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Dear Reader

In our newsletter at the beginning of 2011 we look ahead to developments in European law that are sure to have an impact on companies. At the same time we review important decisions taken in 2010:
Problems associated with the use of foreign companies, insolvency matters relating to associations and questions that labour law and – as so often – commercial tenancy and public building law, with its numerous zoning issues involved in the planning of large-scale retail projects, give rise to.

In the hope that our newsletters of 2011 will once again provide you with valuable insights, I remain

Yours sincerely

Dr Johannes Grooterhorst
Attorney at Law

A. Current News

2011: Developments in European law of relevance to companies

At the beginning of 2011 planning entrepreneurs are inclined to look ahead. And in so doing they will ask themselves to what extend European law might influence their plans and projects. The European legislator is in the business of creating and planning norms that supplement and replace domestic German legislation. Thus planning with an eye to German law only is insufficient. The decisions of the European Court of Justice are unlikely to leave German entrepreneurs unaffected. Real estate developers have for example on occasion found themselves at the sharp end of the public procurement law provisions of 2009/2010. Three recent examples deserve scrutiny: From the fields of company law, general civil law and the domain of coercive measures in competition law (the large area of economic sanctions).

No protection in competition law of the confidentiality of communication between client and lawyer in the case of staff lawyers

I. In its judgement of 14.09.2010 (Case C-550/07 p) the European Court of Justice in the matter of "Akzo Nobel Chemicals Limited" vs. the Commission found that records of a lawyer working as a member of staff in the legal department (staff lawyer) of Akzo Nobel Chemicals Limited were not protected against confiscation. The records in question consisted mainly of e-mail traffic between Akzo Nobel and other companies involved in the case.

For defence purposes only

The proceedings were brought about by a confiscation order issued by the Commission against the companies concerned in response to suspicions of their having engaged in anti-competitive practices. In its ruling the court points out that in its previous decisions it had acknowledged the confidentiality of communication between attorney and client provided two conditions were met: Firstly, that the records in question be related to "the exercising of the rights of the client to defend himself" and, secondly, that the correspondence in question be one that originated from an "independent attorney".

Only in the case of independent attorneys

In the opinion of the court the second condition had not been met. Despite his admission to the bar and the professional legal constraints thereby created a staff lawyer did not possess the same degree of independence from his client as an attorney working for an external law firm, the ECJ observed. By the same token the party seeking to assert its right (the company) had to accept the constraints arising from its legal adviser carrying out his profession, the court added.

Practical considerations

The judgement is related to the current discussion about the protection of privacy in criminal defence. The German federal lawmaker is planning to extend the current "defence counsel privilege" to all attorneys. The decision by the ECJ highlights the importance assigned to the "independent" administration of justice by "independent" attorneys. It is only they who are in a position to protect confidential records.

The European Private Company – an alternative to the German private limited company [GmbH]?

II. The plans to create a European Private Company (Societas Privata Europaea – SPE) have made considerable progress. In December 2010 the parliamentary groups of the Bundestag began work on the topic (Frankfurter Allgemeine Zeitung article of 08.12.2010). The European Commission had submitted a draft proposal for a European Private Company (SPE) as early as 2008. The European Parliament subsequently approved the proposal in 2009 (KOM 2008, 8396-C6-0283/2008-2008/0130 CNS). The new discussion in political circles should speed up the process and give added

momentum to the proposal which is currently being blocked (by Germany in particular): On the European Level the European legal form could turn into a serious competitor to the German private limited company [GmbH] and provide German companies with a new company law concept (a German specialist publishing house has already announced that it intends to publish a commentary on the new legal form towards the end of 2011!).

European Civil Code versus German Civil Code (BGB)?

III. In December 2010 the major German trade associations (the German Federation of Skilled Crafts, the Federation of German Industries, the Federal Association of Consumer Advice Centres) and the Federal Chamber of German Civil Law Notaries submitted a "common position on a Green Paper (Project) by the Commission on European contract law".

The Green Paper by the Commission on a European contract-law "optional instrument" (KOM 2010/348/3) contains a number of so-called "options" that extend all the way to a statutory instrument for the introduction of a European Civil Code.

In their joint declaration the German trade associations and the Federal Chamber of German Civil Law Notaries criticise the plans of the Commission. Their critique focuses in particular on what they regard as the poor analysis of requirements, the absence of transparency, the unnecessary time pressures created, the inadequate preparations and the absence of any estimate as to the likely consequences of implementing the instrument.

Practical considerations

Observers assume that the concept of the EU Commission still has a long way to go. However, given the fact that in many areas of law (such as for example gender equality legislation, publicity of accounts, procurement law) companies have had to get used to regulations issued by Brussels, they should work on the assumption that something might emerge that could be a competitor to the familiar German Civil Code (BGB).

Dr Detlef Brümmer

B. Commercial and Company Law

Company law – personal liability of managing director in the case of ambiguous references to the company

I. The private limited company (Ltd.) incorporated under English law has become increasingly popular in Germany in the last few years. Even so the fact that certain risks are entailed in opting for this legal form is not always given the weight it deserves. The following ruling makes this plain:

In its decision of 05.10.2010 (File No. 4 U 139/08) the Higher Regional Court (OLG) in Rostock declared that a managing director of an English public limited company is personally liable if he upon concluding a contract fails to refer unambiguously to the company as the contracting party.

The facts of the case

The claimant wanted to have his roof newly tiled for about € 25,000. The defendant submitted an appropriate offer, which however was without a letterhead. In the address window of the letter in question it said: "... Ltd. (Dach u. Hochbau [Roof and Building Construction]) – Ch. J. U [the initials of the defendant]". While the footer of the offer letter contained: "... Ltd. (Dach u. Hochbau)", an address in the UK and a German mobile phone number.

The defendant and claimant agreed that a mock invoice amounting to about € 42,600, which would allow the claimant to claim higher subsidies, should be issued.

Following the construction work the claimant filed a liability suit against the defendant – as the roof was found to have a leak and had to be retiled completely.

In this he failed at first instance. The District Court was of the opinion that because the contract had been signed exclusively with the English Ltd., which had in the meantime been stuck off the register, the lawsuit had to be dismissed.

Ambiguous indication of parties harmful

The Higher Regional Court disagreed with the findings of the court of first instance. Through his offer, which had featured two legal personalities next to one another and on an equal footing, the defendant had created the impression, the court declared, that either two contractors were involved or one company made up of the two. At no point had he, the court went on to say, pointed out that he (Ch. J.) was merely the private limited company's managing director.

What also needed to be taken into account, the court stated, was that the defendant during the earlier local inspection had introduced himself as a tiler, without pointing out that he was only there as representative of the English private limited company.

Moreover the defendant was also not in a position to render the transaction void on account of the mock invoice (German Civil Code Sections 134, 139). For a contractor who received a fee for deficient work would be consistently acting in bad faith if, to ward off claims for defects, he were to invoke the unlawfulness of a side agreement and the voiding of the construction contract as a whole this entailed, the court observed.

Practical considerations

As early as 2002 the Federal Supreme Court declared that an architect was personally liable towards a contractor if during the negotiations with the said contractor he failed to point out that the contracting German private limited company [GmbH], ostensibly with a domestic company headquarters, was in reality a company incorporated under Hungarian law with a registered office in Hungary only.

Ralf-Thomas Wittmann

II. Consumer loan used to acquire a stake in a German private limited company

In its judgement of 22.09.2010 (File No.: 3 U 75/10) the Higher Regional Court (OLG) in Celle ruled that the activity by the later sole shareholder and managing director of taking out a loan with the intention of acquiring all shares in a German private limited company (GmbH) did not amount to an "act in exercise of his or its trade, business or profession" as defined by Section 14 of the German Civil Code (BGB). Hence the provisions on consumer loan contracts laid down in BGB Sections 492ff applied, the court noted.

The facts of the case

A bank granted the defendant an equity capital loan designed to allow him to acquire all shares of a GmbH – which with the loan he did. Subsequently the defendant became the sole shareholder of the company in question. Following a deterioration of the company's financial position the defendant filed for bankruptcy for the private limited company. In response the bank terminated the loan contract. At a later date the bank assigned the claim arising from the contract to the claimant. Following a number of failed attempts to settle the matter out of court the claimant

filed an action for recovery of money with regard to a part claim. The defendant thereupon filed a motion to dismiss on the grounds that the claim was by then stale. The decisive factor was whether the defendant was a consumer as defined by Section 13 BGB, a circumstance that would have made the provisions of Section 497 Subsection 3 Sentence 3 of the German Civil Code applicable. There it says that the "limitation of the claims for repayment of the loan and interest is suspended from the date when default begins under subsection (1) until they are determined in a manner described in section 197 (1) nos. 3 to 5, but not for more than ten years from the date when they come into existence."

Is the loanee a consumer as defined by Section 13 BGB?

The OLG in Celle came out in favour of assigning the properties of a consumer to the defendant. The basic criteria for answering the question regarding consumer properties are whether the activity in question is one of a private or commercial/self-employed-professional nature. With the point in time at which the activity is carried out requiring scrutiny here and possible preparatory activities – if they have an appropriate relationship to the commercial/self-employed professional activity in question – likewise having to be taken into account. Commercial activity was an orderly business/self-employed activity or participation in competition designed for the long term, the court noted. The signing of the loan contract had not been intended to promote activity of this kind, it observed.

GmbH shares as investment

This was so because the acquisition of shares was an investment belonging to the realm of portfolio management – regardless of the size of the stake acquired with the loan, the court added. Hence it was of no consequence that the defendant had bought all shares of the company and in addition taken over the position of managing director, the court declared.

Managing the company no commercial activity

For the managing of a private limited company by the director of the same also failed to amount to commercial activity, the court stated. Nor did the acquiring of all shares of a GmbH render the sole shareholder an entrepreneur. The only entrepreneur was the private limited company itself, for it was the GmbH, not its shareholders or director(s) that was liable for the debts of the company, the OLG pointed out.

Objective thrust the decisive factor

The decisive factor for designating the activity of a person as entrepreneurial or private was the objective thrust of the business not the volitional direction of the activity, the court declared. The aim and purpose of taking out the loan had been to acquire shares in the GmbH, an activity from the – private – realm of portfolio management. This observation would only fail to apply, the court remarked, if portfolio management was such a complex activity that the time it took to carry it out was tantamount to exercising a profession and required, for example, the setting up of an office or the funding of an organisation.

Practical considerations

From a practical point of view this means that the rules on consumer credit likewise apply to cases of company acquisition financed through borrowing. In certain cases, such as the one delineated here, this can have negative consequences for the loanee.

Dr Steffen Schleiden

Advisory council as special counsel of a German public limited partnership

III. In its decision of 07.06.2010 (File No: II ZR 210/09) the Federal Supreme Court declared that a German public limited partnership can appoint its advisory council as a special counsel tasked with asserting claims for damages against inter-company representatives.

The facts of the case

In the case in question the members' meeting had appointed the advisory council as special counsel tasked with asserting claims for damages against one of the limited partners.

Effective appointment of council members

The Federal Supreme Court stated that advisory council members can be appointed counsel to partnerships effectively. For members of a partnership are likewise entitled to choose a special representative to assert claims for damages against inter-company representatives.

Comparable provisions in the Private Limited Companies Act (GmbHG) and the Public Limited Companies Act (AktG)

This transpires from the analogous application of Section 46 No. 8 Second Alternative GmbHG, and Section 147 Subsection 2 Sentence 1 AktG. Given the prohibition of inter-se proceedings the limited partner against whom the claims for damages are to be asserted is barred from acting as counsel for the claimant(s). However, this state of affairs does not automatically allow the remaining limited partner to act as counsel. He cannot be expected to pursue claims and in so doing run the risk of exposure of possible defaults of his own or of colleagues for whose professional conduct he is liable or of persons with whom he has business relations. Section 46 No. 8 GmbHG is designed to remedy the situation of a trial involving one of several directors in which the other directors might be too biased to pursue the interests of the company during the trial with the vigour such a pursuit deserves. Hence Section 46 No. 8 Second Alternative GmbHG allows for the appointment of counsel even in such cases in which the legal representation of the company in such a trial could be undertaken by other directors. The same approach emerges from Section 147 Subsection 2 Sentence 1 AktG, according to which the Annual General Meeting can – despite the supervisory board in principle representing the public limited company (Section 112 AktG) – appoint a special counsel to assert claims for damages against the board of directors.

Practical considerations

In practical terms this decision means that directors in a trial in which the partners of a partnership claim damages from one or more directors can appoint a special counsel. In such cases the question of whether the appointment of such a special counsel might be indicated on account of a possible conflict of interest of the other directors should be looked at closely.

Dr Steffen Schleiden

C. Bankruptcy Law

Association Law: No liability of directors of associations for insolvency assets-reducing payments made after crossing the insolvency threshold

I. When an association has crossed the insolvency threshold, i.e. is insolvent or bankrupt, its executive board oftentimes fails to file for bankruptcy in time. In its decision of 08.02.2010 – II ZR 54/09 – the Federal Supreme Court upheld the decisions of the higher regional courts according to which directors of associations are not liable for insolvency assets-reducing payments.

The law stipulates that the executive board has to make good the losses incurred by the association's creditors brought about by the delay in the filing for bankruptcy

(Section 42 Subsection 2 German Civil Code). What the Federal Supreme Court now had to decide was whether this liability encompassed so-called "insolvency assets-reducing payments". These are payments of debts of the association made by the executive board at a time when the association should legally speaking already have filed for bankruptcy.

German law makes the executive boards/directors of German public limited companies, private limited companies and cooperative societies liable for losses incurred through these insolvency assets-reducing payments. Despite being controversially discussed in the literature the consensus of opinion was that such liability did not apply to associations.

Thus the Federal Supreme Court based its decision in particular on the legislator's fundamental stance in favour of voluntary and unsalaried work in associations, thereby continuing its adjudicative approach in favour of such bodies.

Practical considerations

The judgement creates legal certainty and removes some of the pressure on executive boards. However, as the decision only relates to certain specific types of loss that creditors to an insolvent association might suffer due to a delay in a filing for bankruptcy, it does not give the executive boards of associations carte blanche. In other circumstances executive board members are fully liable to the extent of their private assets, if they fail to file for bankruptcy in time.

Niklas Langguth

II. Private Limited Company Law – Liability of the facultative supervisory board of a GmbH on account of a dereliction of supervisory duties

In its judgement of 20.09.2010 (File No.: II ZR 78/09) the Federal Supreme Court declared that a dereliction of supervisory duties of a facultative supervisory board regarding the prevention of illegal payments by the managing director subsequent to the crossing of the insolvency threshold does not trigger liability for losses incurred by the company's creditors.

The facts of the case

The claimant was receiver of the assets and property of a German private limited company (GmbH) and filed a suit for damages against the members of the facultative supervisory board of the GmbH in question. He based his suit on the claim that the defendants had culpably and in breach of their duties allowed the managing director after the company had crossed the insolvency threshold to effect payments in accordance with Section 64 Sentence 1 of the Private Limited Companies Act (GmbHG).

No damages in the absence of damage

The Federal Supreme Court noted that a claim for damages was excluded because no harm as specified in Sections 249ff of the German Civil Code had come about. For in the event of a dereliction of supervisory duties with regard to the observance of the prohibition to make payments as spelt out in Section 64 Sentence 1 GmbHG, it was not the GmbH but the creditors to the company that had suffered on account of the payments made, the court observed. For the payments had reduced the liabilities of the company, the court added. At the same time, however, the insolvency assets of the company had shrunk, thereby harming its creditors. The legal position was hence different when compared with that of obligatory supervisory boards of German public or private limited companies, the court pointed out.

Differences between public and private limited companies

Because German public limited companies legislation puts the loss suffered by a company's creditors on a par with that suffered by the company itself, the supervisory board of a German public limited company is also liable if the company itself

does not suffer a loss. In the case of a GmbH's facultative supervisory board, however, no rule equating such losses exists. Thus the members of a facultative supervisory board of a German private limited company are not liable if – even though regulations regarding the preservation of assets have not been met – the company's liabilities have been reduced by the payments made and hence no additional loss was incurred by the company. Having said that, this decision does not allow any general conclusions about the liability of members of a facultative supervisory board of a private limited company to be drawn.

Practical considerations

The liability rules for the members of the supervisory board of a public limited company do not coincide with those for the members of a facultative supervisory board of a GmbH. Thus when considering liability issues it is important that the question of whether the private limited company's facultative supervisory board is liable for the actual loss incurred be looked at very carefully.

Dr Steffen Schleiden

D. Labour Law

Bonus claim despite unclear or opaque clause in a contract of employment

I. In its ruling of 08.12.2010 – 10 AZR 671/09 – the Federal Labour Court (BAG) declared that an unclear or opaque general clause in a contract of employment does not prevent the emergence of a future legal claim to a Christmas bonus based on regular behaviour.

The facts of the case

In the period 2002 to 2007 a graduate engineer had received, with no explicit proviso attached, an annual Christmas bonus amounting to his gross monthly income. On account of the financial crisis the defendant pointing to a clause in the written contract of employment refused to pay the Christmas bonus in 2008. The clause in question in the contract of employment reads as follows:

"To the extent that the employer makes payments which it is not obliged to make by law or on account of the collective bargaining agreement, such as premiums, (holiday) allowances, bonuses and Christmas bonuses, these payments are made on a voluntary basis and without legal obligation of any kind. They can therefore be cancelled at any time without observing a particular time limit."

A clear voluntariness proviso

The Labour Court came out in favour of the graduate engineer's claim to a Christmas bonus payment. On appeal by the employer, however, the Federal State's Labour Court dismissed the engineer's lawsuit. The BAG for its part ruled that although a "voluntariness proviso" in a contract of employment could in principle preclude future payments, for it to do so it had to be formulated in a manner that was clear and unambiguous. The clause applied by the employer failed to meet these requirements, the court observed. It failed to invalidate sufficiently the employer's repeated actual behaviour, the court added. The clause could be read as to imply a voluntary commitment on the part of the employer to make such payments, the BAG pointed out. What is more, the Federal Labour Court believes that the conditional cancellation presupposes the existence of a claim.

Practical considerations

The BAG's ruling is in line with its previous decisions on the emergence of employees' claims to bonuses and similar payments towards employers, provided these

have shown a consistent pattern of behaviour in the absence of reservations. If the employer wishes to prevent its regular conduct from creating claims to bonuses or other payments, there is in principle the option of including a provision to this effect in the contract of employment. However, as this decision clearly indicates, an employer is well advised to consider the exact wording of such a provision carefully. For only a clear and unambiguous clause will prevent the emergence of any future claims.

Johanna Noßke

Three week time limit for claims also in disputes about date of termination

II. Employees who want to file a suit with a labour court to prevent their notice of termination from terminating their contract of employment must do so within three weeks after receiving their notice of termination (Section 4 Subsection 1 Dismissal Protection Act).

In its judgement of 01.09.2010 – 5 AZR 700/09 – the Federal Labour Court (BAG) declared that the three-week time-limit for filing a lawsuit with a labour court also applied if the employee's aim was not to challenged the dismissal per se but only the date of the termination of the contract of employment.

The employee had been working at a petrol station since 1995. The defendant took over the petrol station in the spring of 2007 and in a letter dated 22.04.2008 gave the claimant notice that his contract of employment would terminate on 31.07.2008. In November of 2008 the claimant filed a suit for compensation for default of acceptance for the months of August and September 2008 on the grounds that the defendant had failed to abide by the statutory period of notice.

The BAG found that although the defendant had failed to abide by the statutory period of notice the claimant should nonetheless have filed his lawsuit within three weeks after having improperly accepted the period of notice. As this had not happened the written notice of termination had as claimed by the defendant terminated the contract of employment on 31.07.2008, the court stated.

Practical considerations

This surprising decision by the Federal Labour Court extends the reach of Section 4 of the German Dismissal Protection Act and hence the need to comply with the three-week time limit when filing a lawsuit further. The practical consequence for employers is that even in the case of notices that do not abide by the statutory period the employee can henceforth only challenge these in court within a period of three weeks. If the employee does not take legal action against the notice that fails to abide by the statutory period, the fictional effect spelt out in Section 7 of the Dismissal Protection Act applies and the dismissal will be considered legally valid as of the date specified by the employer.

Johanna Noßke

E. Commercial Tenancy Law

Passing on expenses for terrorism insurance in the case of vulnerable objects

I. In its judgement of 13.10.2010 (File No.: XII ZR 129/09) the Federal Supreme Court (BGH) ruled that the expenses for terrorism insurance can be passed on to tenants as operating costs if because of special circumstances the rented property in question is a suitable target for a terrorist attack.

Offices in an "architecturally conspicuous" building complex in a special location

The lessor had rented out to the tenant office space in a large "architecturally conspicuous" building complex. The rented property is located right next to the Federal Statistical Office and a football stadium. According to the terms of the tenancy agreement the lessee was obliged to bear the "property and third-party liability insurance" costs and offset additional cost arising from the reintroduction of operating costs. Following the attack on the World Trade Center on September 11 2001 the lessor's insurance company was no longer prepared to insure the risk of a terrorist attack and hence partially cancelled the insurance contract. Whereupon the lessor took out a terrorism insurance policy with a specialist insurance company, passing on the costs of the same to the tenant. The tenant objected to the lessor's conduct.

No common approach by the higher regional courts

Previously there had been no agreement in the decisions of the higher regional courts as to whether property terrorism insurance costs could be passed on to tenants of the same in all cases or whether this was only possible if due to the circumstances the property was deemed especially vulnerable (In all cases: OLG Stuttgart, ruling of 15.02.2007 – 13 U 145/06; only in the case of vulnerable property: OLG Frankfurt-on-the-Main, ruling of 26.06.2009 – 2 U 54/09).

The BGH has now sided with the latter approach. The court first made it clear that terrorism insurance was a form of property insurance the costs of which the lessor could passed on to the lessee in accordance with the allocation of costs agreement (Compare Section 2 No. 13 Operating Costs Ordnance). Furthermore the court noted that passing on the costs of terrorism insurance also accorded with the precept of economic efficiency. This precept, the court said, "denoted the contractual accessory obligations of the lessor – based on the principle of good faith – to refrain from burdening the lessee with additional costs that are not reasonable and necessary." With regard to necessity the question to be answered was, the court declared, "whether concrete circumstances obtain that serve to justify considering the possibility of damage to the building due to a terrorist attack". Only if this was the case would the taking out of a terrorism insurance policy by the lessor accord with the precept of reasonable management, the Federal Supreme Court stated.

Practical considerations

Following the decision by the BGH questions about whether the costs of terrorism insurance can be passed on or not boil down to a case-by-case assessment of the threat potential. The decisive factor here is the degree of exposure of the property in question.

Dr Rainer Burbulla

Cessation of trading not tantamount to an implicit cancellation of a tenancy agreement

II. In its judgement of 12.04.2010 (File No: 8 U 175/09) the Supreme Court of Berlin ruled that the mere fact that a German private limited company (GmbH) had ceased trading did not imply an implicit cancellation of a tenancy agreement nor did it imply that the GmbH had waived its right to receive a notice to quit.

A GmbH had rented premises which it had subsequently sublet. The private limited company ceased trading and vacated the premises, while the subtenant stayed. The GmbH was not struck off the register of companies, although its registered office remains unknown. Invoking the fact that the tenancy agreement with the GmbH had been terminated by the cessation of trading and the company's having vacated the premises the lessor filed an action for eviction against the subtenant.

In the opinion of the Supreme Court the mere cessation of trading by the GmbH did not amount to an implicit cancellation of the tenancy agreement. Nor did the cessation of trading on the part of the lessee indicate an implicit waiver of the right to receive a notice to quit, the court added. Rather, what was required to terminate the contract was a written termination of the tenancy agreement with immediate effect, the court pointed out. The fact that it was not possible to ascertain the registered office of the company was no obstacle to meeting the requirements for terminating the tenancy agreement. In such a case German law made a service by publication procedure available (Section 132 Subsection 2 German Civil Code), the Supreme Court observed.

Practical considerations

As a matter of principle a lessor should not in the event of his lessee's ceasing to trade rely on a tacit termination of the tenancy agreement. The courts are very wary of endorsing tacit agreements. Should the lessor be unable to determine the registered office of the lessee he is free when terminating the agreement to avail himself of the service by publication procedure spelt out in Section 132 Subsection 2 of the German Civil Code.

Dr Rainer Burbulla

Editorial transparency: Invalidity of an otherwise lawful "hidden" clause in a tenancy agreement

III. In its ruling of 21.07.2010 (File No.: XII ZR 189/08) the Federal Supreme Court (BGH) declared that a clause in a tenancy agreement that in terms of content too did not provide grounds for objection can nonetheless be ineffective for the simple reason that it is to be found in the agreement text in a place where a contracting party would not necessarily be expected to find it.

In the case in question the contracting parties had agreed to an exclusion of the lessor's liability for initial defects. This exclusion of liability was embedded in a clause intended to set offsetting-prohibition and retention-rights standards.

The BGH believes that the positioning as such of the clause in the agreement invalidates it. Though the contracting parties are free in a tenancy agreement to exclude culpability-independent lessor liability (Section 536a Subsection 1 BGB) by way of a boilerplate clause, in the case in question, however, the boilerplate exclusion clause would have had to have been part of the agreement. This is not the case if the clause in terms of the outward appearance of the text is so unusual that the party contracting with the user would not necessarily be expected to find it (Section 305c Subsection 1 BGB). The contracting party can also not be expected to find such a clause, if the rule in question is in a position in the text and under a heading that would not lead a reader to expect its presence there (so-called "editorial transparency").

Practical considerations

When drawing up a tenancy agreement the author of the same should take care to preserve the logical order of the various clauses. Failing to do so can render problematic a regulation that in terms of content is not – in the process invalidating it and creating a considerable liability risk.

Dr Rainer Burbulla

F. Public Law

Constitutional Court stops supplementary budget of the federal state of North Rhine-Westphalia

I. On 18.01.2011 the Constitutional Court of the German federal state of North Rhine-Westphalia (NRW) stopped in part by way of a provisional order the implementation of the Supplementary Budget Act 2010 (decision dated 18.01.2011 – VerfGH 19/10). The government of the federal state was ordered to desist for the time being from borrowing on the basis of the supplementary budget and to suspend the closing of the accounts for 2010.

Constitutional issue

Numerous members of the federal state's parliament had filed a complaint against the Supplementary Budget Act 2010 with the state's constitutional court on the grounds that the scale of borrowing permitted by the statute exceeded the funding required for the investments planned. According to Article 83 Sentence 2 of the Basic Law of the federal state of North Rhine-Westphalia the income in the budget generated by borrowing may not in general exceed the scale of the investments in the same.

Implementation of the supplementary budget a threat to the public interest

In a preliminary judgement the Constitutional Court had to decide on the question of whether the public interest was more adversely affected by the implementation or the temporary suspension of the supplementary budget.

The court accorded greater weight to the preservation of a future financial room for manoeuvre. For their part the effects of borrowing on future budgets, the court declared, were to some extent irreversible. This being so the implementation of the budget had to be suspended, the court observed. The suspension however only applied to borrowing and the closing of the books, the court added. The more comprehensive request to suspend the act as a whole was rejected by the Constitutional Court.

No preliminary judgement with regard to the principal proceedings

The Constitutional Court made a point of saying that the temporary suspension did not amount to a decision on the main constitutional question of whether the Supplementary Budget Act 2010 was constitutional or not. This issue is to be settled in the pending main proceedings (File No.: VerfGH 20/10).

Justification of more extensive borrowing

During the main proceedings the Constitutional Court will have to look into the matter of whether the supplementary budget might be constitutional despite allowing a degree of borrowing that exceeds the planned investment expenditure. The main subject of the legal dispute is the question of whether, notwithstanding the fact that constitutional provisions would seem to prevent it, special circumstances nonetheless obtain that would allow for more extensive borrowing. A decision in the main action is to be reached within the next three months.

Practical considerations

The provisional order issued by the Constitutional Court is of especial importance. Budget acts are quite frequently the subject of voidance petitions filed by the political opposition. This being the case the constitutional courts are cautious in their decisions when it comes to weighing the respective merits of such petitions, especially since a decision by a court on the budget of a federal state can have a considerable impact on day to day politics. An observation that applies even more so to provisional orders, such as the one issued in this case, through which the implementation of the law has been suspended – even if only partly and temporarily.

Niklas Langguth

The current body of rulings on the location of FOCs

II. In the last few months the courts have issued numerous rulings on the location of Factory Outlet Centres (FOCs).

Does the conversion of a conventional shopping mall into an FOC undermine existing standards?

In summary proceedings the Administrative Court in Halle had to decide on whether the conversion of a conventional shopping mall into an FOC was possible from the point of view of the preservation of existing standards. This would only have been the case if from a town-planning perspective the new use to which the premises were put was deemed to be equivalent to the previous one. In its judgement of 23.09.2010 (2 B 215/10 HAL) the Administrative Court in Halle ruled that the conversion of a conventional shopping mall into an FOC required a reassessment of the project. The conversion was hence tantamount to a change of use, thereby – among other things because of the greater traffic to and from the premises – once again raising approval issues, the court declared. While the court's ruling is final, the decision in the main proceedings is still pending.

Does the Federal State Spatial Structure Programme infringe the rights of municipalities?

In an emergency appeal the municipality of Bispingen in Lower Saxony challenged the building permit for the FOC in Soltau. According to the ruling of the Administrative Court in Lüneburg dated 09.11.2010 (2 B 54/10) the building permit for the FOC in Soltau does not violate the rights of the municipality of Bispingen. The Spatial Structure Programme of the federal state of Lower Saxony, which allows for only one FOC in the Lüneburg Heath tourism region, did not infringe the rights of the municipality of Bispingen, the court declared. This was so because the decision in favour of Soltau did not undermine the programme's objective of strengthening the tourism region, the court pointed out. The appeal against the decision is pending with the Higher Administrative Court (OVG) in Lüneburg.

The principle of resolving conflicts through planning

For its part the OVG in Koblenz in two judgements dated 15.11.2010 (1 C 10320/09 and 1 C 10403/09) ruled on voidance petitions filed by the cities of Limburg and Neuwied targeting the land-use plan that calls for locating an FOC in the area of the ICE train station in Montabaur. The Higher Administrative Court in Koblenz noted that there were no serious objections to the land-use plan. The land-use plan was notably in accordance with the principle of resolving conflicts through planning; it neither violated a superior regional planning objective nor did it fail to meet the requirements of inter-municipal coordination, the court observed.

Emergency appeals against FOCs

Finally, the OVG in Bautzen in its decisions of 22.11.2010 rejected the emergency appeals lodged by the city of Leipzig and the major county town of Schkeuditz against the building permit for an FOC with 11,000 m² of sales space in the town of Wiedemar. The threat of a negative impact on central service areas was a moot point, the court stated. What was more, the parties lodging the appeals were not objecting to the construction of the building, but only to its use as an FOC, the OVG added. It was a matter for the principal proceedings to identify and if necessary take

account of any possible draining of purchasing power due to restrictions of use, the court pointed out. The State Directorate Leipzig has in the meantime also rejected the two towns' appeals. By filing a main action with the Administrative Court (VG) in Leipzig the city of Leipzig has however decided not to abandon its goal.

Practical considerations

The FOC concept is continuing to gain ground on the German market. Even though it cannot be assumed that a building permit for a common shopping mall will in all cases allow the latter to be converted into an FOC. FOC projects must therefore at regular intervals, in a coordinated effort that involves the investors and municipalities in question, be put on a new licensing-law footing. FOC concepts can be developed in accordance with federal state planning and comprehensive regional planning law provisions – with individual cases being able to surmount the obstacles thrown up by these provisions. As last year's judgements by the OVG in Munster and the Constitutional Court of the German federal state of North Rhine-Westphalia regarding the Euregio Outlet Centre (EOC) Ochtrup – but also the outlines of decisions by the OVG in Koblenz and the Administrative Court in Lüneburg – serve to show. Please also note the current decisions by the OVG in Schleswig and the Federal Constitutional Court on regional planning objectives (for details please see subheadings II and III).

Isabel Gundlach

III. Admissibility under comprehensive regional planning law of major retail projects – Schleswig-Holstein's integration requirement and interference proscription declared void

In its judgement of 22.04.2010 (File No.: 1 KN 19/09) regarding the Designer Outlet Centre (DOC) Neumünster the Higher Administrative Court of the federal state of Schleswig-Holstein declared void the regional-planning-law integration requirement and interference proscription found in that state's State Development Programme. The decision is not yet final however.

According to the now rejected integration requirement major retail establishments with core ranges of goods of relevance to city centres could only be planned in locations that were integrated from an urban development point of view and on the condition that the establishments were spatially and functionally related to the central service areas of the municipality in question. While the interference proscription for its part sought to prevent any kind of planning likely to have a substantial negative impact on existing or planned local service centres.

Distinguishing between local and supra-local planning

The Higher Administrative Court considered both planning objectives to be ineffectual, because they were examples of local planning, which was, the court noted, a prerogative of municipal land-use planning and not of supra-local planning as covered by comprehensive regional planning law. The Higher Administrative Court in Schleswig has thus followed the obiter dictum of the Higher Administrative Court in Munster, which in the EOC Ochtrup case had already denied the status of comprehensive regional planning law rule to a number of planning objectives in the State Development Programme of the federal state of North Rhine-Westphalia – without, however having had to reach a final verdict on the matter.

The Higher Administrative Court of the federal state of Baden-Württemberg on the other hand did in its judgement of 17.12.2009 (File No.: 3 S 2110/08; see also the following article on the Centro decision of the Federal Administrative Court [BVerwG]) not raise the issue of the interference proscription in Baden-Württemberg's State Development Programme, choosing instead to apply the same. The decision by the Administrative Court in Mannheim was overturned by the Federal Administrative Court and referred back to the court for further consideration (Federal Administra-

tive Court, ruling of 16.12.2010 – 4 C 8/10). So far there is only a press release by the Federal Administrative Court on the matter dated 16.12.2010. It remains to be seen if the Federal Administrative Court has dealt with the issue in its judgement.

Practical considerations

For major retail projects the scope of regional planning powers is of decisive importance. Federal state planning, which in the past has tended to incorporate strict regulations regarding major retail projects, has caused many a project to come to nothing. In light of the decisions outlined above it would appear that with regard to many of these rules the question of whether they are valid regional planning rules or rather hidden land-use planning rules, which the federal state is in no legal position to dictate to the municipalities, is far from settled. The pending decision of the Federal Administrative Court will in all likelihood add considerable momentum to the resolution of this issue.

Niklas Langguth

Federal Administrative Court upholds Centro ruling on mandatory regional planning rules

IV. On 16.12.2010 (4 C 8.10) the Federal Administrative Court ruled that mandatory objectives for the land-use planning of municipalities (regional planning objectives) can only be issued as mandatory rules if the rules allow for the exceptions to them to emerge sufficiently clearly. The Federal Administrative Court has thereby confirmed and given a boost to the judicial approach previously taken towards the Centro Oberhausen case (Federal Administrative Court, decision dated 28.12.2005 – 4 BN 40/05).

On the other hand the court overturned the latest ruling of the Constitutional Court (VGH) in Mannheim, which in its judgement of 17.12.2009 (3 S 2110/08) had declared that such mandatory rules could be drawn up as regional planning objectives without meeting any particular requirements.

Practical considerations

The decision is of importance because notwithstanding the judicial approach taken by the Federal Administrative Court in 2005 numerous mandatory rules are still to be found in federal and regional plans of the German federal states. These rules are void if and to the extent that the exceptions to them cannot be adequately determined. To the extent that these rules prove to be void, additional scope for the planning of municipalities is opened up that might prove helpful when it comes to planning major projects. When opposing these, the federal planning authorities can now no longer invoke the rulings of the VGH in Mannheim.

Niklas Langguth

G. Litigation

Abandoning of trial by record possible at any time

In a recently published judgement of the Regional Court in Frankfurt dated 21.10.2010 – 2 -11 S 371/09 – the court pointed out that in a trial by record a defendant must be prepared for the possibility that at any time the claimant might chose to abandon the procedure. In cases where tenants are unwilling to pay trial by record is frequently the most adequate means for the lessor to obtain an enforceable title in a short period of time. The precondition for a trial by record, however, is that all facts relevant to the claim in question can be proved with the help of documents; Section 592 German Code of Civil Procedure (ZPO).

Immediate continuation of the lawsuit at the hearing

However, the claimant can, without having to obtain prior permission from the defendant, up to the very end of the oral proceedings abandon trial by record, with the effect that the dispute remains pending as an ordinary lawsuit: In which case the claimant can make use of other types of evidence, such as witness testimony and expert evidence; Section 596 ZPO.

What is remarkable about the judgement is that the exercising of this right by the claimant does not provide grounds for delay: If the opposing party is present at the hearing at which the declaration is made, the trial will continue forthwith. The claimant could thereupon also provide new evidence, the court declared. Ahead of the hearing the defendant was well advised to prepare for the possibility of the claimant abandoning trial by record and arrange his pleadings, including any possible submission of evidence for his statements, accordingly, the court added. The defendant thus had to be ready to request a deadline for submitting written pleadings, should the claimant decide to abandon trial by record, the court observed. The court was not required to point this out to the defendant, the Regional Court in Frankfurt went on to say.

Practical considerations

In a trial by record the parties quite frequently have to ask themselves if it is opportune or even necessary to make a declaration of abandoning. It would appear to be advisable to do so if the court has doubts about whether the pleadings of the defendant are relevant and the opposing party has not filed a motion to dispense with written pleadings. In such a case the court can "take the decision all the way", with the effect that the defendant is robbed of the possibility of making his case successfully in any subsequent proceedings. This kind of approach is intended to speed up proceedings.

Ralf-Thomas Wittmann

News and Events

27.01.2011 in Dusseldorf
Tenancy Law:
The current judicial approach in commercial tenancy law
Speaker: Dr Rainer Burbulla, Grooterhorst & Partner Rechtsanwälte

Should you be interested in taking part in an event, please contact the speaker in question at: www.grooterhorst.de

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