Contents

Dear Reader

Our fourth newsletter of 2010 focuses on important decisions and developments in those fields of law our firm has specialised in. New rulings have given a more concrete legal shape to the rights of the popular civil-law partnership. For its part labour law is having an ever greater influence on the legal framework of the employment contracts of managing directors in limited liability companies. While public planning law is aiming to resolve legal issues pertaining to the property sector – one of the most important branches of industry – especially as these relate to major construction projects and the freedom of architects, businessmen, lessors and lessees to design the clauses of their private contracts. The field of arbitration is also currently contributing to the development of the law.

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

Yours sincerely

Dr Johannes Grooterhorst
Attorney at Law

A. Current News

Arbitration: The new Rules on the Taking of Evidence in International Commercial Arbitration of the International Bar Association (IBA) now in force

On 29.05.2010 the Council of the International Bar Association (IBA), one of the world's leading associations of attorneys at law, passed its amended Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules of Evidence). The parties to an arbitral agreement can now in addition to engaging in arbitration agree to have the IBA Rules of Evidence apply to their proceedings instead of the public process. As with the rules of the various arbitration bodies (such as the DIS, the ICC etc.) the IBA Rules of Evidence apply once the parties have agreed to this being the case. In addition the IBA Rules of Evidence will apply if the arbitral tribunal decides that they should (Article 1.1 IBA Rules of Evidence).

Effectiveness due to contractual agreement

The parties to a contract can decide to have any disagreements that might arise from or in relation to the contract resolved by an arbitral tribunal in place of a public court. The decisions of these tribunals are normally final and are always enforced without prior examination of their content by public courts. What has been agreed by the parties, including for example adherence to certain sets of pre-established rules (the arbitration rules of a specific arbitration body, say) and/or the procedural law that is to apply will determine the shape the arbitration procedure takes.

A modern set of rules – suitable for international relations

To parties engaged in commercial arbitration the new IBA Rules of Evidence make a modern set of rules available that to a great extent takes their requirements into consideration and into the bargain offers a number of very interesting solutions. The IBA Rules of Evidence are especially suited to international contractual relations, especially between parties from Continental Europe and East Asia on the one hand and the US or England on the other.

Considerable differences between for example Germany and the US

With its new Rules of Evidence the Council of the IBA has been able to come up with a system that in encompassing the fundamentally different attitudes to evidence of the two legal systems in question represents an acceptable compromise. Thus the two systems differ fundamentally in for example their approach to the examination of witnesses and the production of documents.

The (cross-) examination of witnesses

While in Germany the parties are accustomed to having the witnesses examined by the judge in what is generally a straightforward manner, in the US an examination of witnesses without a cross-examination would be scarcely imaginable. The cross-examination is not only intended to give the two parties the opportunity to question the witness, but is also meant to subject the witness to an especially stringent test of his or her credibility. In many cases witnesses are extensively coached by professionals prior to their appearance in court, something that in Germany for example would engender grave doubts about their credibility.

Article 8.3 of the IBA Rules of Evidence permits the cross-examination of witnesses and the coaching of witnesses prior to their appearance in court (Article 4.3 IBA Rules of Evidence).

Production of documents

The approaches to the production of documents are also fundamentally different. Whereas in Germany the party bearing the onus of proof is always itself responsible for producing documents in its favour (with the exception of the procedure in accordance with Section 142 of the German Judicial Code [ZPO]), it is common in the US for the court in the run-up to and during the trial to order one party to make certain documents – notwithstanding the fact that they might be detrimental to that party's case – available to the other party (pre-trial discovery). In practice this approach frequently entails an extensive duty of presentation, with vast amounts of documents being handed over, leading in turn to very expensive selection and evaluation procedures. The IBA Rules of Evidence hence considerably limit the ability of the arbitral tribunal to force one party to make documents available to the other party (Article 3.3 IBA Rules of Evidence).

Special rules pertaining to electronic documents

To make the presentation of documents as cost-efficient as possible, these can also be presented in electronic form, as files stored on CD or DVD, for example. In addition a party can insist and/or the arbitral tribunal order that the electronic data be made available in a format that allows them to be searched electronically. Thus it makes a huge difference if vast numbers of e-mails or other electronic data that are being presented have been arranged in chronological order. Without this option the analysis of data that if printed out would in many cases amount to several hundred folders would require a massive investment in terms of both time and staff.

Requesting data that is unavailable

As a matter of principle a party can only request to have such documents made available to it that it does not itself possess. Though this rule appears reasonable with regard to physical documents, it can, in the case of electronic data, lead to some difficulties. While physical documents have either been destroyed or are stored away somewhere in a file cabinet, electronic data, such as e-mail traffic, may continue to exist for many years as backup files on a decentralised server or some other physical medium or be reconstructable. Thus Article 3.3 (c) (ii) IBA Rules of Evidence permits a request for data, if for the requesting party it would mean an unreasonable amount of time and effort to obtain the same.

Practical solutions

These examples serve to show that the IBA Rules of Evidence amount to well-crafted compromises between the various legal systems that combine the accommodation of the requirements of modern business transactions with practical solutions. Details not covered by the IBA rules that nonetheless constitute an essential part of a business relationship can either be agreed upon separately by the contracting parties or an arbitral tribunal can issue appropriate additional rules by means of so-called procedural orders.

Practical considerations:

In international arbitration in particular the application of the new IBA Rules of Evidence is likely to be most helpful. The advice of a lawyer versed in arbitration law would appear to be a prerequisite for determining in which contracts an arbitration clause should be amended to include a reference to the IBA rules.

The set of rules are to be found in numerous languages on the IBA's homepage (www.ibanet.org).

Dr Lutz Kniprath

B. Commercial and Company Law

Company law: Representation of a German civil-law partnership (GbR)

I. In its ruling of 19.07.2010 (File No.: II ZR 56/09) the Federal Supreme Court noted that a civil-law partnership is legally represented by all partners invested with managerial authority, unless other-wise stated in the articles of partnership.

Representation by all partners with managerial authority

The claimant in the case in question was a closed property fund in the legal form of a German civil-law partnership (GbR), which the defendant had joined as a partner. As its representative the claimant had exclusively designated the female partner J. E. By so doing the claimant had in the opinion of the Federal Supreme Court rendered itself not properly represented. Applying Section 51 Subsection 1 of the German Judicial Code in conjunction with Section 714 of the German Civil Code made it clear, the court observed, that a GbR was represented in and out of court by all partners invested with managerial authority, unless otherwise stated in the articles of partnership. The said articles of partnership failed to include such a clause. The partner J. B had neither impliedly nor explicitly been charged with representing the partnership on her own, the court noted.

No rectification of the caption in the absence of a designation error

As there were no indications that there had been an error as to the particulars of the representative, no rectification of the caption was possible, the court stated. Moreover, no attempt had been made to cure the representation deficit in the course of the legal dispute.

Cure requires the approval of all partners with managerial authority – it cannot be achieved by an unauthorised person representing the party in the action

In its judgement of 19.07.2010 the Federal Supreme Court again explicitly made it clear that such curing was only possible if the legal representatives of the claimant joined the action in that capacity and authorised the manner in which the unauthorised representative had conducted the case. If an appropriate power of attorney could not be furnished in evidence a simple declaration in court that one was joining the action and approved of the manner in which the representative had conducted the case did not, however, suffice, the court noted.

Practical considerations:

In practical terms this means that although a civil-law partnership can (possibly under its own name) sue and be sued, it must nonetheless be represented in the action by all partners with managerial authority. Falsely assuming that one partner on his or her own has the authority to represent the partnership runs the risk of having the action rejected as unlawful.

Isabel Gundlach

II. No voting ban in the shareholders' meeting on the shareholder to be excluded

No voting ban

In its ruling of 21.06.2010 (File No.: II ZR 230/08) the Federal Supreme Court declared that there was no voting ban in the shareholders' meeting on a shareholder if the aim of the vote was to remove him as chairman of the shareholders' meeting. Such a ban did apply however, the court noted, if the vote was on redeeming the shares of the said partner, asking him to relinquish his position as shareholder and/or on terminating his contract as managing director.

Vote on asking a shareholder to stand down as chairman of the shareholders' meeting

The ruling was based on the minutes of two rival shareholders' meetings of the same German private limited company (GmbH). The two voting shareholders of the GmbH in question both had the same number of votes. Both of them had recorded their own shareholders' meeting and their own resolutions. Originally both had been invited to a single shareholders' meeting at which there was meant to be a vote on redeeming the shares of one of the shareholders, asking him to relinquish his position as shareholder and on terminating his contract as managing director. In accordance with the articles of association of the company the shareholder in question had proceeded to chair the meeting. Whereupon a dispute between the shareholders as to whether the said shareholder was – because of a conflict of interest – excluded from taking part in the vote on removing him from the position of chairman led to a stalemate. The shareholder in question had voted against his removal as chairman, with the result being that he would only have been voted out of office if a ban had been in force.

Conflict of interest and voting on one's own behalf

A vote in favour of himself by a shareholder is not per se invalid. Hence the voting ban in accordance with Section 47 Subsection 4 of the German Private Limited Companies Act (GmbHG) only applied to the above-mentioned decisions because the redemption of shares and the removal from office were undertaken for an important reason. To the extent that it bars a shareholder from acting as a judge in his own behalf the Federal Supreme Court has derived a general principle of law from the ideas embodied in Section 47 Subsection 4 of the GmbHG.

No conflict of interest unless the attempt at removing the person as chairman of the meeting is undertaken for an important reason

Even so the Federal Supreme Court (BGH) refused to apply these legal notions to the attempt to vote a shareholder out of office as chairman of the shareholders' meeting. It was not certain that the shareholder would invariably act on his own behalf when it came to the question of whether the chairman of the meeting should be removed from office on account of a conflict of interest, the court observed. Although he would be able to influence the course of the proceedings, he would neither be in a position to remove an item from the list of resolutions to be voted

on nor to adjourn the meeting, the BGH noted. Being bound by the provisions of Section 47 of the Private Limited Company Act, he also had no discretion when it came to the important act of ascertaining and making a statement on the outcome of the various votes on the resolutions, the court pointed out. From a practical point of view it was just such a kind of stalemate as the one that had ensued that the law sought to prevent, the court went on to say. On the other hand the threat of the shareholder failing to carry out his duties properly as chairman of the meeting did not place an unreasonable burden on the other shareholders, the Federal Supreme Court averred. A breach of any basic rules of procedure would constitute an important reason for removing the shareholder from his position as chairman, the court concluded.

Practical considerations:

From a practical perspective the court's judgement would seem to indicate that a vote by a shareholder may yet be valid even if there are strong indications of a conflict of interest. In addition the rival shareholders' meetings would seem to suggest that under certain conditions a shareholder might be well advised to make use – under protest – of his majority-preventing vote, even if he considers the shareholders' meeting in question to be improper.

Dr Lutz Kniprath

C. Labour Law

Private Limited Company Law: Legal effectiveness of a dismissal protection clause in the employment contract of a managing director of a private limited company

I. In its ruling of 10.05.2010 (File No.: 2 ZR 70/09) the Federal Supreme Court (BGH) concluded that a dismissal protection clause in an employment contract for a managing director of a German private limited company (GmbH) in favour of that company organ can be made legally effective.

In the case in question a managing director had signed a contract of employment with a company affiliated to the one of which he was the managing director. With the consent of all parties the company took over his contract. The employment contract was subsequently extended to include a clause providing for a company pension for the managing director. In addition the open-ended employment contract contained a clause allowing for its termination and stipulating in favour of the managing director that Germany's legal protections against unlawful dismissal should apply.

Taking over labour-law provisions amounts to admissible discretion – no interference with executive body relationships

The BGH declared that when signing the contract of employment for managing director in the form of a free service contract the discretion of the parties in drafting the contract provisions arising from their private autonomy did not exclude the possibility of agreeing to the applicability of labour-law provisions of this kind. In the view of the Federal Supreme Court the dismissal protection provisions agreed upon neither interfered with the legal design of the organ relationships within the company nor did they violate German dismissal-protection rules.

Practical considerations:

The decision of the Federal Supreme Court creates additional leeway when it comes to designing the employment contracts of managing directors: The managing director and the company can incorporate material rules derived from German dismissal-protection legislation into the managing director's employment contract in a legally effective manner, provided the functioning of the company – especially with regard to the legal design of the relationships of its organs – is not detrimentally affected. Companies are hence given a flexible instrument with which to accommodate the frequently expressed desire of managing directors to have limits placed on the free and purely civil-law-based terminability of their employment relationship.

Johanna Noßke

II. Managing director of a German private limited company as consumer within the context of an employment contract

In its judgement of 19.05.2010 (File No.: 5 AZR 253/09) the Federal Labour Court (BAG) has decided on a managing director's capacity as consumer within the context of the conclusion of an employment contract for managing director and spelt out the consequences.

Employment contract with two-stage preclusive period

In the case in question the claimant was on the basis of his employment contract outside manager at the defendant company. The contract contained a so-called two-stage preclusive period, which specifies that all claims arising from the service contract expire if they are not raised in writing against the other contracting party within a period of three months (1st stage). In addition the contract also specifies that subsequent to the other contracting party's rejecting it a claim will also expire if it is not raised in an action within three months after the rejection (2nd stage). Following the exceptional dismissal of the claimant by the defendant, the managing director as a first step demanded in writing that the defendant ensure compliance with the terms of his contract; eventually filing a dismissal protection suit and asserting all his remuneration claims – without however at first suing for a particular amount.

Managing director of German private limited company with-out a blocking minority acts as a consumer

The BAG declared that a managing director of a German private limited company who as a shareholder is not in possession of a blocking minority and cannot exercise power of direction over the company is, when signing his employment contract, acting in his capacity as consumer (Section 13 German Civil Code [BGB]).

Dismissal protection action sufficient for remuneration and damages claims

In light of the signer's position as consumer the Federal Labour Court in addition declared that likewise in the context of a managing directors employment contract with a two-stage preclusive period the bringing of a dismissal protection action was sufficient for asserting by legal action (2nd stage) claims endangered by the dismissal (such as remuneration claims and/or claims for damages on account of the withholding of contractually agreed benefits). In the opinion of the Federal Labour Court the criteria applicable to the managing director should not differ from those that apply to other employees, for whom the BAG has already confirmed the above interpretation of the law. The Federal Labour Court moreover assumed that even a

managing director with only basic legal knowledge was not required to take such a clause as obliging him to bring an action for performance (2nd stage of the preclusive period) for a specific amount.

Practical considerations: Restrictions on the design of employment contracts

One-time use of pre-formulated provisions will suffice

Thanks to the decision it has now definitively been established that a managing director when signing his employment contract must be considered a consumer. A company should therefore as a matter of principle take into account that when signing an employment contract with a managing director no provisions of the kind that have been formulated in advance for numerous contracts are required for the consumer-friendly rules for standard business terms to apply generally. Rather, it is the case that any one-time use of the pre-formulated provisions will trigger the applicability, at least in part, of the rules governing standard business terms (Section 310 Subsection 3 No. 2 German Civil Code), any doubts as to the interpretation of which are resolved against the user, i.e. the company (Section 305c Subsection 2 BGB).

Johanna Noßke

D. Property Law

Effects of Architects Law/ HOAI-related supplementary items agreed between prime contractor and client on the calculation of chargeable costs in determining architect's fees for the performance phases 5 to 7

Not taking account of supplementary items in the quotation

I. In its recent decision of 05.08.2010 (File No.: VII ZR 14/09) the Federal Supreme Court has come out against the custom of taking account – when calculating chargeable costs within the context of a quotation (estimate of costs for the performance phases 5 to 7) – of supplementary items of the prime contractor that lead to an increase in costs. The decisive factor for determining the chargeable costs for the performance phases 5 to 7 was the state of planning prior to the awarding to the contractor of the construction work scheduled up to that point, the court declared. Consequently developments subsequent to the awarding and supplementary items in particular could not be taken into account within the context of the quotation, the court observed.

No inclusion of supplementary items prior to determination of costs

Only at the determination of costs, i.e. the costing for the performance phases object monitoring (8) and documentation (9), was the architect permitted to incorporate the supplementary items into those costs chargeable there, the Federal Supreme Court went on to say.

Practical considerations: Clear separation of supplementary cost items and new basic services required

Elucidating its point of view further the Federal Supreme Court added that if the architect had to render additional basic services in connection with supplementary items involving contractors, he was entitled to an additional fee for these. This fee had to be clearly distinguished however from the evaluation of the fee for the planning work already owed on account of the architect's contract, the court stated.

Ralf-Thomas Wittmann

Architects Law (contract for work and labour): Limitation period for claims in the event of fraudulent concealment

II. According to Section 634a Subsection 1 No. 2 of the German Civil Code (BGB) claims for defects against an architect who renders planning or monitoring services for a building are statute-barred in five years.

Standard – 3-year – limitation period and beginning of the same in the event of fraudulent concealment of a defect

Notwithstanding this principle, claims against an architect are statute-barred in the standard limitation period if the architect fraudulently concealed the defect (Section 634a Subsection 3 Sentence 1 BGB). The standard limitation period is three years, but only begins at the end of the year in which "the claim arose and the obligee obtains knowledge of the circumstances giving rise to the claim and of the identity of the obligor, or would have obtained such knowledge if he had not shown gross negligence" (Section 199 Subsection 1 BGB).

Failure to point out that no monitoring of individual trades has taken place tanta-mount to fraudulent concealment

In a recently published judgement (dated 05.08.2010, File No.: VII ZR 46/09) the Federal Supreme Court observed that an architect commissioned to monitor construction work was fraudulently concealing a defect of his work if upon acceptance of the completed work he failed to reveal that no such monitoring had taken place. Elaborating on its opinion the court declared that not only the concealed absence of all monitoring but also a failure to reveal that any one of the trades the architect was duty-bound to monitor had not been monitored amounted to fraudulent concealment.

Practical considerations: Awareness of monitoring tasks required

For fraudulence to obtain however there has to be awareness on the part of the architect that he has failed to perform his monitoring duties in accordance with his contractual obligations. Such an awareness cannot be assumed to exist however if the architect does not recognise that he has a duty to monitor a trade, and for that reason neglects to mention his failure to carry out the monitoring of the same.

A feeling on the part of the architect that the contractor's work is below standard is not a precondition for fraudulence, however.

Ralf-Thomas Wittmann

E. Commercial Tenancy Law

Changes to the planned tenant structure do not undermine the commercial basis of a commercial lease agreement

I. In its judgement of 17.03.2010 (File No.: XII ZR 108/08) the Federal Supreme Court (BGH) ruled that a change to a planned tenant structure was not tantamount to the disappearance of the commercial basis of a lease agreement. The tenant structure was within the ambit of risk of the lessee of the premises, who as a matter of principle bore the risk of use of the leased property, the court observed.

The effects of change of use in a leased property – residential lease as opposed to office lease

In the case in question the claimant had rented out to the defendant premises on the ground floor of a six-storey building under construction. As the marketing as office space of the four stories above the ground floor ran into substantial difficulties the claimant instead chose to convert them into living space. There had been no undertaking on the part of the claimant to the effect that these storeys would only be rented out as office space. Rather, the parties at the time of the signing of the contract had merely assumed that this would be the case. However, the changes to the tenant structure put the defendant in a difficult economic position causing him to fall in arrears with his rent payments. The claimant thereupon decided to terminate the lease agreement. The defendant considered the termination to have been in breach of good faith and was of the opinion that because what he had previously assumed would be office space was now being used as living space the commercial basis of the contract had disappeared, thereby giving him a right to have the contract adjusted accordingly.

Risk of use in the case of lease agreements

Profit risk part of the risk of use

Flaws in the surroundings delineated

The BGH considered the termination to be valid. It confirmed the tenor of its previous rulings according to which in the case of commercial properties the tenant as a matter of principle bears the risk of use with regard to the leased property. A principal part of that risk was the ability to generate profits with the leased property, the court noted. That being so it was also within the sphere of the responsibility of the tenant as entrepreneur to evaluate the prospects of success for his business at the chosen location, the BGH added. This included the risk of a change to the tenant structure in the immediate surroundings of the leased property. In the opinion of the BGH a flaw in the surroundings could only be made out if there was an immediate detrimental effect on the suitability of the leased property for the business of the tenant – a state of affairs that did not in this case prevail, the court declared.

Practical considerations: Contractual provisions required

Unless the parties to the lease agreement contractually agree upon the distribution of risk in the event of changes to the surroundings, the risk will be borne solely by the lessee. A potential tenant who only intends to lease a property if certain conditions as to the surroundings are met should seek to secure these through explicit contractually agreed upon termination and rentreduction provisions, if these conditions are within the lessor's sphere of influence and cannot be influenced by the lessee. This applies in particular to the tenant structure and tenancy rate in shopping centres.

Dr Rainer Burbulla

No general ineffectiveness of a standard-form clause on the right of a lessor to transfer the lease contract to a third party

II. In its ruling of 09.06.2010 (File No.: XII ZR 171/08) the Federal Supreme Court stated that a standard-form clause that gives the user the right to transfer his contractual position as lessor of non-residential premises to another person at any time is not per se ineffective on the grounds that it unreasonably discriminates against the lessee.

Transferring a lease agreement to an affiliated company

In the case in question the German public limited company S. AG had signed a lease agreement for non-residential premises with the defendant and had transferred the agreement in question during the lease period to the claimant. The claimant is a civil-law partnership whose executive board in terms of members is virtually identical to that of S. AG and which at the same time is the owner of the non-residential premises of which S. AG had hitherto been the lessor. S. AG informed the defendant about the transfer of the agreement while at the same time requesting the defendant to make future rent payments to the claimant. The defendant objected to the transfer. Because of a delay in payment the claimant terminated the lease without notice and filed an action for outstanding rent. The defendant was of the opinion that the lease agreement had not effectively been transferred to the claimant and that consequently the claimant had no right to sue.

Balancing of interests indispensable – freedom of legal arrangement v tenancy rights in the presence of a legal personality element

The BGH considered the transfer to be valid, thereby in effect finding against the defendant. The standard-form clause in the lease agreement according to which the lessor had the right to transfer the agreement to another company at any time was regarded as effective by the Federal Supreme Court. In the opinion of the BGH the effectiveness of a transfer clause in commercial tenancy law depends on the balancing of the interests involved. What accordingly needs to be taken into account is, on the one hand, the interests of the lessor in facilitating any future change of legal form or proprietorship that might be thought economically sound by creating the possibility of having the portfolio taken over (in this case that of the lease contracts signed by S. AG). On the other the interests of the lessee in establishing the reliability and solvency of the lessor have to be weighed in the balance. The scales will tip in favour of the lessee's interests if the tenancy relationship is determined by a legal personality element. Thus for example the legal personality of the previous lessor – natural person or partnership – can give rise to such an interest on the part of the lessee. A lessee's general interest in the proper fulfilment of the contract will not however – in the absence of a legal personality element – suffice to justify treating the transfer clause as ineffective.

Practical considerations:

In practice it is fairly frequent for the legal personality of one or more parties to a contract to change. The decisive questions to emerge in such a case are whether and if so how a transfer of contract can be achieved. Even without special legal requirements such a transfer is in principle permitted by law, while nonetheless requiring the cooperation of all parties concerned. The issue here is whether agreement to such a move can be obtained in advance and by means of a standard-form

clause. The legal state of affairs that appears to obtain is the following: If the lease agreement contains a general contract transfer clause in favour of the lessor that in the form of a standard-form clause is designed to stand in for the required agreement of the lessee (in line with an appropriate application of Section 415 Subsection 1 German Civil Code), the particulars of the case in question and especially the interests of the various contracting parties have to be taken into account. The greater the degree to which the contractual relationship is shaped by the lessee's particular interest in the person of the lessor the greater the weight accorded the lessee's interest.

Dr Rainer Burbulla

F. Public Law

Zoning Law: Ineffectiveness of a legally binding land-use plan due to a deficient weighing of issues (the Datteln case)

I. In its judgement of 16.03.2010 the Federal Administrative Court confirmed the ruling of the Higher Administrative Court of the German federal state of North Rhine-Westphalia according to which a legally-binding land-use plan for a power plant in North Rhine-Westphalia can also become ineffective due to a deficiency in the weighing of issues (File No.: 4 BN 66/09 – "Datteln").

Actions brought by individuals against major building projects

Although in legal terms this is in essence a special-case decision based on the fact that important concerns raised by a local resident bringing an action had not been taken into account, what is remarkable above all about the ruling is that an action brought by a single local resident sufficed to put a stop to a building project of this scale.

Practical considerations: major projects require a careful weighing of concerns

The judgement makes it clear once again that zoning law also puts a very sharp instrument for undermining the planning of major construction projects into the hands of individuals affected by them. It would thus in the light of this decision appear that for municipalities' urban land-use planning with regard to major projects in particular to be made unassailable in a court of law a careful weighing of ostensibly less important concerns of private individuals cannot be avoided.

Niklas Langguth

Zoning Law: Extensive options granted to municipalities for reviewing building permits in undesignated outlying areas

II. Provided the conditions set out in Section 35 of the Federal Building Code (BauGB) are met certain types of projects can be approved in undesignated outlying areas of municipalities in the absence of legally binding land-use plans. The law provides this option with regard to major and/or potentially controversial projects, such as for example wind power plants. Given that such projects are often viewed unfavourably by the municipalities concerned, legal challenges by them to the permits issued by the building permit authorities are fairly frequent.

Procedure to consider a building permission: Do the preconditions set out in Sec. 35 BauGB apply?

In its judgement of 01.07.2010 (File No.: 4 C 4/08) the Federal Administrative Court has now enhanced the legal protection of such municipalities. Thus municipalities can henceforth when challenging building permits for undesignated outlying areas demand that all preconditions spelt out in Section 35 of the Federal Building Code be duly considered, which in the subsequent legal proceedings will now have to be taken account of to the fullest possible extent. As the scope of the preconditions listed in Section 35 is very extensive – effectively enjoining a weighing of all public interests the project gives rise to – this judgement hands the municipalities a potent legal means for protecting their interests.

Practical considerations:

The decision applies to municipalities in whose area a particular project is to be realised. It therefore does not relate to challenges mounted by municipalities to building permits issued for projects in neighbouring municipalities.

Niklas Langguth

Zoning Law: Designation of sales area limits in legally binding land-use plans

III. In its judgement dated 24.03.2010 (File No.: 4 CN 3.09) the Federal Administrative Court has once again underlined its adjudicative approach whereby it considers any policy aimed at steering the retail sector by imposing in special areas (SOs) sales area limits that are specific land-use area-related but independent of any particular project to be unlawful.

No policy of steering the retail sector based on sales area limits that are land-use area-related but independent of any particular project

In the case in question a municipality had designated an area "SO Supermarket" in which retail and service businesses with sales areas of no more than 4,500 m² would be allowed to operate. In addition, of the 4,500 m² of selling space that any supermarket in this area would at most be allowed to have, a minimum of 3,600 m² would have to be reserved for that supermarket's core range of goods; for their part small-item retailing, service or catering operations saw their sales area or principal floor space cut to a maximum of 300 m².

No basis in law – exceptions in special areas with one trading company only

The Federal Administrative Court has reiterated its position according to which the absence of a legal basis renders the imposition of limits on selling space that are specific land-use area-related but independent of any particular project unlawful. Such a specific land-use area-related limit would only be lawful, the court declared, if in the special area in question only one trading company was permitted to build, in which case a project-related limit on selling space would be identical to one related to the specific land-use area. Such a coincidence of limits would only occur however, the court observed, if the provisions of the legally binding land-use plan allowed for only one retailing operation to build in the designated area. For such a coincidence to occur the fact that all properties in the special area in question were owned by the entity funding the project would not suffice, the court pointed out, as the legally binding land-use plan could not guarantee that no changes to property relationships might occur subsequent to the adoption of the legally binding land-use plan.

Imposing restrictions on the range of a supermarket's goods with the aid of selling space limits

The Federal Administrative Court has already in several isolated cases in the past taken the view that it is permissible to use selling area limits to impose rules on the range of goods to be sold. The reasoning being that in the cases in question the limits had been adopted in the interest of giving additional material shape to a "supermarket" project, with the result that their adoption was project- rather than land-use area-related.

Practical considerations: Project-related legally binding land-use plans in accordance with Section 12 BauGB

In other cases one possible solution might be to implement the planning procedure as a project-related legally binding land-use plan in accordance with Section 12 of the Federal Building Code (BauGB). When it comes to project-related legally binding land-use plans a municipality is not bound to adopt the designations set out in the Federal Land Utilisation Ordinance (BauNVO), but can instead choose to adopt its own.

Independent special area

Another possibility might be to designate as special areas the various operations the planning area is supposed to contain – whether this makes sense in individual cases from a practical point of view remains doubtful however.

Designating floor space – no limitation of selling space down to the square metre

A further approach to specifying selling area limits would be via the designation of floor space; an approach to steering that because it involves applying building-law criteria to the classification of land use allows distinctions in accordance with the Federal Land Utilisation Ordinance to be made. Having said that, however, there is no fixed ratio for converting floor space into selling space, only approximate values at best. Therefore an approach based on designating floor space can only impose approximate rather than precise limits on square metre space. Moreover, the latitude thereby created may in individual cases work out in favour of the investor.

Isabel Gundlach

G. Litigation

Arbitration: Position of arbitrators vis-à-vis challenges strengthened – independence and impartiality

In its judgement of 07.07.2010 the Federal Supreme Court of Berlin (File No.: 20 SchH 2/10) has ruled that an arbitrator is not obliged to reveal to the parties all possible circumstances that might conceivably raise doubts about his impartiality and independence. In addition failing to reveal circumstances that clearly cannot constitute grounds for a challenge cannot in turn constitute grounds for a challenge.

With its decision the court has strengthened the position of arbitrators, and in so doing increased the overall predictability of arbitration proceedings. What is more the court's decision has further diminish the likelihood of success of tactical challenges to a judge on the grounds of bias, such as might be attempted by a party to ward off the possibility of imminent defeat.

Personal contacts do not invariably imply bias

The case in question decided by the Supreme Court involved an arbitrator who four to five times a year met with one of the representatives of one of the parties at a conference on medical law where in line with the code of etiquette of the conference they would address one another with their first names. The court declared that the circumstances did not warrant concerns of the personal relationship between the two persons being a close one. Grounds for a challenge did therefore not exist, the court added. The court refused to follow the argument according to which the arbitrator's silence on the matter raised reasonable doubt about his independence. Because, on the one hand, the court observed, the arbitrator did not have to reveal "every possible circumstance" but only those that he assumes might upon reasonable scrutiny – that is in the opinion of a calmly and reasonably thinking party – give rise to doubts about his impartiality and independence. On the other, the court went on to say, a circumstance that by itself clearly failed to provide grounds for a challenge for bias could not in turn and thus in a roundabout fashion form the basis of a successful challenge for failure to reveal (see also Higher Regional Court Naumburg, ruling dated 19.12.2001 – File No.: 10 SchH 3/01).

Obstacles in the way of a tactical approach toward adducing grounds for a chal-lenge

The tactical approach the Supreme Court of Berlin has now put a stop to consisted of artificially expanding the legal grounds on which a successful challenge might be based. In principle German law allows for an arbitrator to be dismissed if "circumstances exist that give rise to reasonable doubt about his impartiality and independence" (Section 1036 Subsection 2 Code of Civil Procedure [ZPO]). To allow the parties to explore the possibility of this being the case arbitrators are duty bound to reveal on a regular basis in the course of the arbitration proceedings "all circumstances that might give rise to doubts about their impartiality and independence" (Section 1036 Subsection 1 ZPO).

Thus the circle of all circumstances that have to be revealed ("circumstances that might give rise to doubts") is much wider than that which encompasses those that can provide grounds for a successful challenge ("circumstances … that give rise to reasonable doubt"). This discrepancy provided an opportunity to any party keen to exploit it: It could use the failure to reveal a circumstance that had to be revealed as proof of a lack of impartiality and consequently base its challenge on this particular lapse; the line of reasoning being that the failure had prevented at least one party from exploring the possibility of basing a challenge on the circumstance that had not been revealed.

Practical considerations:

With its decision the Federal Supreme Court of Berlin has increased the attractiveness of arbitration clauses. If purely tactical manoeuvring is less likely to be successful arbitration in turn becomes more predictable.

Dr Lutz Kniprath

News and Events

1. 24 October 2010 in Hanover, Nord/LB Forum, Friedrichswall 10, 30159 Hanover
   Heuer Dialog GmbH: Handels Dialog
   Retail properties:
   Retail Projects – Do recent court decisions provide more or less room to manoeuvre?
   Speaker: Dr Johannes Grooterhorst, Grooterhorst & Partner Rechtsanwälte

2. 30 October to 03 November 2010 in Istanbul (Turkey)
   UIA (Union Internationale des Avocats) Congress – Istanbul (Turkey)
   Contributor: Dr Johannes Grooterhorst, Grooterhorst & Partner Rechtsanwälte

3. 04 November 2010 in Dusseldorf, Industrieclub, Elberfelder Straße 6, 40213 Dusseldorf
   German Council of Shopping Centers
   Forum Law and Legal Advice
   Moderator: Dr Johannes Grooterhorst, Grooterhorst & Partner Rechtsanwälte

4. 09 to10 November 2010 in Frankfurt
   Crenet Deutschland e.V., Autumn Conference

5. 30 November to 01 December 2010 in Wolfsburg, Congress Park
   1st German Factory Outlet Congress
   FOC 2010 – Is the next boom coming?
   Speaker: Dr Johannes Grooterhorst, Grooterhorst & Partner Rechtsanwälte

Should you be interested in taking part in an event, please contact the speaker in question 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

Printed by
B. Lenters & Co. Druck GmbH
Dechenstraße 13a
44147 Dortmund
Tel. +49/231/982304-0
lenters-druck@t-online.de
www.lenters-druck.de