already several times) annulled or declared non-binding several objectives of regional planning regulating the large-scale retail trade. The Federal Administrative Court (BVerwG) has in fact confirmed in its Rastatt judgement of December 16, 2010 (4 C 8.10) the rule of congruence of the federal state of Baden-Wuerttemberg. In contrast to previous judgements, however, the Federal Administrative Court (BVerwG) based its ruling on a comprehensive explanation under constitutional law thus highlighting the limits under constitutional law.

Favourable initial situation for the judicial review of objectives of regional planning concerning the retail trade

This increasing restrictive jurisdiction converges with the efforts of the German federal states (Länder) to pass even tighter regulations compared to the ones existing to date. There are indications that some of these regulations will not last.

Reviewing legal regulations concerning regional planning with respect to their effectiveness, therefore, has good prospects considering the initial situation.

3. Legal objectives concerning regional planning for the large-scale retail trade turned out to be vulnerable with respect to a multitude of legal aspects.
What is now new is that the bailiff does not have to organize the time- and cost-intensive removal and possibly storage of the items owned by the tenant (commercial facilities, office equipment).

Competence of the legislator of the German federal state (Land)

a) Contentious is already in how far the competence of the legislator of the federal state (Land) is sufficient for the objectives of regional planning for controlling the large-scale retail trade. The Higher Administrative Courts (OVGs) Schleswig (judgement of April 22, 2010 – 1 MR 4/10) and Münster (judgement of September 30, 2009 – 10 A 1676/08) declared on this very basis several objectives of regional planning for retail trade control ineffective (the latter by means of an obiter dictum). Many objectives of land-use planning can already be challenged on its formal legal level under constitutional law (comp. in detail on this subject matter: Langguth, Die Grenzen der Raumordnungsplanung – zur Abgrenzung der Gesetzgebungskompetenz für Raumordnung und

Bauleitplanung (engl: The limits of land-use planning – Defining the differentiation of the legislative powers for land-use planning and urban land-use planning – ZfBR (Journal for German and International Construction and Public Procurement Law) 2011, 436)).

Regional planning versus local planning competence

b) On the level of material constitutional law the question arises in how far legal objectives concerning regional planning for the large-scale trade interfere too much with the planning competence of municipalities. Furthermore, the question is whether it is an infringement of the freedom of occupation of retailers. These contentious points are particularly valuable, because they not only open up the way to administrative proceedings but also the possibility to file a constitutional complaint.

EU: Freedom of establishment

c) On the level of European Law, objectives of regional planning for the purpose of controlling the large-scale retail trade can be attacked in view of the freedom of establishment (comp. judgement of the European Court of Justice (EuGH) of March 24, 2011 – C-400/09).

The aforementioned judgement of the European Court of Justice (EuGH) is, for the time being, the last component in a series of rulings which substantially strengthen the impact of the European Law on German Building Law. Three relevant judgements of the European Court of Justice (EuGH) are dealt with in this issue of our newsletter.

National law versus federal law

d) Moreover, objectives of regional planning concerning the large-scale retail trade often feature errors with respect to the requirements specified in the federal law (ROG), which might also make the regulations non-binding.

Practical Considerations

4. One should in fact not forget that even ineffective objectives of regional planning might manifest considerable obstacles for a retail trade project, since the objectives of regional planning have to be overcome by lengthy judicial proceedings.

In case of major retail trade projects this investment could, however, be very interesting since – on entering such a regional market – it can pave the way to a substantial competitive edge over potential competitors.

Niklas Langguth

B. COMMERCIAL AND COMPANY LAW

Rules of interpretation for deeds of partnership – Majority requirements in case of a written vote – Power of representation when winding-up a civil-law partnership

The specific "historic" legal structures of multi-partner entities using either "multi-partner" limited partnerships (partnership under the Commercial Code (HGB), Publikumspersonengesellschaften) or the civil-law partnership (partnership under the Civil Code (BGB)), which have been used for decades as a vehicle of the capital market for public subscriptions, also contribute to the legislative trends in the general law of partnerships. This is clearly reflected in two very recent rulings of the Federal Court of Justice (BGH) concerning the interpretation of partnership agreements, which might also be relevant for "normal" partnerships.

Qualified majority as defined in the deed of partnership in case of written votes

1. The first case deals with a multi-partner limited partnership (Publikumspersonengesellschaft). In this case the Federal Court of Justice (BGH) ruled in its judgement of July 19, 2011 (II ZR 153/09) how the regulations concerning the majority requirement by the partnership agreement are to be interpreted.

"Present" partners

The controversial question was when exactly the "qualified" majority for certain resolutions adopted by the partners required by the partnership agreement had been reached. This qualified majority was specified according to the version of the partnership agreement, which is of interest here, with 75% of the partners/votes "present".

"Participating" and "voting" partners

Considering the wording and context of the regulations of the partnership agreement the Federal Court of Justice (BGH) concludes that the contractual majority requirement refers to the "participating" not to the "voting" majority present in the meeting.

Based on this – objective – interpretation of the respective deed the consequence for a written vote would be that in this case the "qualified majority" clause would refer to those partners "participating in the written vote". Participating partners are understood to be "present" just like those in a meeting. The interpretation of the Court of Appeal, that this refers to "all" partners has been rejected by the Federal Court of Justice (BGH).

The Federal Court of Justice (BGH) has based its interpretation of the term "presence" on the special needs of a partnership with a multitude of members. The court ruled that in this specific case also Corporation Law rules are to be applied such as, for example, § 47 Sec. 1 Companies Act (GmbHG).

In order to support this, the Federal Court of Justice (BGH) contrasts this basic understanding of "presence" and "vote" with possibly higher requirements for typical partnership agreements. Thus, for example, the non-voting partner (or the abstentions) could be taken as "votes against". This, however, had to be expressly agreed upon in the partnership agreement.

Practical Considerations

The ruling of the Federal Court of Justice (BGH) will provide clarity in a multitude of cases for assessing votes and for interpreting partnership agreements. And even for private partnerships, which are outside the public area, these clarifications shed light on the terms "present", "participating" and "voting".

Management and representation of a liquidated partnership under the German Civil Code

2. The second dispute regarding voting rights in a multi-partner entity (Puplikumspersonengesellschaft) deals with a partnership under the Civil Code (BGB-Gesellschaft). In its judgement of July 5, 2011 (XII ZR 199/10) the court had to cope with the question of how a civil-law partnership which was to be liquidated because of missing its objective can remain capable of acting and how, for example, any claims it asserted against a co-partner can be asserted by a judicial process.

The court concludes that in this case there was neither a stipulation related to the partnership agreement nor a statutory regulation about who is entitled to represent, "as liquidator" at court or out-of-court.

Termination of the power of individual representation in case of liquidation

The basis is § 730 Sec. 2 Sent. 2 Civil Code (BGB): According to this the power of individual representation conferred upon the individual partners terminates with the liquidation of the partnership. All partners are jointly entitled to management and representation (in the case to be decided 3,400 partners).

When passing a resolution the partners did not agree upon a liquidator. A resolution was not passed. The partnership agreement did not provide any stipulations. According to the understanding of the Federal Court of Justice (BGH) it was not possible either to "think it through to the end" by means of a "supplementary interpretation", so that a hypothetical parties' will could be understood as the continuation of the existing power of representation.

The Federal Court of Justice (BGH) rejected an analogous application of § 265 Sec. 1 Stock Corporation Act (AktG) or § 66 Sec 1 Companies Act (GmbHG) as a contractual lacuna did not appear to be evident. The partners should be able to adopt a resolution and to establish the representation needed. The application of the regulations of the Stock Corporation Act (AktG) and of the above-mentioned Companies Act (GmbHG) would run counter to the interests of the partners. Not a single partner should recognizably make decisions about measures of the liquidation. Even the application of legal regulations for multi-partner limited partnerships (Publikumspersonengesellschaften), which is still practiced in certain cases by the Federal Court of Justice (BGH), could not be taken into consideration because the specific content of the partnership deed would run counter to it.

No analogous application of regulations concerning a corporation in case of procedure of appeal against the objective of the partnership agreement.

Thus the only remaining alternative would be a resolution of the partners according to § 730 Sec. 2 Sen. 2 Civil Code (BGB) or the possibility that a court upon application of a partner in analogy to §146 Sec. 2 Commercial Code (HGB) would appoint a liquidator in case of an important reason.

Appointment made by the court

The second case portrays that the senate for the law of partnership of the Federal Court of Justice (BGH) only wants to refer to legal regulations for corporations in case of multi-partner limited partnerships (Publikumspersonengesellschaft) if the typical stipulations "of the respective partnership agreement" do not run counter. In practice one could not even in case of a higher number of partners readily rely on the fact that "Corporation Law" is of any help: As the only safe way it remains to integrate an express clause into the partnership agreements concerning the liquidator or the liquidators. Even in this respect this case of a multi-partner limited partnership (Publikumspersonengesellschaft) may induce some critical analysis of partnership agreements. What 3,400 partners do not manage (to pass a resolution about a liquidator), may also perhaps not be accomplished by half a dozen of partners?!

Practical Considerations

Significance of clear regulations in the partnership agreement even for the liquidation

Dr. Detlef Brümmer

C. REAL ESTATE LAW

I Ineffectiveness of a contractual exclusion of set-off in an architect's contract

Pursuant to § 309 No. 3 Civil Code (BGB) a provision in the General Terms and Conditions is ineffective in which the contracting partner of the user is deprived of his power to off-set with an undisputed claim or one that is declared final and absolute by a court. And, conversely, in General Terms and Conditions of Sale the clause is common practice that an off-setting against the purchase price is only admissible with an undisputed or legally valid counter-claim. This was exactly what an architect had in mind when he included in his General Terms and Conditions as an appendix to his architect's contract that off-setting against his fee claim shall only be possible with an undisputed and legally valid claim.

General contractual exclusions of set-off in General Terms and Conditions

When the architect sued for his fee while the building owner set off with claims for damages, the question of the effectiveness of the contractual exclusion of set-off arose.

In its judgement of April 7, 2011 – VII ZR 209/07 – the Federal Court of Justice (BGH) ruled that the contractual exclusion of set-off is ineffective. This clause violates § 307 Sec 1 Clause 1 Civil Code (BGB). The building owner will be unduly discriminated regarding the principles of good faith. Since by means of the contractual exclusion of set-off the orderer is forced into a settlement relationship of a contract of services to remunerate defective or incomplete services to the full,

Special interests in case of contract of services and protection of equivalence between service and consideration

although he would be entitled to counter-claims amounting to the costs accruing for correcting the defects as well as for completing the services. This, in fact, encroaches upon the equivalence of service and consideration regulated in the contract in a manner deemed unreasonable for the orderer. The Federal Court of Justice (BGH) already ruled in a previous judgement that a provisional judgement can principally not be passed if this results in awarding a claim for work wage and if claims for paying the costs of correcting defects specified for off-setting are reserved for the subsequent judicial proceedings. This contradicts the status reciprocitatis between the claim for work wage on the one hand and the claim for defect-free performance on the other hand.

Practical Considerations

On the other hand the Federal Court of Justice (BGH) did not rule on the question of how to deal with contractual exclusions of set-off which are not in a status reciprocitatis to the claim for work wage of the architect.

Since the Federal Court of Justice (BGH) takes the status reciprocitatis into account and not the distinctiveness of an architect's contract, the scope of the judgement is not limited to architects' contracts, but also comprehensively applies to other contracts of work and service.

Ralf-Thomas Wittmann

II Without building permit there is no fee for the planning of implementation (Ausführungsplanung)

"Rushing ahead" with services on the part of the contractor

With its ruling of September 29, 2011 the Higher Regional Court (OLG) Koblenz dealt with the not so rare topic concerning claims for fees, namely how to handle "the rushing ahead" with services on the part of the architect. The subject matter of the respective claim for fees was, among others, the remuneration for performing service phase 5 (Leistungsphase 5) of the planning of implementation (Ausführungsplanung).

The Higher Regional Court (OLG) Koblenz stated that the architect is only entitled to a fee for services rendered which go beyond the approval planning, prior to the building permit, if the building owner expressly requested the priority of service phase 5 (Leistungsphase 5). This, however, in itself is not sufficient. The building owner would also have to bear the risk that these services, which were given priority might not be needed at a later stage.

The architect may not be discharged in this case, even if the building owner is a businessman and, as formulated by the architect, if he was "benevolently" cognizant of the further planning performances.

Reference to cost risks due to services no longer necessary

A prerequisite for a claim for fees of the architect for a "rushing ahead" with services is that the building owner had been comprehensively and appropriately informed by the architect that work requiring remuneration is to be carried out which at a later stage might turn out to be unnecessary due to a lack of building permit.

It is no contributory negligence of the building owner that no building permit had yet been issued. The risk of permission, which is in the sphere of the building owner, is only then relevant for the claim for fees, if the building owner had been sufficiently informed about the risky permission situation.

Practical considerations

Useless works are not subject to remuneration for the building owner; the architect then works for free. If the building owner expressly requests priority, he has to be informed in detail about the risk; in that respect the architect has a duty to provide advice. It then has to be documented with

evidential value, that the building owner in spite of being informed by the architect has insisted on the priority of the service phase.

Ralf-Thomas Wittmann

III Protection of non-smokers is no deficiency of the rental property

Protection of non-smokers as business-related and not construction-related restriction of use

In its judgement of July 13, 2011 (XII ZR 189/09) the Federal Court of Justice (BGH) ruled that the introduction of the legal protection of non-smokers after concluding the restaurant lease only manifests a business-related, but not a construction-related restriction of use and, thus, the rental property does not become deficient.

In the subject-matter the judgement is based on the tenant of a restaurant claimed compensation from the landlord after the protection of non-smokers law had been passed in Rhineland-Palatinate (Law for the Protection of Non-Smokers (NRauchSchG) RP, Journal of Laws and Ordinances 1 (GVB1) 2007, 188) because of a decline in turnover due to the legal smoking ban (§ 7 Sec. 1 Law for the Protection of Non-Smokers (NRauchSchG) Rhineland-Palatinate (RP)). Prior to this, the tenant had unsuccessfully prompted the landlord to create a smoking area by means of structural conversion corresponding with the requirements of the Law for the Protection of Non-Smokers.

No deficiency by only following the business situation of the tenant

According to the Federal Court of Justice (BGH) the tenant is not entitled to compensation. A deficiency of the rental property does not apply, since due to the coming into effect of the Law for the Protection of Non-Smokers Rhineland-Palatinate the contractually provided use of the rented premises is not affected. That is because the restriction of use due to the smoking ban does not refer to the specific nature of the rental object, but only builds on the business conditions of the tenant. Furthermore, the smoking ban is primarily addressed to persons who spend time in the respective establishments (comp. § 1 Sec. 2 Law for the Protection of Non-Smokers (NRauchSchG) Rhineland-Palatinate (RP)). The person operating the restaurant him-/herself is only an indirect addressee of the ban and responsible for its implementation and compliance.

Legislative amendment in the risk area of the tenant

In addition, the Federal Court of Justice (BGH) points out that the (legislative) amendment solely falls within the risk area of the tenant. The landlord has the responsibility for the licence capability of the leased restaurant, however, not for the risk for such circumstances having their origins in the personal and business situation of the tenant.

Practical Considerations

According to consistent rulings of the Federal Court of Justice (BGH) public obstacles to use and restrictions of use which are opposed to the contractual use of the rental object only then justify a material defect, if they are based on the specific nature of the rental matter and if they do not have their origin in the personal or business situation of the tenant. The Federal Court of Justice (BGH) has now consolidated this ruling and has extended it to the protection of non-smokers. For the tenant the judgement of the Federal Court of Justice (BGH) has the consequence that he should take care when drafting the lease so that the creation of a smoker area becomes a contractually agreed condition of the rental object. Only in this very case he/she is entitled to claims (for defects) in case the specifications for the protection of non-smokers have not been complied with.

Dr. Rainer Burbulla

D. LABOUR LAW

Limited standard form employment contract – denial of terminability

With its judgement of August 4, 2011 (6 AZR 436/10) the Federal Labour Court (BAG) ruled about the termination with notice of a limited contract of employment.

"Form" to be ticked

The employment relationship between the plaintiff (employee) and the defendant (employer) was based on a standard form employment contract for commercial employees of October 20, 2008. The draft version of the contract provided that applicable provisions had to be ticked and non-applicable provisions were to be deleted. Empty spaces in the contractual document could have been used for written insertions. In § 2 of the employment contract the parties agreed under the heading "Work, Wage, Probationary Period, Termination, Working Time" the following by ticking the respective provisions as well as by a handwritten insertion of the date:

"This employment contract is limited until October 10, 2009. Within this period both contracting parties can give notice within a period of.... . The first three weeks/months of the employment are considered a probationary period. During this probationary period the employment can be terminated by both parties within two weeks."

In a further provision – once again in § 2 – it says later:

For the termination of the employment – after completion of the probationary period – the statutory period of notice applies."

No general exclusion of the termination with notice within the time stipulated due to the provision of a probationary period

The plaintiff was of the opinion that a termination of notice of the employment within the time stipulated was ineffective. She was of the opinion that it was not agreed with the defendant pursuant to § 15 Sec. 3 Law for Part-Time Employment (TZBG) that the limited employment could be duly terminated at the end of the probationary period. The provisions agreed upon in the contract of employment concerning the termination notice following the end of the probationary period are not clear and understandable due to a gap in the sentence, i.e. the missing insertion of a period for the termination, therefore, violating the law which requires such a clear and understandable provision (§ 307 Sec. 1 Sent. 2 in comparison to Sent. 1 Civil Code (BGB)).

Not filling in a form-period-option ("box"), no statement about content-related contract provision

The Federal Labour Court (BAG) gives effect to the termination. A limited employment can principally only then be terminated ordinarily if this has been agreed in the individual contract or in the tariff agreement. The Federal Labour Court (BAG) deemed the last formulation of § 2, i.e. that the statutory period of notice applies following the end of the probationary period, unambiguous. The parties had hereby expressly regulated for this individual contract the ordinary terminability of the limited employment. Furthermore, this agreement of the parties concerning the ordinary terminability of the employment does not become unclear and incomprehensible due to the gap in the sentence of the previous provision in § 2, i.e. the lack of a period set for the termination. If the parties refrained from filling in the empty space and if they did not fill in a period for the termination, then it cannot be derived from this that they did not intend not to agree upon an ordinary terminability of the limited employment subsequent to the time following the probationary period.

Practical considerations

Once again the ruling of the Federal Labour Court (BAG) makes clear how important it is to agree to unequivocal contractual provisions in the context of the employment. In many cases

unclear formulations in the contract of employment are at the expense of the employer. In the present case the Federal Labour Court (BAG) though quite correctly assessed the agreements met in the contract of employment in favour of the employer as clear and comprehensible. The employer as well as the employee can, however, avoid legal action if they agree to clear and unequivocal contractual provisions. In a standard form employment contract with gaps for any written insertions it makes sense to fill the respective gaps or to cross out non-applicable provisions in order to produce a clear and unequivocal regulatory situation.

Johanna Westermeyer

E. COMMERCIAL LANDLORD AND TENANT LAW

I Non-apportionable costs for the "Centre Management"

In its judgement of August 3, 2011 (XII ZR 205/09) the Federal Court of Justice (BGH) has ruled that a form clause is ineffective which imposes unspecified costs of the "Centre Management" on the tenant of a shop located in a shopping centre as incidental costs in addition to the costs of the "Administration".

The commercial lease the judgement of the Federal Court of Justice (BGH) is based on included the following (additional costs) clause:

"All additional costs of the shopping centre, especially all costs of operating and maintaining the technical facilities are to be proportionally borne by the tenant. These are especially the costs for (in extracts):

h) facility manager, staff, centre manager and administration;

r) space expenses for offices, administration offices and engineering rooms as well as common facilities, common rooms, customer toilets, etc. on the basis of local rents including the thereof proportionately accruing additional costs.""

Missing contractual definition of the "Centre Manager"

A limitation of the costs for the "Centre Management" in terms of the amount or a description of the activities of the "Centre Manager" was not included in the lease.

No sufficiently determined relation between the "centre Management" and the "Costs of Administration"Agreement

The Federal Court of Justice (BGH) deemed the terms "Centre Management" or "Centre Manager" in the aforementioned clause insufficiently specified and, thus, pursuant to § 307 Sec. 1 Civil Code (BGB) ineffective. The term "Centre Management" lacks sufficient transparency, given that it does not become evident which costs are included by the "Centre Management" or which services in terms of content should concern the "Centre Manager". Especially since the tenant has, apart from the costs of the "Centre Management" also to bear the "costs for administration" as well as the "space expenses for offices and administration rooms", it does not become apparent which other costs are categorized under the term "Centre Manager".

Practical considerations

In its judgement of December 9, 2009 (XII ZR 109/08 – for further reference see our Newsletter 1/2010, pp.6) the Federal Court of Justice (BGH) deemed the standard form apportionment of "costs for the commercial and technical property management" valid. The standard form apportionment of the "costs of the centre management", is, however, deemed ineffective by the Federal Court of Justice (BGH). The contracting parties should, therefore, either in the lease itself or in an addendum to the lease, specify which measures of the services of the centre management are com-

prised (for example, tenant support/services, centre concept, etc.). Moreover, it is recommendable to limit the "costs for the centre management" in terms of the amount (for example, 4% of the rent).

Dr. Rainer Burbulla

II Infringement of written form requirements in case of contradictory information in the lease concerning the contract period

In its judgement of June 7, 2011 (9 U 213/10) the Higher Regional Court (OLG) Naumburg ruled that the written form requirement is not complied with if the lease includes various (contradictory) provisions about essential contents.

Contradiction between active enforcement of a right of option and automatic (tacit) exercise of option

In the subject matter the judgement is based on the parties are in dispute about the effectiveness of a notice of termination expressed by the tenant because of an infringement of the written form requirement. The tenant ascribes this to the fact that the lease includes contradictory information concerning the extension of contract due to the exercise of option. While § 12 of the lease provides that the lease has a period of contract of 15 years and that the tenant is entitled to 3 rights of option concerning the extension of contract by 5 years respectively, which the tenant has to exercise at least 12 months prior to the expiry of the contract period, it says in addendum 1 of the lease, that the tenancy is definitely concluded for 15 years and will be extended by 5 years respectively if the tenant does not cancel the lease 12 months prior to the end of the rental period at the latest.

Contradiction between contract text and contract addendum

The Higher Regional Court (OLG) Naumburg affirms an infringement of the written form requirement and decisively explains that the lease allows two different objective interpretations of the contract extension. According to the provisions in the lease the contract extension requires the express "active" assertion of the right of option, whereas addendum 1 provides a tacit "automatic" exercise of option. Since the lease does not include any information regulating the priority of the provisions in the lease as well as in addendum 1, the contractual document does not provide any indications for the one or the other interpretation. In this case the lease does not satisfy the written from requirement of § 550 Sent. 1 Civil Code (BGB) (comp. also Higher Regional Court (OLG) Rostock, Journal for Rental and Housing Law (NZM) 2001, 426, 427) because of contradictions of essential terms and conditions of contract.

Practical considerations

The contracting parties should practise due diligence when providing information about the period in the contractual document if they use pre-printed standard form contracts. No contradictory information should be given. In case that, for example, passages in a standard lease concerning the contract period are not crossed out or gaps are not filled or if the contracting parties agree upon deviating provisions in the addendum to the lease, this could then, for example, regulate a specific as well as an unspecific period. The consequence of this is that the lease then does not comply with the written form requirement and can thus be terminated ahead of time.

Dr. Rainer Burbulla

F. Public Law

Procedural Law Associational claims instituted by environ-mental associations

I European Court of Justice (EuGH) associational claims instituted by environmental associations

In its judgement of May 12, 2011 (C-115/09) the European Court of Justice (EuGH) has significantly strengthened the associational claims instituted by environmental associations in Germany.

Originally German Law did not know associational claims. In Germany the right to take legal action was only granted to natural or legal persons, as long as their own rights were concerned (so-called right to bring an action).

Originally associational claims in Germany

It was not until 2006 that due to European law requirements (Art. 10 of the directive RL 85/337 European Economic Community (EWG)) that a right of associational claims was introduced for acknowledged environmental associations (§ 2 of the Act concerning Supplemental Provisions on Appeals in Environmental Matters of December 7, 2006) According to this regulation not only individuals involved, but also acknowledged environmental associations can file a suit in case of specific environmentally relevant decisions (in particular development plans, planning approval decisions, permissions, amongst others). The German legislator, however, had restricted this power of associational claims considerably. An associational claim instituted by an environmental association could have only been based on the violation of regulations, which in fact also justify the rights of individuals. Many essential regulations of the environmental law do not specifically serve the protection of the individual, but are primarily designed to protect the concerns of the general public.

Since 2006 a strongly limited right of associational claims

In its judgement the European Court of Justice (EuGH) stated that the German legislation with respect to the right of associational claim violates European law.

European Court of Justice (EuGH): Associational claim even with respect to generally protecting norms

According to the European Court of Justice (EuGH) European law requires a right of associational claims for environmental associations with which particularly the infringement of regulations serving primarily the general public and not the individual can be claimed.

In the very same judgement the European Court of Justice (EuGH) ruled that a corresponding further right of associational claim of environmental associations results directly from Art. 10a of the directive 85/337 for lack of orderly implementation of European law requirements in Germany. This means that renowned environmental associations in Germany can base associational claims also on the infringement of general regulations of the environmental law.

Right to claim under directive even without national implementation

The "tame tiger" associational claim will now subsequent to the ruling of the European Court of Justice (EuGH) also be a substantial risk for claims in Germany, a fact that should be taken into account when the planning environmentally relevant projects. As a result environmental issues might now have more relevance than before when such projects will be planned and approved. The prevention of associational claims could then require additional time and money for the examination of aspects related to environmental law when planning respective projects.

Practical Considerations

Niklas Langguth

II Cordon Sanitaire for incident-prone facilities

In its judgement of September 15, 2011 (RS.C-35/10 "Müksch") the European Court of Justice (EuGH) ruled that local authorities have to verify when approving development projects whether the project has an appropriate distance to so-called incident-prone facilities.

Incident-prone facilities are special industrial locations at which hazardous substances are dealt with (such as chemical facility sites) or which pose further considerable risks. For such premises the regulations under EU-law provide that development projects in need of protection have to keep an appropriate distance (so-called principle of separation, Art. 12 of the Seveso II Directive).

Principle of separation under European law

Until now: Consideration in urban land-use planning

In Germany this regulation has only been implemented in planning law, especially in urban land-use planning. Many projects in Germany, however, are materialized in the so-called unplanned inner or outer area. There is then no development plan in which the principle of separation could have already been considered.

Verification in the proceedings on granting building permissions

The European Court of Justice (EuGH) has now ruled that in these cases the principle of separation has to be reviewed in the proceedings of granting building permission. The authority has then to make a weighing-up decision by taking into account a number of factors. The necessary weighing-up decision can delay building projects and require supplementary expert opinions. The wording of the ruling is not yet available and the particulars of the weighing-up decisions have to be taken from the detailed judgement.

Practical Considerations

It remains to be seen in how far this decision will be implemented by German courts or, if necessary, by the legislator. Until then one should be careful with (former) industrial locations if these are close to incident-prone facilities. In future, one has to check the environment even more carefully when acquiring such locations.

Niklas Langguth

III Catalan regulations concerning the restriction of the large-scale retail trade violates EU law

Land-use planning versus right of establishment

In its judgement of March 24, 2011 (C-400/08) the European Court of Justice (EuGH) ruled that binding objectives of land-use planning for the large-scale retail trade could violate the guaranteed right of establishment under EU law (Newsletter 2/2011, p.3).

Regulations in Catalonia/ Spain

The ruling affects legal regulations in Catalonia concerning planning law and concerning commercial law for the large-scale retail trade. The subject matter of the ruling was, among others, a regulation according to which it was only permitted to plan large-scale retail trade projects in municipalities exceeding a certain threshold value of inhabitants. The height of the threshold of inhabitants was scaled according to the size of the sales areas.

Inhabitant-related scale of sales area

In its landmark judgement the European Court of Justice (EuGH) ruled that the restrictions of the choice of location for large-scale retail projects limit the right of establishment guaranteed under EU law (Art. 52 European Community (EG)). Such restrictions are only admissible if they are justified by appropriate and compelling reasons.

No evidence of appropriate and compelling reasons.

In the case ruled by the European Court of Justice (EuGH) the Kingdom of Spain was not able to provide appropriate and compelling reasons in case of several of the regulations objected to. The European Court of Justice (EuGH), therefore, found several infringements of the right of establishment.

Comparable questions in Germany

This question of EU law also arises in Germany. With a reminder of 2009, the EU Commission introduced a preliminary legislative procedure, which has not yet been concluded. Regardless of the preliminary legal procedure of the Commission, the German courts have to respect already now the decision of the European Court of Justice (EuGH) concerning the right of establishment and have to review the justification under EU law of German objectives of regional planning.

Practical Considerations

It can be expected that German courts will address respective questions of reference to the European Court of Justice (EuGH) provided that the decision of the European Court of Justice

(EuGH) cannot necessarily be applied to the German regulations. Hence the German regulations concerning the large-scale retail trade are on trial.

Niklas Langguth

IV Headwind for retail trade settlements: Claims for participation of the citizens

Referenda Siegburg, Weil am Rhein, Kaiserslautern

In the daily press news items are becoming more frequent: The citizens want to have their say concerning retail trade settlements. In Siegburg in September 2010 a referendum meant the end of plans for a large shopping centre of 16,000 m2, in Weil am Rhein in July 2011 the plans for a settlement of 20,000 m2 were defeated. In Kaiserslautern on October 23, 2011 the decision had to be made about the sale of several municipal plots of land to enable the settlement of a shopping centre of approximately 23,000 m2 – the citizens of Kaiserslautern voted in favour of the sale of the plots of land and hence in favour of the realisation of the project "New City Centre".

St. Peter/High Black Forest

The Higher Administrative Court (VGH) Mannheim recently had to decide on the admissibility of a referendum in the community of St. Peter in the High Black Forest region. At the end of 2010 the "citizens' initiative lively city centre St. Peter" submitted a referendum posing the question: "Are you in favour of the fact that the Doldenmatten are not intended for a grocery store?" The topic is the relocation of a grocery store from the village centre to the outskirts of the village.

Municipality: Conflict with the decision-making power of the local council

The referendum was rejected by the community because it was inadmissible as the referendum aims at the anticipation of a weighing-up decision concerning the use of a plot of land under construction planning law. This contrasts with the legislative intent to leave weighing-up decision concerning urban land-use planning to the local council as the main body of the community.

Difference between urban land-use planning and fundamental decisions as to the development of a municipality

Neither the Administrative Court (VG) Freiburg (judgement of May 11, 2011 – 5 K 764/11) nor the Higher Administrative Court (VGH) Mannheim (judgement of June 27, 2011 – 1 S 1509/11) have adopted this view. The referendum does, in fact, relate to the urban land-use planning which, according to the municipal code, is not competent of a referendum, because the complex weighing-up processes in the context of such a procedure cannot be reduced to a "yes-no-question". Something different, however, applies to fundamental decisions concerning the development of the municipality in the run-up to a procedure under construction planning law. Indeed, the question whether the municipality admits a retail trade settlement in a specific area is primarily a political decision. In this case the citizen has to decide for him-/herself whether he/she is in favour of or against the planning so that a referendum will be possible.

The way for the implementation of a referendum was, therefore, free. The die was cast on October 9, 2011: with a clear majority in favour of the new supermarket at the edge of the village.

Practical Considerations

In case of settlement plans the responsible citizen may not be left out of sight. He/She must be won over for the respective project, otherwise the project will easily run out of breath as we have shown. It can be considered in the individual case to push a referendum at an early stage in order to have an influence on posing the question. The posing of the question can be decisive for the outcome of the referendum: The questions "Are you in favour of the demolition of the town hall?" / "Are you in favour of the sale of municipal plots of land?" might in case of doubt evoke other answers such as, for example, the question "Are you in favour of an upgrading of the city centre by a further use of the empty Karstadt building?"

Isabel Gundlach

V Authority for the application of a judicial review in case of a conceptual context

Collision between the urban land-use planning of neighbouring municipality areas

It occurs again and again that municipalities in the context of their urban land-use planning make the development of one area of the municipality dependent on the (non-) development of another area of municipality. In many cases this has to do with the development of the retail trade: The retail trade should be focused on one specific area, whereas the further development of the retail trade is either restricted in another area, if not excluded altogether. Actually this not rarely manifests openly at least between the lines that the promotion of one location depends on the downgrading of the zone of another area or vice versa.

No attention to impacts on other areas of validity

In order to be able to successfully refuse to accept a development plan on the basis of a judicial review, it is a prerequisite that the applicant is directly affected by the development plan.

This principally requires that the applicant or his/her property are integrated into the area of validity of the development plan to be attacked.

Exceptions in case of "narrow conceptual connection between the planning areas"

In a most recent ruling (judgement of June 16, 2011 – 4 CN 1.10) the Federal Administrative Court (BVerwG) again stated, with this in mind, that the planning municipality is principally allowed to disregard such impacts which will only be directly realised in other, as a rule later planning with another area of validity. An exception to the principle, however, applies if there is a close conceptual connection between the planning areas to which the municipality recognizably refers and which forms the basis of their weighing-up in the preceding "first" planning area. Subject to these conditions, the landowners (in the second planning area) who are affected later are already entitled to file a petition in the judicial review procedure against the preceding first development plan according to the Federal Administrative Court (BVerwG).

Practical Considerations

The Federal Administrative Court (BVerwG) has strengthened the defensive rights of those owners who will be affected by a staggered planning of the municipality. The planning concepts of the municipality for the location should, therefore, be kept an eye on. If it becomes obvious that the municipality intends to proceed in a staggering manner, it may be necessary to already proceed against the first development plan in order to continue to strengthen and secure one's own weighing-up position in the second development plan procedure.

Isabel Gundlach

G. CONDUCTING CIVIL PROCEDURE

I Procedural rights when seeking assistance of a private expert

The role of the private expert in construction lawsuits

Especially in construction lawsuits the outcome of legal proceedings not rarely depends on the expert assessment made by an expert appointed by the court. In order to adequately prepare a lawsuit under construction law, the parties regularly consult an expert, i.e. a private expert, of their choice either prior to the lawsuit or in order to accompany it.

Preparation of the party in view of court-appointed experts

If the court-appointed expert has submitted his/her expert opinion, the parties are entitled to give their view within a period regularly specified by the court. In judicial practice the parties often consult a private expert in order to prepare this statement.

In the subject matter the ruling of the Higher Regional Court (OLG) of Karlsruhe of March 11, 2011 (9 W 7/11) is based on, a party requested to adjourn a discussion meeting with the court-

appointed expert, because the private expert they engaged was temporally not available. The (first instance) regional court (LG) refused to adjourn the day of the court hearing. The plaintiff, supported by the private expert, filed a challenge on the grounds of bias against the judge of the regional court, who sat alone.

Adequate change of the court hearing date for guaranteeing an adequate preparation period with the private expert

The Higher Regional Court (OLG) proved the plaintiff right. A change of the court hearing date does indeed presuppose substantial grounds pursuant to § 227 Code of Civil Procedure (ZPO). But refusing a change of the court hearing date as such does not justify the accusation of bias. However it represents a material reason that a party (in this case: the plaintiff) is able to assert those procedural rights it is entitled to – being able to pose sufficient questions to the court expert – as well as being able to assert its position in the oral hearing in an adequate manner. If such a material reason exists the court undertakes to adjourn the date of hearing.

Bias of the court in case of non-consideration of the interest of the party worth to be protected to have some preparation time with the private expert.

Since there was a considerable divergence between the statements of the court-appointed expert and the statements of the private expert and since the lawsuit was of a substantial significance for the plaintiff, especially considering the damage asserted, the plaintiff had – according to the Higher Regional Court (OLG) – an interest worth to be protected that he was able on of the date of the court hearing to pose adequate questions to the court-appointed expert and to assess his/her answers. The respective lawsuit was about medical specialized knowledge, which was impossible for the plaintiff to assess sufficiently without his/her private expert. Since the Regional Court (LG) refused to change the date of the court hearing, the challenge on the grounds of bias was justified according to the Higher Regional Court (OLG) Karlsruhe (Higher Regional Court (OLG) Karlsruhe, ruling of March 11, 2011 – 9 W 7/11).

Practical Considerations

Rule of the right to be heard even in case of the preparation of appointments

Concerning the question whether it is necessary to summon an expert to orally explain the expert opinion provided by him, it is irrelevant according to consistent case-law (comp. Federal Court of Justice (BGH), VI ZR 167/06, Online Journal for Real Estate and Building Law (IBR) 2007, 717) whether the court still assumes a need for explanation or whether such a need for explanation has been comprehensibly presented by a party. In order to guarantee the right of being heard according to § 397, 402 Code of Civil Procedure (ZPO) a party is entitled to submit those questions for oral answer to the expert which it considers necessary for clarifying the subject matter. It can not be expected from a party filing an application to summon the expert that the party has formulated in detail beforehand those questions intended to be addressed to the expert. It is sufficient if the party generally specifies in which direction it wants to bring about clarification by means of questions relevant for a decision (Federal Court of Justice (BGH), IBR 2006, 706).

Ralf-Thomas Wittmann

II International competence for legal actions against resolutions of the general meeting of partners of a limited with its administrative headquarters in Germany

Legal practice and court rulings have to deal ever more often with cases across borders. The Federal Court of Justice (BGH) had to rule in its judgement of July 12, 2011 (III ZR 28/10) whether the German courts are competent for disputes among partners of a Private Limited Company (Ltd.) under the law of the United Kingdom with its registered legal office in England and its actual administrative headquarters in Germany.

The Federal Court of Justice (BGH) has answered in the negative in spite of the regulations of the partnership agreement because of the exclusive competence of the English courts.

Disputes concerning the replacement of a body according to Art. 22 No. 2 Sent. 2 EC Regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (EuGVVO) not in Germany

In the respective case a partner of an (English) Limited objected to a partners' resolution with respect to his replacement as director and to the position of another – sole – director. The action for annulment of the director, who was relieved form office, was deemed inadmissible by the Federal Court of Justice (BGH). Art. 22 No. 2 Sent. 2 EC Regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (EuGVVO) (EC Regulation No. 44/2001 – "Regulation of the council on court competence and the recognition and enforcement of rulings in civil matters" of December 22, 2000, in force since March 1, 2002) leads according to the Federal Court of Justice (BGH) to an exclusive competence of the courts of the United Kingdom.

Principle: Seat-of-management theory, but incorporation theory in case of EU partnerships

The decision continues considerations of former decisions of the Federal Court of Justice (BGH) and the European Court of Justice (EuGH), among others the decision "Inspire Art": Pursuant to this the so-called seat-of-management theory principally continues to exist in Germany (i.e. competence according to the registered office of the partnership). However, for overseas partnerships founded in a member state of the EU the so-called incorporation theory has to be applied. This does not even depend on the fact "whether a connection in economic terms to the state of founding (genuine link) going beyond the mere fact of being registered exists. The international private law applicable in case of a dispute follows the rules of the incorporation theory. According Art. 22 No. 2 Sent. 2 EC Regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (EuGVVO) this results in the competence of the decisive registered office of the plaintiff: Registered office, according to the incorporation theory, is principally the registered office existing in the country of origin. This results in the exclusive competence of the courts of the state of foundation (also called state of origin). The legal action before the German courts was inadmissible.

Practical Considerations

Advantages and risks of using an English Private Limited Company in Germany are not undisputed. The German legislator has tried to enable low-threshold types of companies under German law with the simplified foundation of a private limited company (GmbH) and the admission of a limited liability entrepreneurial company (UG). The case decided by the Federal Court of Justice (BGH) clearly shows that the obstacles, however, are high in case of legal disputes in a private limited company. In future entrepreneurs have to take this into account when planning a company.

Dr. Detlef Brümmer

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Dates

26 January 2012 **8 a.m**	Breakfast on labour law with partners from the human resources management in our law firm Presentation: Düsseldorf, Königsallee 53 – 55 Referee: Dr. Johannes Grooterhorst, lawyer, partner, Grooterhorst & Partner, Lawyers
26 January 2012 **all day event**	Heuer expert dialogue Revitalizing Shopping Centres Referee: Dr. Johannes Grooterhorst, lawyer, partner, Grooterhorst & Partner, Lawyers

In case you are interested to participate in one of these events, please contact the respective referee: www.grooterhorst.de