20 YEARS LAW FIRM GROOTERHORST & PARTNER

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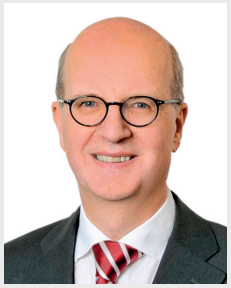

Dear readers,

Legal development relating to D&O liability gains more and more in practical importance. Our law firm contributes intensively to this development. Current rulings demonstrate this.

As far as other areas of work of our law firm are concerned, we report – in the context of new rulings - on stock corporation law and foundation law, on real estate law and commercial landlord and tenant law. Important rulings were also made for citizens and entre-preneurs in the Local Rates Act (development costs) and concerning the weighing up of pros and cons of urban land-use plan-ning. New rulings were also de-livered with respect to insurance law and labour law.

As usual, I wish you some stimu-lating reading.

In gratitude for decades of your staunch support

Yours
Dr. Johannes Grooterhorst

A. Current News

Developments in D&O insurance law – Assignment prohibition (§ 108 Insurance Contract Act (VVG)) in case of right to exemption

In the near future the Federal Supreme Court (BGH) (IV ZR 304/13) will decide on the appeal against rulings of the OLG Düsseldorf: In its rul-ings of July 12, 2013 (4 U 149/11) and of January 1, 2014 (4 U 176/11) the OLG has ruled that an assignment prohibition as set forth in § 108 Sec. 2 Insurance Contract Act (VVG) can be ruled out by means of an individual agreement between the insurer and the insurance holder and – generally speaking – towards any other persons.

1. The initial situation:

In recent times, the number of cases of damage in the area of D&O insurance has strongly increased (for more details, please refer to FAZ of March 11, 2015). The amounts of damage declared are also getting higher and higher.

The (recent) development in this area, i.e. that hardly any cases of damage are regulated by an out-of-court settlement, is of particular im-portance for executive bodies affected (members of the management board, members of the supervisory board, managing directors of a pri-vate limited company). Court proceedings are almost always necessary.

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In doing so, it has to be taken into consideration that the aggrieved company is not entitled to any direct claim against the D&O insurer. If the D&O insurer rejects an out-of-court settlement, the company at first has to make claims against the member of the executive body. Following a conviction of the executive board member, it can then demand exemption from the D&O insurance company.

A judicial dispute between an executive body member and the aggrieved party, which often last several years, poses in most cases a substantial burden on the relationship between the company and the member of the executive body, especially if the member of the executive body affected is still active for the company. In order to mitigate these negative side effects, it is sometimes considered whether the member of the executive body affected should assign his/her existing right to redemption to the aggrieved company. The latter could then take immediate legal action against the insurance company. The member of the executive body would hardly be involved in the legal dispute (any longer). Legal proceedings would rule on the claims for damages of the company as well as on the duty to assume liability of the D&O insurer.

2. Assignment of the direct claim

Company law versus insurance law – burden of explanation and proof

In case of assigning the right to exemption the question arises as to who bears the burden of explanation and proof concerning claims for damages in the event of a direct claim. As far as company law is concerned ((§§ 93 Sec. 2, 116 Stock Corporation Act (AktG), 43 Sec. 2 Private Limited Companies Act (GmbHG)) the aggrieved company only has to explain and prove the possibility of a breach of duty and the coming into being of some causal damage. The member of the executive body, in return, has to provide evidence that he/she has neither acted in breach of duty nor in a culpable manner. This thus implies a substantial facilitation regarding the burden of explanation and proof for the company. The underlying idea is that the member of the executive body is generally more familiar with the facts than the company. Actually the member of the executive body was involved in the facts allegedly causing the damage.

In contrast, the principle applies in insurance law that the insurance holder is obliged to produce an explanation and proof concerning the existence of an insurance case. The existence of an insurance case particularly covers the existence of a claim for damages of the company against its member of the executive body.

If, in fact, the burden of explanation and proof of the insurance law were to be applicable, the assignment of the right to exemption would have considerable consequences for the company. For in that case the company would have to explain and prove all factual preconditions of the claim for damages.

Contractual distribution of the burden of explanation and proof?

Concluding some contractual distribution of the burden of explanation and proof could be a possible solution. However, the insurance company would have to approve such an agreement, too. The insurer could include such an approval in its General Terms and Conditions of Insurance or grant it in the individual case. In fact, this question would have to be clarified

with the D&O insurer prior to any assignment so that the aggrieved company does not run the risk of losing the legal proceedings for reasons of a burden of explanation and proof that is unfavourable to the latter.

3. Problems of the statute of limitation

It is equally unclear as to which statute of limitation applies to the right to exemption assigned. On the one hand the general rules on limitation (§§ 195 following German Civil Code (BGB)) may be taken into consideration which also apply in insurance law and which provide a principle statute of limitation of three years. On the other hand it would also be an option to apply the special provision under the Stock Corporation Act of §§ 93 Sec. 6 Stock Corporation Act (AktG), 43 Sec. 4 Private Limited Companies Act (GmbHG) which provide a period of limitation of at least five years.

Against this background the safe way is to assert the right to exemption within three years subsequent to the occurrence of the claim for damages.

4. Issues relating to the competence of the executive body

It would also be a question as to which executive body is competent to file and bring about a direct legal action.

Stock Corporation Law/ Private Limited Companies Law – Com-petence of the supervisory board

In case of a public limited company (AG) the supervisory board represents the public limited company (AG) pursuant to § 112 Stock Corporation Act when a claim for damages against a member of the management board is involved. As far as the private limited company is concerned, the shareholders are the legal representatives of the company if a claim for damages is asserted against a managing director. The competence of the supervisory board or of the shareholders respectively does not only exist with respect to current members of the management board, but also with respect to former board members. Extending the competence of the supervisory board is justified by the fact that there might also be some inappropriate solidarity between current and former management board members or managing directors respectively.

If the right to exemption is assigned to the aggrieved party, the company asserts the coverage claims against the insurer. It is thus considered that the management board pursuant to § 78 Stock Corporation Act (AktG) is then competent to assert that claim.

5. Collision of interests within the board of management

When asserting a direct claim resulting from a right assigned a collision of interest may, in fact, exist. Actually, as far as the content is concerned this legal action also deals in most parts with the dutiful behaviour of the member of the executive body member affected.

For that reason the supervisory board of the shareholders or the private limited company respectively should represent the company in case of a direct legal action.

6. Consequences of a failure of a direct legal action

Legal doubts also arise if the direct legal action fails or is in danger of failing. When dismissing the action – either for legal reasons of coverage or of liability – the company is generally interested in now asserting the claim against its member of the executive body.

Interim declaratory action

a) If the company is concerned about the fact that its direct action is dismissed for legal reasons of coverage (because the member of the executive body acted, for example, with intent and thus no insurance cover existed for that reason), the company could file an interim declaratory action already in the context of the direct action so that it can be legally established that there is an entitlement to the liability claim. In order for this ascertainment to also have a binding effect concerning the member of the executive body, a third-party notice towards the member of the executive body can be taken into consideration. In doing so, however, the member of the executive body would again be involved in the court proceedings; as a rule it is exactly this condition that should be avoided by means of the assignment.

Scope of the insurance cover of the D&O insurance

b) Equally unclear is the question in how far the member of the executive body can also claim coverage of the D&O insurance if subsequent to an unsuccessful direct action of the company the company itself brings claims against him/her.

In this case the following has to be taken into account: The D&O insurance has two components: a defence component with respect to unjustified claims, and an exemption component with respect to the justified claims

Defence component and exemption component

In the context of the direct action the exemption claim is finally ruled on. If the member of the executive body is convicted to payment in the subsequent legal proceedings, he/she can, therefore, no longer demand to be exempted by the D&O insurance. The member of the executive body, therefore, has to pay the damage him-/herself. If the member of the executive body does not have sufficient financial means, the claim for damages of the company is factually devoid of purpose.

A somewhat different result in the direct action and the subsequent judicial recourse against the member of the executive body can occur in particular if – as already explained – the distribution of the burden of proof differs in both legal proceedings.

Possible loss of the defence component in case of assignment

c) And, if nothing else, the question as to whether the defence component gets lost in case of an assignment has not yet been clarified in court. If that were the case, the member of the executive body would have to finance his/her own legal proceedings entirely on his/her own. Furthermore, the member of the executive body would only receive a partial reimbursement of his/her lawyer's costs when winning the legal proceedings, because the procedural claim for the reimbursement of costs only covers the legal fees, but not some billing according to an hourly rate, as is common practice in the D&O area – due to the complexity and the scope of the facts.

Waiver after 3 years pursuant to § 93 Sec. 4 Stock Corporation Act (AktG)

d) In order to rule out the risk of a subsequent claim the company and the member of the executive body could also agree that all claims of the company against the member of the executive body are satisfied by assigning the right to exemption (so-called "assignment in lieu of fulfilment").

As far as such an assignment is concerned, it is important, however, to note in stock corporation law that according to § 93 Sec. 4 Stock Corporation Act (AktG) the company can waive the claim for damages not earlier than three years following the occurrence.

If a member of an executive body behaves contrary to duty, asserting claims for damages frequently puts considerable strain on the relationship between the company and the member of the executive body. Especially if the member of the executive body continues his/her business activity, the assignment of the right to exemption can be a reasonable option. In doing so, however – particularly because of the uncertain status of court rulings – the aforementioned aspects have to be considered so that the assignment is of benefit to all parties involved.

Practical considerations

Dr. Johannes Grooterhorst

B. Commercial and Company Law

I. Company Law – Stock Corporation Law: Dismissal of a member of the management board

In its ruling of February 17, 2015 (5 U 111/14) the OLG Frankfurt has declared the dismissal of the management board for reasons of public communication as unlawful.

Public communication: Changes even on the management board level

The plaintiff was member of the management board of the defendant. In 2013 the defendant decided on a comprehensive concept of staff reduction, which was intended to be implemented by December 31, 2016. In order to communicate to the public that staff reduction would not spare the board of management either, the plaintiff was, therefore, dismissed from his management board position at the end of 2013. A termination of the employment contract did not take place. The plaintiff filed a suit against that dismissal and applied for determining by court that is was invalid to revoke the appointment of the plaintiff as member of the board of management.

Jörg Looman
Rechtsanwalt

This action was successful before the Landgericht and before the OLG.

Options of revocation pursuant to § 84 Sec. 2 Stock Corporation Act(AktG)

Pursuant to § 84 Sec. 2 Stock Corporation Act (AktG) the supervisory board is entitled to revoke the appointment of a board member for good cause. Such good cause particularly applies in the event of some gross breach of duty, the inability of orderly management or due to the withdrawal of confidence by the general meeting, unless confidence was withdrawn for obviously unfounded reasons.

Good cause

Moreover, good cause can exist if the continuation of the relationship of the member of the executive body until the orderly termination of the term of office is unacceptable for the company. In such case the circumstances of the individual case are relevant: It is necessary to weigh up the interests of the company and those of the board member. In doing so, it has to be taken into consideration that the supervisory board is not entitled to any margin of judgement with respect to the question whether any good cause applies, which is not open to any judicial review, but that this issue has to be subject to full judicial review.

Weighing up a valid viable general concept and the intended mere communication effect

The OLG stated in its ruling that changes in the structure of the company or in the board of management principally represented good cause. However, for this purpose a viable general concept had to be submitted. By contrast, good cause did not apply if the dismissal had only been made in order to be able to achieve a communicative success in public relations.

In doing so, particular consideration had to be taken that no termination of the employment contract had been effected, so that the company was under an obligation to pay the plaintiff the salary for the remaining two years of his employment without there being any need on the part of the plaintiff to perform any work in return.

Practical considerations

The ruling reveals that courts take the review seriously as to whether good cause applies for dismissing a board member. Therefore it is important that - in case of a dismissal not founded in the person of the board member itself - a coherent and comprehensible general concept is made available.

Jörg Looman

II. Foundation Law – Conversion of a dependent foundation into an independent foundation

In its ruling of January 22, 2015 (III ZR 434/13) the Federal Supreme Court (BGH) has ruled that a (co-) founder of a dependent foundation was entitled to a claim against the trustee for issuing a declaration of intent for the purpose of converting the dependent foundation into an independent one, only if it had been expressly provided for in the trustee contract or in the foundation articles.

Dependent family cultural foundation with trustee – request made to the trustee to convert the dependent foundation into an independent one

Dr. Moritz Ulrich
Rechtsanwalt

The plaintiff and his mother were founders of a dependent foundation. The defendant, the brother of the plaintiff, was trustee of this dependent foundation. The dependent foundation created by the plaintiff and his mother by means of a "foundation business for the creation of a dependent foundation in trust (hereinafter referred to as: "trustee contract") served the purpose to promote art and culture, in particular by maintaining, preserving and conserving the art work of a particular painter, i.e. the grandfather of the plaintiff and the defendant. In the trustee contract the trustee is given task to convert the dependent foundation into an independent one as soon as there was sufficient foundation capital. Both the plaintiff and the defendant were members of the foundation council of the dependent foundation. The articles of the dependent foundation included further regulations specifying the characteristics the persons who formed part of the foundation council should bring to that position. When the foundation assets had accumulated to a sufficient amount, the foundation council decided that the trustee should be summoned to initiate the conversion of the existing dependent foundation into an independent foundation as provided for by the trustee contract and to take all necessary steps for that (e.g. submitting the declaration of foundation, transfer of the foundation assets pursuant to §§ 80 ff German Civil Code (BGB)). At the same time the trustee was instructed to commission an expert in foundation law appointed by name with drawing up the articles, including the foundation business for the independent foundation intended to be newly formed. After the defendant not having responded to that request, the plaintiff himself commissioned the expert in foundation law. The competent ministry wrote that the draft versions of the articles and the foundation business fulfilled the statutory requirements for the recognition of the legal capacity of the foundation. The competent tax office, too, did not express any doubts about the recognition of the non-profit status.

Action for issuing the declaration of intent regarding conversion

The plaintiff intended with the action to oblige the defendant to issue all declarations required for the legal independence of the dependent foundation, to particularly sign the foundation business and to submit it to the foundation supervisory authority for the purpose of recogniti-

on. The Landgericht dismissed the case. In consequence to the appeal of the plaintiff the OLG convicted the defendant in accordance with the request. An appeal made by the defendant to the Federal Supreme Court (BGH) was successful.

No sufficiently specific instructions in the trustee contract or in the articles regarding the content of the foundation business con-cerning "conversion"

The Federal Supreme Court (BGH) has stated that neither the trustee contract, in which the duty of the trustee to form an independent foundation was basically regulated, nor the articles of the dependent foundation attached to that contract included sufficiently specific instructions concerning the content of the foundation business of the subsequent independent foundation, the wording of the foundation articles as well as the formation or the personnel composition of the foundation bodies. Even if it was, in fact, obvious that the foundation purpose of the independent foundation could not be essentially different from the purpose of the dependent company and even if the founder and co-founder of the dependent foundation should play an essential role in the independent foundation, it was not possible to understand from the defendant as far as the commissioning is concerned any further and required specification neither expressly nor in an implied manner by means of interpretation.

Practicial considerations

The ruling is interesting in several respects. On the one hand there do not seem to be any doubts to provide for a later conversion of a dependent foundation into an independent foundation already in the trustee contract. However, if this is the case, it should be sufficiently laid down right from the beginning what the foundation purpose of the later independent foundation is meant to be and who exactly the born members of the body are. On the other hand, the high importance attached to the founder's will – and his formulation – has once again been demonstrated.

Dr. Moritz Ulrich

C. Real Estate Law

Dr. Rainer Burbulla
Partner

I. Land Register Law – Right to inspection of construction companies for preparing the entry of a security mortgage for construction companies

In its ruling of February 9, 2015 (34 Wx 43/15) the OLG Munich has granted construction companies the right to inspect the land register: In order to secure claims of construction companies resulting from the building contract an inspection going beyond the inventory and section I can also be taken into consideration when weighing up the interests of the individual case, if the customer is no (longer) owner of the premises.

Claims resulting from constructions work – Application for issuing a temporary injunction for entering a security mortgage for construction companies

In the facts underlying the ruling a building contractor wanted to fully inspect the land register in order to prepare an application for issuing a temporary injunction for entering a security mortgage for construction companies. To justify that, he referred to a claim for compensation of work (construction work) of at least (about) 40.000,00 €. The land register only granted a land register excerpt comprising the inventory and section I. That indicated a change of ownership. The owner of the premises is a "R. Familien KG" and no longer "Ms R.". The land register did not provide any further information.

Legitimate interest also for economic reasons

The appeal of the building contractor made against this was successful. A legitimate interest to inspect the land register could also result from economic reasons. The creditor, who intended foreclosure in the real estate of his debtor, was therefore entitled to inspection. This

particularly applied to construction companies who could demand a security mortgage for their claims from their customer (§ 648 German Civil Code (BGB)). The security mortgage, however, principally presupposed the legal – not only the economic – identity between customer and owner of the premises. This was not the case, since ownership had changed ("R. Familien KG"" instead of "Ms R"). In order to assume a legitimate interest some understandable interest justified by the facts would, in fact, have been sufficient. That applied because the building contractor performed construction work for the former owner ("Ms R.") which had covered a period prior to the transfer of ownership as well as subsequent to it. For that reason it could not be ruled out that the new owner ("R. Familien KG") would be liable for obligations of the former owner.

Practical considerations

In order to secure any compensation for work and labour of a construction worker, the security mortgage for construction companies constitutes an appropriate means. Prior to applying for an entry of a security mortgage for construction companies, the land register should be inspected.

Dr. Rainer Burbulla

I. Private Building Law – Multi-level contract design – Damages with the beginning of the statute of limitation at an intermediate level

On October 14, 2014 (10 U 15/14) the OLG Stuttgart has ruled that a general planner could not assert any claims for damages against a sub-planner, if the general planner itself could not be sued for damages by the building owner because the statute of limitation of claims for the liability of defects coming into effect in the meantime.

Claims for fees of the subplanner against the general planner

The sub-planner asserted engineering fees amounting to approximately 38,500.00 for an industrial building. The defendant general planner had commissioned the sub-planner with the planning of the electrical engineering as well as with the technology in the area of heating/ventilation/sanitary.

planning deficiencies

The defendant offset against the claim for fees of the sub-planner with the argument that planning deficiencies had occurred concerning the heating system.

statute of limitation of the liability claims

The charge of planning deficiencies turned out to be justified because the heat output had not been sufficiently calculated. Nonetheless, the OLG sustained the action for the recovery of fees. The warranty claims of the building owner against the defendant for reasons of deficient planning services had become time-barred.

Ruling of the Federal Supreme Court (BGH) concerning the chain of performance

The OLG established a relation to the ruling of the Federal Supreme Court (BGH) concerning the chain of performance: If the subcontractor demanded compensation from its supplier for reasons of deficient work, although the general contractor did not claim anything from the subcontractor for that defect (and because it could not claim anything because of the statute of limitation), the subcontractor lost its right to claims for damages. In fact, by means of an adjustment of profit the subcontractor - who from an economic point of view was only an intermediate station – had to take into account that it did not suffer any loss of assets for lack of claim made by the general contractor (comp. Federal Supreme Court (BGH), GBGHZ 173, 83).

According to the opinion of the OLG Stuttgart this ruling of the Federal Supreme Court (BGH) was also applicable to the case of the sub-planner. Since it was clear that claims could no longer be made against the general planner for reasons of the statute of limitation of the building contract, it did not suffer from any damage from an economic point of view in spite of the defects of the work. For reasons of the duty to minimize damage the general contractor committed itself to the building owner to raise the plea of the statute of limitation.

No exclusion of invoking the statute of limitation because of "the honour of the architect"

An exceptional case in which it would not have been acceptable for the general planner to invoke the statute of limitation, for instance because the continuation of a long-term business relationship would have been at stake, was not apparent with respect to the matter in dispute. For this the mere wish of the general planner to have the defect remedied for reasons of its architectural honour would not have been sufficient.

Appeal

The OLG, in fact, admitted the appeal, since the legal issue it dealt with had not yet been ruled by a supreme court. The legal proceeding is still pending before the Federal Supreme Court (BGH) under the file number VII-ZR 276/14; a ruling is still to be delivered.

Practical considerations

The ruling of the Federal Supreme Court (BGH) has no influence on the statutory right to refuse work of the main contractor pursuant to § 641 Sec. 3 German Civil Code (BGB). The main contractor is, therefore, principally entitled to this right due to defects of the work of the subcontractor irrespective of whether or not it has promised or rendered the same work to its client or irrespective of whether or not the client him-/herself also asserts claims he/she is entitled to. In contrast to damages the ruling in this case aims at the fact that the right of refusing work is an expression of the functional mutuality between work and the compensation for work. In fact, in this case, too, the main contractor does not suffer from any financial loss due to the defect; in contrast to damages, that can be freely made use of, the remedy of defects, however, is finally of benefit for the client who suffers the burden of the defect. From a mirror-inverted point of view, the general contractor does not obtain any unjustified benefit by remedying the defect (OLG Stuttgart, ruling of October 14, 2014 – 10 U 15/14; Schmidt, in: Beck-Online Extended Comment, version of November 3, 2014, § 635 German Civil Code (BGB), marginal no. 83).

Ralf-Thomas Wittmann
Partner

Ralf-Thomas Wittmann

D. Commercial Landlord and Tenant Law

I. Rental agreement for business premises – Conclusion of con-tract – Incorrect designation of a contracting party

Decisiveness of the real will of all parties concluding the contract even in case of formal contracts

In its ruling of January 29, 2015 (IX ZR 279/13) the Federal Supreme Court (BGH) has decided that also for formal contracts, in case of an inadvertently incorrect designation of one contracting party, it was not the incorrectly stated that applied, but the real will of all parties concluding the contract was decisive. If accordingly a written rental agreement specified the two owners of the premises as landlords, the contract with a partnership under civil law formed by the owners and designated as the landlord did come into being, if that corresponded - on the occasion of the conclusion of contract - to the real will of all authorized representatives both on the part of the landlord as well as on the part of the tenant ("falsa demonstratio"). The written form requirement of § 550 Sent. 1 German Civil Code (BGB) was observed.

Rental agreement between persons or partnership under civil law

In the facts underlying the ruling the two brothers F.R. and H.R. are together with limited partners of the later insolvency debtor. Furthermore, all three are shareholders of a general partner in the form of a private limited company of the debtor. Until February 2010 the brothers F.R. and H.R. had jointly operated as managing directors; after that only H.R.. The brothers F.R. and H.R. were half owners of three commercially used properties. On January 2, 2009 they concluded as landlords a rental agreement for business premises with the debtor. Subsequent to the opening of insolvency proceedings the insolvency administrator terminated the rental agreement by the next possible date. The partnership under civil law – consisting of F.R. and H.R – sued (as landlord) for outstanding rental payments up to the commencement of the cancellation period as debts incumbent. The insolvency administrator invoked the fact that the landlord was not the civil-law partnership but F.R. and H.R.

In the context of interpreting the rental agreement the Federal Supreme Court (BGH) has concluded that the civil-law partnership had to be deemed landlord. The concordant will of the parties concluding the contract aimed (at that time) at the fact that the rental agreement should have come into force between the partnership under civil law and the debtor and not between the brothers and the debtor. The incorrect designation included in the rental agreement was, therefore, harmless. This so-called principle of "falsa demonstratio" also applied to formal legal transactions such as rental contracts. The (inadvertently) incorrect designation of the landlord in the rental agreement did not oppose the compliance with the written form (§ 550 Sent. 1 German Civil Code).

Practical considerations

(Even) rental agreements have to be interpreted according to the general rules (§§ 133, 157 German Civil Code (BGB)). As far as the content of the contract is concerned, the concordant will of the parties involved is decisive. In order to determine the will of the party it is also possible to consider circumstances outside the deed when interpreting it, if these are reflected (even if in an incomplete manner) in the written rental agreement. In doing so, it is not rare that "violations of the written form" can be remedied.

Dr. Rainer Burbulla

II. Landlord and Tenant Law – Residential premises – Content of contract: invalidity of renovation clauses and quota compensation clauses

Amendment of rulings

In its rulings of March 18, 2015 (VIII ZR 185/14; VIII ZR 242/13; VIII ZR 21/13) the Federal Supreme Court (BGH) has fundamentally amended its case law concerning renovation and quota compensation clauses.

In the cases ruled unrenovated apartments had been rented out. Subsequent to the termination of the tenancy the landlords asserted claims for compensation because of renovation work that had remained undone because the rental agreements included renovation and quota compensation clauses. Those renovation and quota compensation clauses were formulated as General Terms and Conditions. The actions remained unsuccessful.

The regulation of § 535 German Civil Code (BGB)

Pursuant to § 535 German Civil Code (BGB) the landlord principally has the obligation to renovate the apartment. However, the landlord is entitled to pass on this duty of renovation to the tenant in the rental agreement (so-called "renovation clauses"). In principle, this can also be done by means of the General Terms and Conditions.

If the duty of renovation is passed on to the tenant, many rental agreements also provide a so-called "quota compensation clause". These clauses shall apply if the tenant moves out prior to reaching the renovation intervals. The tenant is then expected to pay a compensation amount corresponding to the proportional relationship between rental period and renovation interval.

Renovation and quota compensation clauses as General Terms and Conditions

The Federal Supreme Court (BGH) has decided in its rulings that renovation clauses were invalid if the tenant had taken over an unrenovated accommodation. The tenant bore the burden of proof regarding the fact that he/she had taken over an unrenovated apartment. As far as a clear definition is concerned, it was decisive as to whether existing signs of usage were so immaterial that the rental space at the time of transfer conveyed the overall impression of a renovated accommodation.

Invalid clauses in case of unrenovated accommodation – burden of proof

The Federal Supreme Court (BGH) has stated with respect to the ineffectiveness of renovation clauses when passing on unrenovated apartments, that the tenant could only be obliged to perform such renovation work which form part of his/her own contracting party. It would be an inappropriate disadvantage if he/she is burdened with removing signs of usage in the apartment which already came into being in a pre-contractual period of wear and tear. This ineffectiveness at least existed if the tenant had not been granted an appropriate compensation for that. Such compensation may, for instance, be a sufficiently appropriate rent-free period.

Inappropriate discrimination in case of a precontractual period of wear and tear

The invalidity of quota compensation clauses was decisively based on the fact, that the Federal Supreme Court (BGH) had already stated in previous rulings that rigid time schedules for renovation intervals were invalid. Therefore, it has to be reviewed in the individual case how long an appropriate inspection interval is. Since it can, therefore, not be established upon the conclusion of the rental agreement how long the renovation interval is, the tenant is not able to reliably specify the cost share arising when concluding the rental agreement. According to the Federal Supreme Court (BGH) these uncertainties cannot be borne by the tenant, because it would, in fact, manifest an inappropriate disadvantage.

Appropriate inspection interval

The rulings passed apply to landlord and tenant law for residential premises. The competent 12th Civil Senate in charge of commercial landlord and tenant law, however, regularly follows the rulings of the 8th Civil Senate that is responsible for residential landlord and tenant law. It can, therefore, not be ruled out that future court rulings will apply the available rulings also to commercial landlord and tenant law.

Application to rental agreements for commercial premises

In order to avoid these legal uncertainties, an individual agreement could, therefore, be recommended which presupposes that the renovation and quota compensation clauses have been negotiated between the parties. Furthermore, it is of particular importance for the landlord that the condition of the rental spaces is sufficiently documented upon transfer in order to be able to prove in case of legal proceedings that the premises had been renovated. For this purpose a handover certificate with photo documentation can be appropriate.

Practical considerations

Jörg Looman

III. Commercial Rental Agreement – Content of contract – Validity with respect to standard-form contracts of disconnection clauses

In its ruling of April 29, 2014 (I-10 U 559/13) the OLG Düsseldorf has deemed valid a so-called disconnection clause in a commercial rental agreement also in the form of General Terms and Conditions (AGB).

With a disconnection clause the landlord intends to ensure the payment of the full rent irrespective of potential counter rights of the tenant. For that reason, disconnection clauses regularly include an exclusion of offsetting, retention and reduction.

Clause: No offset – Reduction of rent or retention

The disconnection clause which was the matter in dispute in the legal proceedings at the OLG Düsseldorf provided that the tenant was not entitled to offset with a counter claim or to assert a right of reduction or retention, unless the claim was uncontested or legally established. The tenant defaulted in payment. This is why the landlady terminated the rental agreement without notice. The tenant opposed the termination by invoking defects at the rental object. The action for payment brought by the landlady because of the tenant's default in payment was successful.

"Disconnected" claim for payment

According to the opinion of the OLG Düsseldorf a claim for payment of the landlady existed irrespective of the fact whether the rental agreement was terminated due to the notice of termination or not. As a matter of fact, the tenant unrestrictedly continued to use the rental spaces (even subsequent to the termination). For that reason the landlady was either entitled to a claim for compensation for use (§546 a German Civil Code (BGB) or – should the rental agreement continue to exist – to a claim for rental payments (§535 Sec. 2 German Civil Code (BGB)).

Validity of the disconnection clause in commercial landlord and tenant law even subsequent to content review under General Terms and Conditions Law

The tenant is not entitled to invoke any potential defects (in the payment process). The disconnection clause opposed that. The clause was valid. It would withstand a content review under General Terms and Conditions Law. On the one hand, a disconnection clause in commercial rental agreements corresponded to common practice, so that the tenant (as entrepreneur) had to expect it. On the other hand, the disconnection clause did not entirely curtail the tenant's right to reduction. In fact, the tenant still had the possibility to assert her counter rights in separate legal proceedings. The ruling of the Federal Supreme Court (BGH) concerning the invalidity of a disconnection clause in an architect's contract (Federal Supreme Court (BGH), ruling of April 7, 2011 – VII-ZR 209/07, for further reference see Newsletter 03/2011, p.9) was not transferable to commercial landlord and tenant law. Comparability was missing. Rent manifested continuous payments resulting from a continuing obligation. By contrast, an architect's fee regularly constituted a one-time payment.

Practical considerations

The Federal Supreme Court (BGH) has dismissed the appeals against denial of leave to appeal initiated against the ruling of the OLG Düsseldorf (XII ZR 114/12 and XII ZR 57/14). As far as the effectiveness of disconnection clauses in commercial landlord and tenant law is concerned, Karlsruhe thus "put its foot down".

Dr. Rainer Burbulla

IV. Commercial Rental Agreement – Public legal restrictions as defects of the rental object (here: barrier-free accessibility)

On January 6, 2015 (6 U 134/13) the OLG Brandenburg has ruled that the landlord was not responsible for barrier-free accessibility when renting out premises for operating a physiotherapeutic

practice if the agreement under landlord and tenant law specified something different concerning the nature of the premises.

Rental agreement concerning commercial premises to be expanded

In the facts underlying the ruling the landlord rented out commercial premises still to be expanded to the tenant for the operation of a physiotherapeutic practice. The attachments to the rental agreement specified the floor space, the room height and the steps. After having moved into the rental premises the tenant invoked defects. He based these on the absence of barrier-free accessibility due to a single step to the rental premises.

No relevance of public legal reStrictions without making it part of the agreement on the legal and factual nature

The OLG Brandenburg denied claims for defects of the tenant because barrier-free accessibility was not contractually owed. Even though (public legal) barrier-free accessibility for the planned use of the premises was stipulated for the operation of a physiotherapeutic practice (§ 45 German Building Code of Brandenburg), the parties of the rental agreement had (under landlord and tenant law) separately agreed the condition of the premises still to be established due to the attachments to the rental agreement.

Practical considerations

The OLG Brandenburg could – by referring to the attachments to the rental agreement – build on the separate agreement (on the legal and factual nature) of the parties to the rental agreement. If the parties did not arrange such an agreement the agreed rental purpose has to be aimed at with respect to the legal and factual quality of the rental object. As a matter of fact, the rental object has to be actually and legally suitable for the agreed rental purpose at any time. This also implies that the rental object complies with the (object-related) public legal requirements.

Dr. Rainer Burbulla

V. Statute of limitation for additional claims resulting from a cor-rected bill of utility costs

In its ruling of November 17, 2014 (2 U 133/14) the OLG Celle has stated that the additional claim of a landlord resulting from a corrected bill of utility costs became time-barred in three years commencing with the termination of the year following the receipt of the correction of billing at the tenant.

Accounting of service charges in 2008 covering the period from 2005 to 2007

In June 2008 - subsequent to the termination of the commercial rental agreement - the landlord invoiced the operating costs for the years 2005 to 2007. This resulted in additional claims in favour of the landlord. The invoices were based, among other things, on the gas bills of the municipal utilities. The bills revealed that the prices for the consumption of gas resulted from estimates. This led to a dispute between the landlord and the tenant concerning the values of consumption. The tenant demanded to specifically establish them. In May 2014 the municipal utilities provided the landlord with new gas bills, including exact prices. A fortnight later the landlord produced corrected bills of utility costs and demanded additional payment from the tenant. The latter invoked the statute of limitation.

Application of the general statute of limitation, § 195 German Civil Code (BGB)

According to the opinion of the OLG Celle claims of the landlord for additional payment did not become time-barred. The general period of three years of the statute of limitation applied (§ 195 German Civil Code (BGB)). The statute of limitation commenced with the year in which the claim was established and with the knowledge of the circumstances justifying the claim (§ 199 Sec. 1 German Civil Code (BGB)). The landlord only gained knowledge upon the receipt

of the new gas bills in May 2013. Prior to that the landlord was not able to correct bills of utility costs. The landlord carried out the required correction of the bills of utility costs two weeks later and thus "soon afterwards" (reference to the Federal Supreme Court, ruling of December 19, 1990 – VIII ARZ 5/90).

Practical considerations

The claim of the landlord for additional payment resulting from a bill of utility costs becomes time-barred within three years. Decisive for the commencement of the statute of limitation is the receipt of an orderly bill at the tenant, i.e. in case of some correction the receipt of the corrected bill of utility costs. In fact, at this point in time at the earliest the additional claim becomes due for payment.

Dr. Rainer Burbulla

E. Public Law

I. Local Rates Act – Development contributions – Unconstitution-ality of regulations under the law governing local rates in Mecklen-burg-Western Pomerania (Mecklenburg-Vorpommern) – Validity of notifica-tions until 2008

Valid notifications until December 31, 2008

The Federal Administrative Court (BVerwG) has recently ruled (ruling of April 15, 2015 – 9 C 15.14 – 9 C 21.14) that even an "old connector" (such property owners whose plots of land had been connected to the sewage system at the time of the GDR) in Mecklenburg-Western Pomerania (Mecklenburg-Vorpommern) could be requested to pay connection fees for the sewage disposal at least until December 31, 2008.

There were always disputes as to whether also "old connectors" could be requested to pay connection fees.

"History of the articles", first valid articles in 2004

The subject matter of the legal proceedings was the actions brought by owners of develo-ped plots of land that had already been connected to the sewage disposal system prior to the German reunification. The defendant special purpose association for water disposal and sewage water took over those facilities with its foundation subsequent to the reunification in 1991. Former fee statutes of this special purpose association suffered from drastic legal errors so that it was only in 2006 that the association on the basis of its first valid articles of 2004 requested the plaintiffs to pay contributions for establishing a public institution for the cen-tralized removal of sewage water. By now, the actions intended against that have remained unsuccessful in three instances.

Federal Administrative Court (BVerwG): No unlimi-ted period of time for the fee for benefit sharing

However, the Federal Administrative Court (BVerwG) has clarified in this context that the Local Rates Act of the federal state of Mecklenburg-Western Pomerania (Mecklenburg-Vorpom-mern) opposed the constitutional principle of legal certainty resulting from the new ruling of the Federal Constitutional Court (BVerfG): According to this current ruling of the Federal Constitutional Court (BVerfG) fees serving the purpose of sharing benefits were not to be set for an unlimited period of time after having gained the benefit. On the contrary, the legislator was obliged to provide a balance between the interest of the general public in raising the contributions and the interest of the debtor of the contribution concerning clarity about the

claim made against him/her. As far as the Bavarian Local Rates Act is concerned the Federal Constitutional Court (BVerfG) ruled that the legislator had failed to establish that required balance: By putting off the commencement of the statute of limitation to a later date without any upper time limit, the legislator left the justified expectation of the citizen entirely unconsidered, namely to no longer having to anticipate the contribution fixed some time after the beneficial situation has already come into being for some time. The Federal Constitutional Court (BVerfG) clarified in this context that the legitimation of contributions consisted in the compensation of a benefit that had been made available to the person affected at a particular point in time. However, the further that point went back in time when levying contributions, the more the legitimation for levying such contributions evaporated.

Isabel Strecker
Rechtsanwältin

In the case just ruled by the Federal Administrative Court (BVerwG) the VG and the OVG were of the opinion that the statements made by the Federal Constitutional Court (BVerfG) were not transferable to the present proceedings which dealt with the application of the Local Rates Act of the federal state of Mecklenburg-Western Pomerania (Mecklenburg-Vorpommern). The OVG Greifswald explained in particular that the confidence of not being requested to pay contributions could not arise because the defendant association had repeatedly made its intention of levying contributions clear by passing several fee statutes, irrespective of their invalidity.

Illegal Local Rates Act because of the absence of an upper time limit – violation of the principle of legal certainty

This legal assessment of the OVG Greifswald, in fact, was not confirmed by the Federal Administrative Court (BVerwG): On the contrary, the Federal Administrative Court (BVerwG) made it clear that the Local Rates Act of the federal state of Mecklenburg-Western Pomerania (Mecklenburg-Vorpommern) ran contrary to the constitutional principle of legal certainty, since the federal state legislator failed to subject the levying of contributions for reasons of benefit sharing to an upper time limit, if the decisive statutes – as was the case in the proceedings ruled – were at first invalid and were replaced by legally effective statutes only later. Nevertheless, the legislator determined that owners of property had, in fact, to expect a request for payment until the end of December 31, 2008, because according to the Local Rates Act of the federal state of Mecklenburg-Western Pomerania (Mecklenburg-Vorpommern) the appointment period terminated at the end of December 31, 2008 at the earliest (§ 12 Sec. 2 Sent. 1 Local Rates Act (KAG) Mecklenburg-Western Pomerania (Mecklenburg-Vorpommern) (MV)).

As far as contribution notifications are concerned that – as in the case ruled – were issued until December 31, 2008, the established constitutional violation had, therefore, no effect.

Practical considerations

According to the rulings of the Federal Administrative and the Federal Constitutional Court (BVerwG and BVerfG) there is no room for requesting any follow-up contributions where the applicable statutory regulations for requesting the payment of contributions for the purpose of sharing benefits do not include any upper time limit or where such an upper limit has been formulated, but where the actual request for payment only occurs subsequent to that point in time. As far as the “old connectors” in Mecklenburg-Western Pomerania (Mecklenburg-Vorpommern) are concerned the Federal Administrative Court (BVerwG) has, however, made it clear that the period between having obtained a benefit and levying the contribution until 2008 is deemed acceptable, bearing in mind the challenges connected to the reunification.

Isabel Strecker

II. Planning Law - Expansion plans of the retailers affected by the planning as an issue requiring considerable weighing up

Central supply areas and prevention of growth outside central locations

The protection of central supply areas and the preservation of supply close to consumers are central urban planning concerns of urban land-use planning. In order to protect existing central supply areas and in order to maintain the supply of the population close to consumers, municipalities frequently develop retail trade locations outside central supply areas or on the outskirts of the respective municipality. In doing so, the municipalities mostly define the admissible sales areas as those existing. Objective of the development is to prevent further growth outside central locations at the expense of existing central supply areas.

In a ruling of the OVG Berlin-Brandenburg (ruling of October 16, 2014 – 10 A 6.09) the court has ruled that municipalities also have to consider in their weighing up the expansion plans of an existing retail trade business when developing a location by establishing admissible sales areas as those already existing.

City of Berlin – DIY store with garden centre/no taking into consideration of expansion plans in the urban landuse planning – errors of assessment

In the facts underlying the ruling the city of Berlin developed the location of a DIY store with a garden centre and defined the admissible sales areas as those existing. In the context of public participation the owner asserted his/her intention to expand the existing DIY store with garden centre in the future in order to remain competitive. The city of Berlin did not consider the expansion plans of the owner in its urban land-use planning. The expansion plans of the owner were, according to the city of Berlin, no urban-planning issue which had to be assessed in the context of urban land-use planning. The court ruled that the legally binding land-use plan had been incorrect in terms of weighing up. The court stated that when setting up the legally binding land-use plan the city of Berlin had misjudged the private concerns of the owner in the context of weighing up. These private concerns also implied economic concerns and thus the specific concerns of the business in the preservation of the operational existence, the interest in a business expansion as well as the expansion of capacity in order to maintain competitiveness. When weighing up, all interests in development on the part of the owner had to considered, which were obvious when realistically viewing the development possibilities. Since the city of Berlin did not take these concerns into account, the development plan was contrary to law and, thus, invalid.

Practical considerations

This ruling is decisive for planning authorities as well as for owners of retail trade businesses. When developing existing retail trade businesses by securing existing businesses the planning authorities have to take into consideration in the context of weighing up compellingly possible intentions of expansion of those retailers affected by the planning. Only if prevailing interests of urban planning oppose the approval of expansion options, the planning authorities are entitled to simply rule out the expansion of existing retail trade businesses. Otherwise, the planning authorities have to give them significant prominence in their weighing up process. For that purpose the owner is in any case obliged to communicate his/her interests in expansion to the planning authorities at an early stage so that they can be integrated into the weighing up process and be afforded due importance and be in his/her favour. Actually, the planning authorities are only able to consider possible interests in expansion if they are informed about them.

Eva Appelmann
Rechtsanwältin

Eva Appelmann

III. Planning Law – Requirements for the reference to available environmental information in the disclosure announcement

In its ruling of September 11, 2014 (4 CN 1/14) the Federal Administrative Court (BVerwG) has dealt with the question as to which requirements apply to the reference concerning the types of available environmental information with respect to the announcement regarding public participation of a legally binding land-use plan pursuant to § 3 Sec. 2 German Building Code (BauGB).

Legally binding land-use plan for a developed commercial and mixed area – general reference to environmentally relevant state-ments

The issue dealt with was about a legally binding land-use plan for an already developed commercial and mixed area, which was again to be developed as a commercial and mixed area, however, the usage valid until to date would be ruled out. In contrast to that, the extent of structural use remained unchanged and the building footprint was only slightly extended. The disclosure announcement only included a general reference to the environmentally relevant statements in a general manner as well as the environmental report.

Breach of the duty of public an-nouncement pursuant to § 3 Sec. 2 Sent 2 German Building Code (BauGB)

The Federal Administrative Court (BVerwG) has ruled that this public announcement did not comply with the requirements as set forth in § 3 Sec. 2 Sent. 2 German Building Code (BauGB). According to the latter place and duration of disclosure of the draft versions of urban land-use plans as well as information concerning the types of environmental information available have to be made public in a manner customary to the place at least one week prior to the disclosure.

Necessary summary of environ-mental topics according to blocks of topics and catchphrase-like characterisation

According to established case law of the Federal Administrative Court (BVerwG) municipalities undertook to summarize environmental topics dealt with in the existing statements and documents in the form of blocks of topics and to characterize those in the disclosure announcement in a catch-phrase-like manner. The mere reference to the environmental report did not satisfy the requirements of § 3 Sec. 2 Sent. 2 German Building Code (BauGB), since the latter did not enable a content-related assessment as to which environmental concerns had been addressed in the planning so far.

No exceptions – no thresholds of relevance

The Federal Administrative Court (BVerwG) has now made it clear that a disclosure announcement even in the present case in which a development area had been newly developed and had been only slightly changed, had to satisfy those requirements. The strict wording of § 3 Sec. 2 Sent. 2 German Building Code (BauGB) clearly revealed that there was no room for information as to which types of environmentally related information were available. Furthermore, and according to the intent and purpose of the norm, the duty of reference could not be made subject to exceeding specific thresholds of relevance.

Practical considerations

This ruling is of particular importance for practice since it has now been made clear that in the context of the disclosure announcement reference has always to be made to available environmental information. Omitting such a reference represents a substantial defect of the legally binding land-use plan within the meaning of § 214 Sec. 1 Sent. 1 No. 2 German Building Code (BauGB) which could lead to the invalidity of the legally binding land-use plan, provided that a complaint is made about it within one year as of the coming into force of the legally binding land-use plan pursuant to § 215 Sec. 1 Sent. 1 No. 1 German Building Code (BauGB). In the context of urban land-use planning particular attention must be paid to the fact whether the disclosure announcement satisfies the requirements of the ruling in order to avoid the invalidity of the legally binding land-use plan.

Dr. Steffen Schleiden
Rechtsanwalt

Dr. Steffen Schleiden

F. Insurance Law

I. Liability Law – Building contract – Right to recover possession of an insurance contract

The LG Hannover has denied in its ruling of September 22, 1014 (2 O 3/14) a general claim of the aggrieved third party to recover possession against the liability insurer of the contracting partner und injuring partner.

Building damage – architect – liability insurer

The building owner informed the architect about a damage of a substantial amount. In consequence, the architect reported the case of damage to his liability insurer. The liability insurer commissioned a lawyer for representing the legal interests of the architect.

Right to information of the aggrieved party only in an exceptional case

The building owner, however, deemed this insufficient. He was worried about realising his claim and then sued against the insurer of the architect for surrendering the insurance contract documents.

The LG Hannover has rejected this application. It stated that such a right to information could only be considered under strict conditions. This would, for instance, be the case if in the context of filing for insolvency proceedings concerning the assets of the insurance holder some claim of the aggrieved party to a separate satisfaction existed pursuant to § 157 Insurance Contract Act (VVG) old version, § 110 Insurance Contract Act (VVG) new version. By going beyond that specified limit and only by arguing that some substantial damage had occurred a right to information against the insurer of the injuring party could not be asserted. It was actually decisive for the LG Hannover that the liability insurer had clearly revealed in the indisputable correspondence that its insurance holder had maintained a liability insurance with the insurer and the latter confirmed this by having commissioned a lawyer to represent the legal interests of the insurance holder.

Practical considerations

The aggrieved party is principally not entitled to his/her own claim of coverage against the liability insurer of the injuring party. However, the aggrieved third party may – in the individual case – have a legal interest in the judicial assessment that the insurer has to grant insurance cover to the injuring party. According to existing rulings such an interest in assessment worth to be protected applies if due to the inactivity of the insurance holder there is the risk that the liability creditor loses the coverage claim as object of satisfaction (Federal Supreme Court, ruling of November 15, 2000 – IV ZR 223/99). The mere interest of the aggrieved party to inform him-/herself in advance about the possibilities of realising his/her liability claim, does not, however, justify a legal interest in a declaratory action addressed against the liability insurer of the injuring party with the purpose of being granted insurance coverage.

However, the aggrieved party can have an interest in the judicial assessment if the insurer when being asked about the existence of insurance coverage does not provide any definite answer or refuses to provide any information. (OLG Naumburg, ruling of July 25, 2013 – 2 U 23/13).

Ralf-Thomas Wittmann

II. Pecuniary Damage Liability Insurance – Exclusion clauses – Strict requirements for the declaration of the conscious breach of duty as reason for risk exclusion by the insurer

In its ruling of December 17, 2014 (IV ZR 90/13) the Federal Supreme Court (BGH) has decided that the insurer bore the burden of explanation and proof for realising the so-called subjective criteria of the facts concerning risk exclusion.

Insolvency proceedings

An insolvency administrator ("IA") concluded a pecuniary damage liability insurance contract with an insurer ("Ins."). Pursuant to § 4 No. 5 of the General Terms and Conditions of Insurance (AVB) underlying the insurance contract, liability claims resulting from damage caused due to some conscious breach of duty were excluded from insurance coverage.

After having opened insolvency proceedings, the insolvency administrator kept up the business relationship of the insolvency debtor to the supplying company ("SC"). The insolvency administrator promised the supplying company to settle its new claims. These amounted to more than € 1.0 million subsequent to opening the insolvency proceedings.

Rejection of the insolvency plan by the creditor meeting

The creditor meeting, however, did not accept the insolvency plan set up by the insolvency administrator. For that reason the insolvency administrator was forced to notify the insolvency court about the lack of assets. The insolvency administrator was no longer able to satisfy the claims of the supplying company.

The supplying company itself went insolvent. In response, its insolvency administrator sued the insolvency administrator for damages, since the insolvency administrator had breached his duties as insolvency administrator. In these liability proceedings the insolvency administrator was finally sentenced to pay about 830.500,00 plus interest.

Burden of explanation and proof in case of risk exclusion

After the insurer refused to cover the damage in an out-of-court settlement, the insolvency administrator took legal action against the insurer. The LG as well as the OLG dismissed the claim for coverage indicating that the insolvency administrator had committed a conscious breach of duty and had not reported in the context of his secondary burden of explanation and proof for which reason the breach had occurred.

The Federal Supreme Court (BGH) was of a different opinion: At first, it has stated that an insured party acted consciously only if it was positively familiar with the duties breached. A so-called conditional intent according to which the insured party only deemed the duty in question possible, was, however, as insufficient as some negligent lack of knowledge. It had to be established that the insured party was clearly aware of its duties.
In order to realize these so-called subjective criteria of the facts concerning risk exclusion the insurer bore the burden of explanation and proof.

Elementary professional duties

There were, in fact, elementary professional duties where knowledge according to life experience could be presupposed for each professional person (as an example the Federal Supreme Court (BGH) mentioned that a lawyer has to attend court hearings and that no default judgment should be delivered against him/her). Beyond those obvious cases of breaching professional cardinal duties, it was the task of the insurer bearing the burden of proof to submit linking facts that could be considered as consistent evidence for some conscious breach of duty. However, the OLG did not deal with that question.

Referring the case back

For that reason, the Federal Supreme Court (BGH) referred the legal dispute back to the OLG with the condition to clarify whether the insurer submitted sufficient linking facts. Only then it is incumbent on the insurance holder (here: the insolvency administrator) to point out circumstances in the context of his/her secondary burden of explanation and proof why the evidence submitted did not allow the conclusion of some conscious breach of duty.

Practical considerations

If the insurance holder sues for insurance cover resulting from a liability insurance contract, the principle of the so-called binding effect applies. This means that the court – in the context of an action aimed at being granted insurance cover - is tied to the previous ruling resulting from the liability proceedings and the assessments made there. In doing so, this prevents that the ruling made in the liability proceedings and the underlying assessments are again put into question in the legal proceedings concerning insurance coverage (Federal Supreme Court (BGH), ruling of December 8, 2010 – IV ZR 211/07; ruling of January 24, 2007 – IV ZR 208/03).

However, this binding effect does not apply with respect to the risk exclusion of intentional knowledge. Whether a conscious breach of duty obtains here, in fact, to be independently reviewed in legal proceedings concerning insurance coverage (Federal Supreme Court (BGH), ruling of January 24, 2007 – IV ZR 208/03). Both basic principles have once again been confirmed by the Federal Supreme Court (BGH) in its ruling of December 17, 2014.

Ralf-Thomas Wittmann

G. Labour Law

I. Employment Contract Law – Validity of taking up some com-petitive activity subsequent to an invalid termination notice

In its ruling of October 23, 2014 (2 AZR 644/13) the Federal Labour Court (BAG) has made the validity of a competitive activity defined in the employment contract during a – disputed – period of termination dependent on the weighing up of interests.

Suing for dismissal protection and new employment contract

The plaintiff worked as a test engineer for the defendant. For reasons of an alleged fraud in connection with legal proceedings the defendant terminated the employment relationship with the plaintiff with immediate effect. The plaintiff sued for dismissal protection against this termination.

In such a case the employee is confronted with the problem that he has no income for the period of the legal proceedings concerning protection against dismissal. Since the plaintiff, too, faced that problem, he started to work in a similar job at a competitor. When the defendant gained knowledge about his, she renewed the termination with immediate effect, since the plaintiff violated his prohibition of competition specified in his contract of employment.

The Federal Labour Court (BAG) deemed all terminations invalid.

The Federal Labour Court (BAG) stated that starting a competitive activity principally entitled the employer to terminate the employment contract with immediate effect, because a violation of the prohibition of competition would be unacceptable for an employer. The prohibition of competition also applied during legal proceedings dealing with the protection against dismissal. The employee could not invoke the order of mitigation as set forth in § 615 S. 2 German Civil Code (BGB) when starting work in a competing company.

If, however, the work in a competing company only started after the termination had been announced by the employer and if the employee sued for dismissal protection, both parties principally acted contradictorily. The employer deemed the termination effective, so that the employment relationship would have come to an end; then a prohibition of competition as defined in the contract of employment would no longer exist. The employee deemed the termination invalid so that the contract of employment – and, therefore, the prohibition of competition - continued to exist.

Contradictory behaviour of both contracting parties

Regarding the question as to whether taking up a competitive activity represented good cause for a termination with immediate effect, court rulings relied, therefore, on weighing up the interests.

Solution by weighing up interests

The Federal Labour Court (BAG) explained in its ruling that it spoke in favour of the employee that his new activity had only been a consequence of having been dismissed prior to that. Furthermore, the employee was not allowed to intend a permanent competitive activity, but it had to be an interim activity. If the employee, therefore, went into self-employment, a permanent competitive activity had to be assumed, which then represented such a massive breach of the original duties resulting from the contract of employment that a termination with immediate effect issued by the employer was justified. If, however, the employee entered into a new employment relationship with a short period of notice at a competing company, it constituted only an interim solution since the employee could terminate it at short notice and could return to the initial employer.

The ruling illustrates the problematic nature which employees, in particular, have to face in case of a notice of termination with immediate effect. If the employee deems the termination invalid, he/she is strongly advised to consider very carefully whether to start working at a competing company during the period of the legal proceedings concerning protection against dismissal. Since the prohibition of competition specified in the contract of employment represents a general legal principle, the ruling of the Federal Labour Court (BAG) should be deemed applicable also to managing directors and to sales representatives.

Practical considerations

Jörg Looman

II. Employment Contract Law – Valid limitation of an employment upon request of the employee

In its ruling of March 4, 2015 (2 Sa 31/14) the LAG Baden Württemberg has decided that it was legally valid to convert an initially permanently concluded contract of employment upon request of the employee into a fixed-term contract of employment.

Conversion of a permanent employment into a fixed-term one (Leaving the company at 60)

The plaintiff worked for the defendant company as senior manager. The employment relationship between the two parties was of a permanent nature. In 2003, the defendant decided for entrepreneurial and human resources reasons that all senior executives in her company should go into retirement when turning 60 years of age. Therefore, she offered all senior members of staff that the formerly permanent contracts of employment were subsequently converted into a fixed-term employment until the age of 60. In return, the defendant offered attractive financial incentives (payments from the company pension scheme as of the age of 60, payment of a one-off sum). As far as this was concerned, the defendant granted the senior managers a decision deadline until the end of 2005, i.e. a period of more than two years.

The plaintiff accepted that offer in December 2005 and received an amount of about 100.000 € as a one-off payment.

When the plaintiff reached the age of 60 in 2013, she nonetheless wanted to continue working for the defendant and sued for converting the fixed-term employment back into a permanent one. This action remained unsuccessful.

Factual reason (§ 14 Sec. 1 Sent. 2 No. 6 PartTime Employment and Limited Employment Contract Act (TzBfG))

The limited term of an employment, which also included the subsequent limitation, principally required some factual reason. Pursuant to § 14 Sec. 1 S. 2 No. 6 Part-Time Employment and Limited Employment Contract Act (TzBfG) the limitation could be justified for reasons lying in the person of the employee. Such a reason lying in the person of an employee could be a limitation made upon request of the employee.

Objective indications for the interest of the employee in deadlines

In order to avoid abuse of this factual reason, a factual reason within the meaning of § 14 Sec. 1 S. 2 No. 6 Part-Time Employment and Limited Employment Contract Act (TzBfG) only applied if the employee had also only agreed a limited employment if the employer had offered him to conclude a permanent contract of employment. At the time of concluding the contract objective indications had to apply from which one could infer a particular interest of the employee in a limited employment.

A wish within the meaning of § 14 Sec. 1 S. 2 No. 6 Part-Time Employment and Limited Employment Contract Act (TzBfG) did, therefore, not apply if the employee solely agreed with the offer of employment in the form of a limited contract of employment.

In the present case the wish of a subsequent limitation of the employment was, in fact, initiated by the employer. However, the time for consideration had been so generous that the acceptance of the offer could no longer be understood as a mere reaction to the employer's offer, but as the employee's own offer. Furthermore, there was no pressure imposed on the employee to accept the limitation, because she already was in permanent employment; moreover, more than half of the senior managers did not make use of the offer without them having suffered from any obvious disadvantages. On top of that, the plaintiff received sufficient compensation by having been paid about 100.000 as interim payment.

Practical considerations

The aforementioned ruling reveals that the courts, in fact, strictly interpret the area of application of a factual reason and that they make high demands concerning the factual reason. If, however, the factual reason is based on a comprehensible overall concept and if the interests of the employees have been sufficiently considered, a factual reason may exist. The LAG has lodged an appeal. It remains to be seen whether the plaintiff lodges an appeal.

Jörg Looman

I. Current News – Events – Publications

Events: **May 19 and 20, 2015**

German Shopping Center Forum 2015
in Düsseldorf, Hyatt Regency Hotel
Talk: Sales-based rent clauses in rental agreements for commercial premises – contractual design possibilities (May 19, 2015)
Speaker: Rechtsanwalt Dr. Rainer Burbulla, Partner
Grooterhorst & Partner Rechtsanwälte mbB

Talk: Newest developments in commercial landlord and tenant law (May 20, 2015)
Speaker: Rechtsanwalt Dr. Johannes Grooterhorst, Partner
Grooterhorst & Partner Rechtsanwälte mbB

June 18, 2015

Internationale Seminar of the Lawyer's Group insuralex
in Munich, Münchner Künstlerhaus,
organized by Grooterhorst & Partner Rechtsanwälte mbB.
Leader: Rechtsanwalt Ralf-Thomas Wittmann, Partner,
Grooterhorst und Partner Rechtsanwälte mbB

August 26, 2015

Trade Dialogue NRW
Rechtsanwalt Dr. Johannes Grooterhorst, Partner
Grooterhorst & Partner Rechtsanwälte mbB

October 20 and 21, 2015

7. German Specialist Retailer Real-Estate Congress 2015
in Wiesbaden
Rechtsanwalt Dr. Johannes Grooterhorst, Partner
Grooterhorst & Partner Rechtsanwälte mbB

Publications:

Eviction of the accommodation – that is who landlords do it correctly
Author: Dr. Rainer Burbulla
in Immobilien Zeitung 15/2015

Evicting tenants from commercial premises
Author: Dr. Rainer Burbulla
in Immobilien Zeitung 16/2015

False names turn into expensive mistakes
Author: Dr. Rainer Burbulla
in Immobilien Zeitung 18/2015

Legal proceedings based on documentary evidence in landlord and tenant law
Author: Dr. Rainer Burbulla
in MietRB 2015, p. 149 - 156

Special edition "Commercial Law Firms" in the Rheinischen Post of March 20, 2015, page E 4

Commentary on foundation law
Author: Dr. Johannes Grooterhorst
In: German Civil Code Online Commentaries (BGB Online-Kommentar – von Göler Commentaries)

Planning law in the transaction
Shopping centers and other large commercial real estate are still very popular
Author: Dr. Johannes Grooterhorst
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