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Dear reader

This year's first newsletter focuses on current fundamental developments in the fields of public procurement and zoning law ("central service area" being the watchword here) as well as on new rulings in other fields our law firm specialises in.
The final quarter of the previous year was especially noteworthy for the interesting changes it brought about in the areas of company law, labour law and property law. We will endeavour to inform you about these changes in what we hope is a clear and concise fashion in the pages below.

In the hope that this letter will provide you with new insights, I remain

Yours sincerely

Dr Johannes Grooterhorst
Attorney at Law

A. Current News

European Court of Justice (ECJ): Municipal property sales might not be subject to procurement law provisions after all

The Ahlhorn ruling

Ever since the so-called Ahlhorn ruling of the Higher Regional Court (OLG) Dusseldorf (ruling of 3.06.2007, Verg 2/07, Newsletter 3/2007, page 4) sales of plots by the Federal Republic, the German federal states or their municipalities burdened with an obligation (however indirect) to build on them have been considered subject to competitive tender. This had led to considerable uncertainty among municipalities, investors and project developers.

Public Procurement Law: The Act Against Restraint of Competition (GWB) 2009

Within the context of the reform of public procurement law (GWB 2009) this uncertainty led to a new definition of construction contract (Art. 99 Sec. 3 GWB) and building concession (Art. 99 Sec. 6 GWB). The object was to undermine the basis of the Ahlhorn interpretation of public procurement law. Since the decision of the OLG Dusseldorf of 02.10.2008 to have the new definitions examined by the ECJ (VII Verg 25/08) that court has been looking into the issue of whether or not they comply with European (public procurement) law.

The OLG Dusseldorf's decision to submit the definitions for scrutiny by the ECJ: Advocate general's statements

However, the tendency to emerge in the ECJ's preliminary ruling proceedings (C-451/08) is for the newly defined national rules restricting the Ahlhorn legislation to be deemed compatible with European law. Thus in his closing arguments on 17.11.2009 the ECJ advocate general Paolo Mengozzi answered the question of whether the rules complied with European law in the affirmative and said:

"The presence of a public building contract or of a public building concession … presupposes a direct connection between the public client and the work or works to be realised. This direct connection exists in particular if the public administration intends to purchase the building or benefits directly from it economically or if the project is being realised at the initiative of the public client or the public client bears at least some of the costs."

Given that the ECJ frequently follows the recommendations of the advocate general this statement, which is in accord with the provisions of the GWB 2009, could strongly influence the European judges' ruling. Should the ECJ base its ruling on the advocate general's opinion this would be tantamount to a rejection of the Ahlhorn interpretation of public procurement law and thereby in the final analysis bring about that legal certainty with regard to municipal property sales the GWB 2009 seeks to achieve.

Practical considerations

Until the ECJ reaches its decision, which is expected to happen in April 2010, the legal uncertainty generated by the Ahlhorn ruling will persist. Municipal property contracts signed in accordance with the new provisions of the GWB 2009 and with a view to town-planning objectives thus continue to bear the risk of possible non-compliance with (European) public procurement law.

Public clients and private investors should thus ahead of signing any property contract thoroughly explore the question of whether this particular contract might even now not be subject to competitive tender (in the case of mere supply planning, say) or constitute a public procurement law exception (which the presence of so-called exclusiveness features might ensure).

Should the contract in question turn out to be subject to competitive tender, experience gained during the last two and a half years nonetheless indicates that public procurement law, even in the field of urban development, makes a suitable set of instruments available and that after a tendering process has begun positive results can be achieved. For the goals of transparency, competition and the prohibition of discrimination that the public procurement law seeks to achieve are essential and make sense, not least in the area of cooperative urban development.

Dr Rainer Burbulla

B. Trade and Company Law

Capital reorganisation and a property fund shareholder's duty of loyalty: "Reorganise or retire"

I. In a decision dated 19.10.2009 (II ZR 240/08) the Federal Supreme Court (BGH) in a case involving a GmbH & Co. OHG (a general commercial partnership with a private limited liability company as a general partner) – with personal liability – ruled that the duty of loyalty of a partner towards the partnership could extend to the partner being obliged to consent to his or her exclusion from the partnership in the event of him or her not being prepared to contribute to the capital reorganisation of the partnership and in which he or she would already in the event of retiring from the partnership be liable towards the partnership's creditors (negative retirement balance sheet). The principle of "reorganise or retire" thus applies – at least in those cases where personal liability already obtains.

Pressure on partners to participate in the reorganisation effort

The approach whereby a partner who is reluctant to contribute to a reorganisation is excluded from certain types of partnership with personal liability – now explicitly sanctioned by the BGH – appears well suited in individual cases to promote the reorganisation of partnerships in times of crisis. In the opinion of the BGH no interests of the reluctant partner worthy of protection stand in the way of this approach. The Federal Supreme Court considers this to be so because his or her retirement would not make the reluctant partner worse off: In the event of a liquidation of the partnership the partner in question would on account of his or her personal liability be obliged to bear a prorated share of the losses incurred. In the event of an exclusion, however, the partnership's assets are valued at going-concern value. The share of the losses calculated on such a basis should generally be lower than that calculated on the assumption of the liquidation of the partnership – which latter share the partner would be obliged to bear.

By invoking the decision of the Federal Supreme Court partners in partnerships with personal liability (OHGs, GbRs [companies constituted under German civil law]) keen to reorganise their company are now in a position to prevail upon reluctant partners to participate in capital enhancement measures. Otherwise these might be expelled from the partnership.

Practical considerations

From a practical point of view it would appear to be advisable to include a rule in the articles of partnership to the effect that a partner is to be excluded from the partnership should he/she/it refuse in the event of a capital reorganisation of the partnership to contribute to the same. Having said that, however, the placeability of such structures on the capital markets would have to be taken into account.

Johannes Pitsch

BGH banking law decision: Restrictions on the duty to provide guidance following the court's investment-related kickbacks ruling – prospectus advice suffices

II. In its of ruling of 27.10.2009 (XI ZR 338/08) the Federal Supreme Court stated that within the context of an investment advisory agreement a bank was not always obliged to reveal the internal commissions to which it was entitled. It was sufficient, the court declared, for a given investment prospectus to list the equity-capital-acquisition and other costs it was obliged to specify, correctly in terms of both size and content. There was however an obligation on the part of the bank to inform the customer, the BGH noted, if part of the issue surcharge or administrative costs flowed back behind the customer's back, in a turnover-dependent manner, to the advising bank (so-called reimbursements) , so that the bank would have a special incentive, not apparent to the customer, to recommend the investment in question (compare BGH ruling of 12.05.2009, XI ZR 586/07).

No general duty to inform about bank earnings

In the opinion of the Federal Supreme Court there is thus no general duty to inform customers about a bank's interest in selling a particular investment product. As in the case of closed funds, say, internal commissions should however continue to be subject to customer disclosure rules if they exceed 15 % (see the BGH ruling of 12.02.2004, III ZR 359/02).

Practical considerations

The limits now imposed by the BGH on its so-called kickback rulings are likely to diminish the chances of success of the various lawsuits filed against banks by investors in so-called Lehmann Brothers certificates alleging that false advice had been given. For it now seems doubtful that in view of the decision reached by the Federal Supreme Court the rulings of various district courts (LGs) according to which a bank selling Lehmann Brothers certificates was obliged to inform about its profit margin (see for instance the ruling of the LG Hamburg of 23.06.2009, 301 O 4/09) will continue to stand.

C. Labour Law

Zillmerisation and company pension schemes

In the context of its ruling of 15.09.2009 (3 AZR 17/09) the Federal Labour Court (BAG) for the first time had to deal with the issue of the validity of company pension schemes that in place of money wages provide deferred compensation by way of direct insurance policies with zillmerised tariffs.

Zillmerisation here means the following: Upon signing the insurance policy one-time acquisition and sales costs are incurred. When zillmerisation is applied these costs are charged against the account of the employee (the person insured) immediately. Consequently, in the first year of the insurance relationship comparatively little or no unearned premium reserve is accumulated.

BAG: Deferred-compensation company pension schemes that involve zillmerisation discriminate unfairly against employees

In the opinion of the BAG, deferred-compensation company pension schemes that involve the use of insurance policies with zillmerised tariffs discriminate unfairly against employees. Although this did not, according to the Federal Labour Court, invalidate these deferred-compensation schemes – and in so doing give rise to a claim for wages on the part of employees –, it did however create a claim on the part of employees against the employer for higher benefits from such direct-insurance-based schemes.

Tobias Törnig

D. Property Law

Public-law duty to grant use in parking-space public easement cases

In its decision of 06.11.2009 (8 A 10851/09) the Appellate Administrative Court (OVG) in Koblenz ruled that even in such cases in which a dominant owner has no civil-law right to use a parking space, the servient owner must grant him or her a public easement-based real opportunity to use the parking space.

Dominant owner's right of use exists even in the absence of a civil law-based relationship of use

The circumstances giving rise to the lawsuit were as follows: On the servient tenement there was parking space for which an easement had been granted to the dominant tenement. Even so the servient owners who had filed the lawsuit made use of the parking space themselves. A civil-law agreement between the neighbours on the use of the parking space did not exist. The body corporate ordered the servient owners to abide by their public easement obligation and cease their actual use of their own parking space.

Compensation for use to accord with the German unjustified enrichment law

Overall the OVG Koblenz came out in favour of a right of use of the dominant tenement, even in those cases in which the public easement is not based on a civil-law relationship of use. The obligation of "making the parking space available" assumed

by granting the easement was not satisfied by the parking space merely existing on the servient tenement premises, the court declared. Rather, the parking space had to be available in actual fact for the use of the dominant owner; a circumstance that excluded the use of the parking space by the servient owner. This did not however imply that the use of the parking space made available had to be free, the court added. In the event of a parking space actually being used the dominant owner was obliged as a matter of principle to compensate the servient owner in cash – with the size of the compensation determined if need be by the courts.

Practical considerations

Parking space easements are generally designed to allow a builder-owner/developer to make the parking space(s) specified by the building regulations of the German federal state in question available on somebody else's premises in the event of him or her not being able to do so on his own. A public easement does not imply a civil-law right of use, however. Because this is so a civil-law agreement on a right of use is frequently concluded between the servient and the dominant owners. The absence of such an agreement frequently leads to disputes about the actual use of the parking space and about compensation in particular. Dominant and servient owners should therefore early on come to an agreement in writing on all easement-related issues; so as not to be dependent on the help of the building supervisory authority later.

Dr Rainer Burbulla

E. Commercial Tenancy Law

Opportunity to pass on technical and commercial property-management expenses for business premises

In its decision of 09.12.2009 (XII ZR 109/08) the Federal Supreme Court (BGH) found the clause in a standard commercial tenancy agreement permitting "technical and commercial property-management expenses" to be passed on to be legally effective. The BGH thereby overturned the contrary ruling by the Higher Regional Court (OLG) Cologne, in the process repudiating the equally contrary opinion expressed by the OLG Rostock in its decision of 10.04.2008, a decision we had commented on in our Newsletter 03/2008 on page 4.

Clause is not surprising and is sufficiently transparent

In the opinion of the BGH such a passing on of costs would not be surprising for tenants nor did the clause lack the necessary degree of transparency, the court noted. In the commercial tenancy realm the passing on of such costs was not unusual, the BGH stated, adding that even if a clause to that effect did fail to put a cap on costs and the actual costs accrued and charged significantly exceeded the advance payments agreed upon it would still be legally effective.

Adequate protection of tenants

According to the Federal Supreme Court tenants are already sufficiently protected by the legal requirement that technical and commercial property-management expenses stay within the bounds of necessity and custom. The court moreover pointed out that – contrary to the opinion of the OLG Rostock (see above) – it was possible to determine the meaning of the term "administrative expenses" by referring to the definition of these in the German Operating Costs Ordinance.

Tobias Törnig

F. Public Law

ECJ public procurement law ruling: contract to build exhibition hall in Cologne in breach of competitive tender regulations

I. Because the city of Cologne had signed a building contract subject to competitive tender without in advance carrying out formal public procurement proceedings the European Court of Justice (ECJ) has concluded breach of Treaty proceedings against the Federal Republic by finding Germany in its decision of 29.10.2009 (C-536/07) to be in breach of the EU Treaty.

Contract assumed the form of a tenancy agreement with rights of use

The circumstances of the case to which the ECJ's decision relates were as follows: Via a (private) trade fair company set up by the city of Cologne the city had signed a contract referred to as a tenancy agreement with a private investor (a closed fund of the Esch-Oppenheim Group) the subject of which was four exhibition halls. In return for rent payments the trade fair company was granted a 30-year right of use with regard to the plot and the exhibition halls to be erected on the plot. At the time the contract was signed no buildings had yet been erected on the site in question. The agreement specified the type, size, nature and quality that the buildings the private investor was to make available should have.

Overall character of the contract not its name the decisive factor

Despite the contract being referred to as a "tenancy agreement" and notwithstanding the involvement of the (private) trade fair company the ECJ concluded that the agreement had been a public building contract subject to competitive tender. The notion of public building contract encompasses all projects involving a contract – regardless of the official designation of the same – between a public client and a company the object of which is the erection against payment of a building by that company. The decisive criterion here is whether or not the building to be erected is built in accordance with the specifications of the public client, regardless of what means are employed to achieve this purpose. With this in mind the ECJ found the agreement's primary aim to be the erection of the buildings, not the subsequent renting of the buildings by the public client.

Legal consequences

This decision will have far-reaching consequences. It is now up to the Federal Republic to put an end to a state of affairs that breaches the EU Treaty. In the final analysis this can only be done by annulling the agreement between the trade fair company and the private investor. Should it not be possible to annul the agreement, the Federal Republic would face the threat of further ECJ proceedings, which could lead to the imposition of a fine for persistent breach of the EU Treaty.

Practical considerations

Public procurement law regulations regarding public building contracts cannot be circumvented by signing tenancy agreements for as yet non-existent buildings. The decisive criterion in these cases is whether the agreement in question imposes on the investor a duty to build.

Dr Rainer Burbulla

Zoning Law: Local service areas as central service areas

II. In two of its decisions dated 17.12.2009 (4 C 1.08 and 4 C 2.08) the Federal Administrative Court has explicitly made it clear that so-called local service areas are also capable of being "central service areas" as defined by Art. 34 Sec. 3 of the Federal Building Code (BauGB) and other zoning-law regulations.

Central service areas

Central service areas are spatially-circumscribable areas in municipalities which on account of the retail shopping opportunities – frequently supplemented by opportunities to purchase services, food and/or drink – they provide have a supply function that extends beyond the immediate neighbourhood, thereby allowing consumers to satisfy various needs in one unified shopping process. Art. 34 Sec. 3 BauGB specifies that building projects that are in principle permissible within a local centre erected along cohesive lines are not permitted if they can be assumed to have harmful effects on central service areas.

Historically grown urban structures

The aim of this and other provisions of the Federal Building Code is to promote and preserve historically grown urban structures, thereby in the final analysis ensuring the sustainability of supply that is close to the consumer.

Pedestrian zones as central service areas

Until now the question of whether areas with a primarily pedestrian makeup in terms of consumers and that (only) cater to the needs of the local community were also to be considered central service areas in the sense explained above had remained controversial and undecided in court decisions and the legal literature. Now however the Federal Administrative Court has unambiguously found this to be the case. As a result the towns and cities have had their assumption that the provisions of Art. 34 Sec. 3 of the Federal Building Code are also meant to protect their local service areas confirmed.

Practical considerations

Projects for setting up shop in a particular location now more than ever need to take the existing structure of the centre(s) of the municipality in question into account.

Isabel Gundlach

Zoning law: right of neighbouring municipalities in the presence of subjective rights to take legal action within the framework of proceedings to obtain permission to deviate from a planning objective

III. With major retail projects it is frequently the case that within the framework of proceedings to obtain permission to deviate from a planning objective the issue of whether the municipality drawing up the plans is permitted to disregard the limits set by the aims of comprehensive regional planning needs to be clarified in advance.

In its recent decision of 05.11.2009 (File No. 4 C 3.09) the Federal Administrative Court ruled that neighbouring municipalities have a right to take legal action against a permission to deviate from a planning objective granted to the planning municipality, provided the aims of comprehensive regional planning grant the neighbouring municipalities their own rights. In the case in question the Federal Administrative Court stated that there was such a right with regard to the regional planning law provision against interference on the part of the neighbouring municipality.

Subjective rights within the aims of comprehensive regional planning

The decision is remarkable in that up to now the Federal Administrative Court had been of the opinion that the aims of comprehensive regional planning did not confer rights of their own on municipalities as they did not flow from the municipalities' planning prerogative (see, for example, the ruling of 11.02.1993 – 4 C 15/92). As a consequence the federal legislator had with regard to the urban land-use planning process in a supplement to Art. 2 Sec. 2 BauGB given the municipalities a right of their own to defend against interfering comprehensive regional planning aims that assign a specific function to municipalities (namely by assigning them centrality levels).

Expanding the means of legal protection

The ruling expands the means of legal protection for neighbouring municipalities in that stage of the proceedings that involve the obtaining of a permission to deviate from a planning objective. The Federal Administrative Court has thus transferred legal provisions from the urban land-use planning proceedings to the earlier proceedings to obtain permission to deviate from a planning objective. The expanded means of legal protection created increase the planning risks for major retail projects.

Niklas Langguth

Zoning law: Retail schemes cannot replace a weighing of facts

IV. To protect town/city centres and other central service areas many municipalities throughout the Federal Republic are currently planning to exclude retail enterprises from, for example, industrial estates. In most cases the basis for such planning is provided by the centre and retail schemes adopted by the municipalities.

In its decision of 23.07.2009 (4 BN 28/09) the Federal Administrative Court made it clear that although centre and retail schemes could within the context of the planning municipality determining the facts and circumstances be taken into account such schemes could not be relied upon exclusively to justify the exclusion of retail enterprises. Rather, the decisive element for excluding retail enterprises was that the municipality had in the course of its planning determined, evaluated and weighed all facts relevant to a balancing of the same in an orderly fashion. In the case in question the municipality, although having had an expert opinion on its retail scheme

prepared, had not yet however adopted the scheme. It was not the (formal) adoption of the scheme but the orderly determination of facts that the Federal Administrative Court took into account in its ruling.

The decision makes it clear that even though the planning schemes and framework development planning frequently adopted or engaged in these days by the municipalities can play an important role in aiding urban land-use planning they cannot substitute nor serve as necessary conditions for a planning-related determination of facts.

G. Litigation

Code of Civil Procedure: Security for costs of the lawsuit to prevent the abuse of law by foreign-controlled German private limited liability companies (GmbH)

I. Claimants whose permanent residence is not in one of the EU member states or in a state that is a signatory to the Treaty on the European Economic Area must at the request of the defendant give the defendant security for the costs of the lawsuit (Arts. 110 ff of the Code of Civil Procedure [ZPO]) . In the case of legal persons (such as for example a GmbH, a German private limited liability company) it is not the permanent residence but the domicile of the company that is decisive.

Providing security for costs of the lawsuit in the case of non-EU claimants

US-controlled GmbH claimant without operations in Germany is obliged to provide security for the costs of the lawsuit

In a lawsuit at the Regional Court (LG) Berlin (33 O 433/07) the claimant sought to exercise the right ceded to it by the defendant to have a share of the equity capital of a company operating a natural gas field in Russia transferred to it.

The claimant in question is a German private limited liability company (GmbH) which in 2007 was incorporated by its Texas-based parent company with a nominal capital of € 25,000. According to the certificate of registration and the articles of association the object of the company is to represent the interests of the Texas-based parent company in Germany and in neighbouring German-speaking countries. The commercial register puts Frankfurt-on-the-Main as the domicile of the claimant. The deputy chairmen of the Texas-based parent company, resident in the US, and the attorney of record of the claimant, resident in Germany, were designated as managing director of the claimant. The claimant had no employees or business premises of its own, the court noted.

In its interlocutory judgement of 29.10.2009 the LG Berlin imposed on the claimant a duty to give the defendant security to the amount of €1.8m for the costs of the lawsuit. In the opinion of the court the claimant could not rely on its having an administrative centre in Germany, given that the parent company by founding the claimant had obtained a formal legal position that relieved it of its duty to provide security for the costs of a lawsuit. The claimant had thereby circumvented the provisions of Arts. 110 ff of the German Code of Civil Procedure (ZPO), the court declared. This amounted to an abuse of rights and was hence unlawful. The court

added that it was unable to detect any business activities on the part of the claimant beyond the litigation activities relating to the pending lawsuit. Since its founding the claimant had used the offices and infrastructure of the law firm of its managing director and attorney of record. In the two years since it had been founded the claimant had neither hired any employees nor moved into offices of its own, the court observed.

Attempt to claim exemption from the duty to provide security violates the principle of good faith

All in all the Regional Court concluded that the claimant was clearly engaged in no other activities than the litigation activities relating to the lawsuit in question. The invoking by the claimant of its formal legal position was contrary to the principle of good faith, the LG Berlin declared. To avoid the duty of providing security the claimant could not claim to be a company under German law with a domicile in Germany, the court stated.

Ralf-Thomas Wittmann

Arbitration law: Right of legal persons to resort to arbitration in instances of GmbH resolution disputes

II. In its decision of 06.04.2009 (II ZR 255/08) the Federal Supreme Court ruled that disputes about resolutions passed at shareholder meetings of German private limited companies (GmbH) can also be resolved by arbitration tribunals (the so-called "right of legal persons to resort to arbitration").

When compared with public civil law proceedings arbitration proceedings, in addition to other advantages, offer a high degree of confidentiality and are therefore extremely well suited for handling company-law disputes.

No arbitration proceedings without equal legal protections

To be legally valid an agreement to extend the jurisdiction of an arbitration tribunal to include GmbH resolution disputes must, however, in the opinion of the Federal Supreme Court meet a list of stringent requirements. First and foremost among these was the requirement to ensure that when compared with civil law proceedings arbitration proceedings provided the same degree of legal protection, the BGH declared.

Practical considerations

To assign resolution disputes to private arbitration tribunals the steps shareholders need to take to initiate arbitration proceedings are hence especially important. GmbH shareholders can for example by making appropriate changes to the articles of association assign all shareholder disputes to arbitration tribunals. In doing so it would appear to make sense to pick a well-established institutional arbitration tribunal (such as, for example, the International Chamber of Commerce [ICC] or the German Institution of Arbitration [DIS]).

Johannes Pitsch

News and Events

1. **New releases 2010**
   Rechtshandbuch
   Immobilien-Asset-Management
   Potenziale und Strategien für Investoren und Eigentümer
   [Legal Handbook on Property Asset Management
   Strategies and Opportunities for Owners and Investors]

   Published by:
   Johannes Grooterhorst, Udo Becker, Rolf-Ulrich Dreyer, Tobias Törnig

   Our authors are:
   Dr Johannes Grooterhorst
   Dr Ursula Grooterhorst
   Tobias Törnig
   Dr Rainer Burbulla
   Niklas Langguth

2. **"Quo Vadis" 2010**
   01– 03 February 2010, Hotel Adlon Kempinski Berlin
   „Quo Vadis" 2010
   A Meeting Place for Deciders and Visionaries
   Member of the "Retail is detail" panel: Dr Johannes Grooterhorst

   Should you be interested in taking part in the event or wish to pre-order the book, please contact the speakers at www.grooterhorst.de.

Imprint

Published by
Grooterhorst & Partner
Rechtsanwälte
Königsallee 53–55
D-40212 Düsseldorf
Tel. +49/211/864 67-0
Fax +49/211/13 13 42
info@grooterhorst.de
www.grooterhorst.de

Design and Layout
Ufer und Compagnie
Werbeagentur GmbH
Darmstädter Landstraße 184
D-60598 Frankfurt am Main
Tel. +49/69/96 87 20-0
Fax +49/69/96 87 20-30
www.uferundcie.de

Printed by
Krautstein & Hampf
Druck GmbH
Kappeler Str. 39
D-40597 Düsseldorf
Tel. +49/211/99 60 10
Fax +49/211/99 60 144