Contents

- New partners of the law firm
- New laws governing the award of contracts
- Production liability guidelines
- Current company law
- Current commercial law

Dear reader,

In our second Clients' Letter for 2009 we inform you about current law regulations and court rulings in the area of business law in Germany.

We are pleased to welcome Rainer Burbulla and Niklas Langguth as new partners in the law firm. You will find out more about our colleagues Rainer Burbulla and Niklas Langguth on page 2 of the circular and at www. grooterhorst.de.

I hope you enjoy reading the material.

Faithfully yours,

Johannes Grooterhorst, LL. D.
Attorney at Law

Two new partners

Rainer Burbulla LL. D.

Niklas Langguth

Grooterhorst & Partners, attorneys at law, are pleased to have welcomed two additional partners to the law firm at the beginning of 2009. Rainer Burbulla, attorney at law, and Niklas Langguth, attorney at law, both of whom worked at the firm before as Senior Associates, have been taken on as partners effective as of 1 January 2009.

After studying jurisprudence at the Ruhr University of Bochum, **Rainer Burbulla LL. D.,** attorney at law, worked as a research assistant at the Chair for Civil Procedure Law, Civil Law and Labour Law with Prof. Dr. Klaus Schreiber. After defending his doctoral dissertation on "The Right of First Refusal under Civil Law" and his internship at Bochum Regional Court he joined the law firm as attorney in 2005.
The focal point of his work is law governing contractual agreements and the award of contracts, in particular including public private partnership projects.
Rainer Burbulla regularly publishes articles and commentaries on law governing real estate property, law governing the award of contracts and civil procedure law

Niklas Langguth, attorney at law, studied jurisprudence at the Rheinische Friedrich Wilhelms University of Bonn. After his internship at Cologne Regional Court and working at a major law firm, Niklas Langguth also became an associate of our law firm in 2005.
He is specialised in public construction, zoning and planning law, law governing associations and conduct of procedures.
Niklas Langguth publishes articles and commentaries on public real estate law.

A. Current news

Law on the Modernisation of Law Governing Public Procurement (GWB 2009) – the Public Construction Contract and ex post Reviews of Contractual Awards Procedures

The German Bundestag (18 December 2008) and Bundesrat (13 February 2009) have passed the Law on the Modernisation of Law Governing Public Procurement (Gesetz zur Modernisierung des Vergaberechts – GWB 2009). The new law aims at modernising and simplifying regulations as well as promoting a more transparent structure of Law Governing Public Procurement to the benefit of small and medium-scale enterprises. Additional amendments are intended to boost efficiency and expedite the ex post review.

The "Ahlhorn" Ruling by Düsseldorf Superior Regional Court

At the heart of GWB 2009 is the revision and amendment of the definition of a public application (§ 99 GWB 2009). The reason for this was the legal uncertainty for public sales of real estate property resulting from a ruling handed down by Düsseldorf Superior Regional Court. Under the precedence established by Düsseldorf Superior Regional Court, which a few additional courts have cited, a real estate purchase agreement (throughout Europe) must be put to tender if the buyer is contractually obligated to build structures on the property to be purchased.

Lawmakers seized upon this ruling to stipulate in § 99 GWB 2009 that sales by local communities of real estate are also exempt from the application of Law Governing Public Procurement when these contain provisions clearly establishing and amending such. Moreover, lawmakers have issued regulations clarifying and amending provisions relating to the invalidity and validity of contractual agreements which violate law and the forwarding of claims in a public contract awards review procedure.

Public building contract and building concessions

§ 99 GWB 2009 lays out the definitions of public building contracts and building concessions.

A public building contract is only deemed to have been concluded when the building performances are carried out *for* the public customer and the public customer *directly benefits from such performances economically.* The performance nature inherent in a building contract is to be stressed and "it is hoped that the uncertainties resulting from the ruling handed down by Düsseldorf Superior Regional Court […] will be eliminated" (see the Grounds for RegE from 13 August 2008, BT-Drucks. 16/10117, p. 14).

In the past building concessions were already set out in § 98, no. 6 GWB a.F., § 6 Regulation on the Award of Contracts (VgV) and §§ 32, 32 a, 32 b GWB, which meant that the amendment contained in § 99, section 6 GWB 2009 does not constitute a watershed change. Lawmakers have clarified the situation, rather, to the effect that building concessions must involve a usage right which is *of a temporary nature.*

Invalidity of a de facto award of contract and claiming invalidity in an ex post review procedure

In procedural terms GWB 2009 is intended to eliminate the continuing legal uncertainty emanating from an award of contract without carrying out a formal procedure (a so-called *de facto* award of contract).

§ 101 b, section 1 GWB 2009 establishes that a contract which requires an award procedure is (provisionally) invalid if it is concluded without the execution of a formal awards procedure. This invalidity can be claimed by a competitor which has been bypassed in an ex post review procedure within 30 days of it becoming aware of a violation of law governing the award of contract and no later than 6 months after the conclusion of the contract (§ 101 b, section 2, subsection 1 GWB 2009). If the public customer has announced the award of the contract in the official gazette of the European Union, the period in which the complaint must be lodged ends 30 calendar days after publication in the official gazette (§ 101 b, section 2, subsection 2 GWB 2009).

After the expiry of this period, there is legal certainty with regard to the contract (even though it was awarded in violation of the law).

Appeals ruling by Düsseldorf Superior Regional Court and European law

The definition of a "public building contract" in the German GWB is being reviewed by the European Court of Justice as a result of the appeals ruling handed down by Düsseldorf Superior Regional Court on 2 October 2008 (VII Verg 25/08). This ruling – in effect – questions the compatibility of national provisions contained in § 99 GWB with European Community law because the definition of building contracts subject to tender requirements set out in Art. 1, section 2, letter b) of the European Award of Contract Directive (Vergabekoordinierungsrichtlinie - VKR) deviates in part from the provisions of § 99 Abs. 3 GWB (including after its revision). It is to be feared that legal disputes involving the conclusion of property purchase agreements containing building obligations (which are not put to tender) will be suspended until a ruling is handed down by the European Court of Justice.

The legal security intended with GWB 2009 will thus not come about at first with respect to the demarcation between contractual agreements subject to tender obligations and contracts not subject to such requirements. GWB 2009 will probably create more legal security by establishing maximum periods in which ex post review procedures must be carried out.

Dr. Rainer Burbulla

B. Commercial and company law

Precedence-setting decision by the German Supreme Court on product liability – retrofitting and repair obligation only to effectively preclude hazards

I. Under case law consistently handed down by the high courts, the manufacturer of a product is obligated to do everything reasonable in order to preclude hazards which are (subsequently) identified caused by its products even after having introduced such products in commerce. Thus far the Federal Supreme Court has not stated its opinion regarding the specific requirements which are to be made, however. This has led to manufacturers frequently initiating costly recall procedures to retrofit or repair products (if they did not already do so out of good will or for the sake of their image) in order to prevent damage suits.

In a precedence-setting decision rendered on 16 December 2008 – VI ZR 170/07 – the Federal Supreme Court held that the obligations of the manufacturer are solely directed at effectively precluding the hazards emanating from its product. In contrast, manufacturers are only subject to an obligation to retrofit or repair products at their own expense (by way of exception) if such measures are necessary to effectively eliminate hazards.

Although in its eagerly awaited ruling the Federal Supreme Court establishes that the obligations of the manufacturer to preclude hazards can only be specified taking all the circumstances of the individual case into account, the High Court has nevertheless provided manufacturers as well as claimants guidelines according to which a product recall is frequently not necessary:

Guidelines for product recalls

If it is known who the purchasers of products are or this can at least be determined, it is often sufficient for the manufacturer to notify these purchasers that retrofitting or repairs are necessary and if need be to offer support. This manner of proceeding may be sufficient even in the face of considerable hazards.

In individual cases it may suffice for manufacturers to notify purchasers that they should not use or should discontinue using hazardous products. In cases of doubt such notices may be sufficient if they are combined with the issue of public warnings or the involvement of the government agencies having jurisdiction.

Additional obligations when third parties are subject to hazards

While emphasising the obligation to effectively eliminate hazards, the Federal Supreme Court notes, however, that warnings may not be sufficient if the users of a product are not put in a position to adequately estimate the hazards posed by a product in spite of sufficient and detailed warning and to behave accordingly. For this reason, in spite of comprehensive clarification more far-reaching obligations to preclude hazards are to apply if there is reason to assume that users would ignore the warning – even deliberately – and as a result pose a hazard to third parties. The Federal Supreme Court does not cite any examples. In actual practice the aforementioned list of obligations would probably apply, for example, after defective, dangerous fireworks have been introduced in commerce.

At the same time the Federal Supreme Court emphasised that manufacturers may not wait until concrete hazards materialise or even damage is actually incurred. This is particularly the case with respect to defects in design if and to the extent that the hazard is not restricted to so-called isolated products.

Finally, the Federal Supreme Court established that manufacturers generally only have to bear the costs of eliminating hazards. The manufacturer thus does not owe the final customer or the user a product which is free of defect and which is usable in every respect.

Effects on suppliers

The decision rendered by the Federal Supreme Court will probably also have an impact on possible recourse claims by manufacturers against suppliers which are responsible for product defects. The latter may be able to cite the latest ruling of the Federal Supreme Court and object that the measures actually taken by the manufacturer were not necessary and in particular constitute an overreaction (recall instead of a warning).

It would have been desirable if the Federal Supreme Court had more pointedly addressed cases involving mass consumer products (washing machines, motor vehicles, notebooks, toys, etc.). At the same time, the guidelines discussed above are also generally applicable to these cases. The obligation to effectively preclude hazards may probably be subject to stricter standards in the case of mass consumer products, however, because the end consumers can no longer be determined in individual cases. In particular when there is a danger of injury or fatality or severe health impairments, a recall may frequently be the only (effective) measure for such consumer products.

Dr. Jens Heller

Liability of a company's governing institutions: five-year statute of limitations and periods in which to forward claims against managing directors for prohibited payments to shareholders

II. In a ruling handed down on 29 September 2008 (file no.: II ZR 234/07), the Federal Supreme Court held that failure of managing directors to forward damage claims for private limited companies in the case of prohibited payments to shareholders within the statutory five-year statute of limitations does not constitute any new violation of the obligations of the managing director triggering a new five-year statute of limitations.

Managing directors who violate their obligations are liable towards private limited companies as joint and several debtors for damage which is incurred (§ 43, section 2 of the Private Limited Companies Act GmbHG). They are in particular obligated to pay damages when they have made payments using the assets of the company which are required to maintain the capital stock of the company (§ 43, section 33 of the Private Limited Companies Act) in violation of the provisions of § 30 of the Private Limited Companies Act. These damage claims expire in five years under the statute of limitations (§ 43, section 4 of the Private Limited Companies Act).

In the case in which the decision was rendered, the managing director effected payments to shareholder which depleted the capital stock of the company. After an insolvency procedure was opened on the assets of the private limited, the insolvency administrator filed for damages against the managing director as a result of his having used the capital stock although this was prohibited and even though the payment had been effected more than five years previously.

The Federal Supreme Court rejected the claim. The statute of limitations for damage claims against a managing director emanating from § 43, sections 2 and 3 of the Private Limited Act, held the Court, begins when the claim comes about, i.e. when the company incurs damages without these damages having to be quantified. The Court furthermore held that it did not matter whether the shareholders or the company had knowledge of the facts warranting the claim, even if the managing director kept such secret. The linkage between the general commencement of the statute of limitations set out in § 199, section 1 of the German Civil Code to the knowledge of the damage and the party causing the damage only applies to the regular statute of limitations, according to the High Court (§ 195 German Civil Code), but not to the special statutory statute of limitations set out in § 43, section 4 of the Limited Liability Act, which still begins when the claim (objectively) commences.

The damage was incurred by the company as early as upon the outflow of funds in its liquidation as a result of the payments effected in violation of § 30, section 1 of the Limited Liability Company Act. If the managing director fails to recover the amounts paid out or if these cannot be recovered, no new damage is incurred warranting an additional claim to damage under § 43, section 2 of the Limited Liability Company Act – and a new statute of limitations.

Prohibited payments thus do not lead to a "doubling" of the statute of limitations for the managing director of a private limited company.

Dr. Anna Gregoritza

C. Commercial lease law

No short statute of limitations for soil contamination by the tenant for older cases (prior to 2004) under lease law

In a ruling handed down on 1 October 2008 (file no. XII ZR 52/07), the Federal Supreme Court ruled that claims on the part of the landlord to compensation for costs under § 24, section 2 of the Soil Protection Act (Bundesbodenschutzgesetz - BBodSchG) do not fall under the short six-month statute of limitations in lease law in accordance with § 548 of the German Civil Code.

In this case the defendant was the tenant at a property upon which the tenant built and operated a petrol station in the 1980s. The government agency in charge carried out an inspection in 2003 and determined that the property was contaminated with fuel and that the ground water was contaminated with benzol. The environmental agency filed a claim against the owner of the property for the costs of the inspection and announced that it would obligate the owner of the property to decontaminate it.

The owner of the property thereupon took recourse to his former tenant for reimbursement of the costs of the inspection. The tenant argued that any claim to compensation in accordance with § 548 of the German Civil Code had expired under the statute of limitations six months after the property upon which the petrol station was located had been returned.

The Federal Supreme Court did not accept this argument. The claim to compensation under environmental law under § 24, section 2 of the Soil Protection Act did not warrant any damage claim against the tenant on the part of the landlord for damage to the property. The Soil Protection Act specifies damage claims between several parties which are obligated to clean up the environment under public-law regulations (which is to say in the public interest). If one of these obligated parties is required to pay compensation by a government authority, it may demand compensation from the other obligated parties if the other obligated parties are responsible for a major share of the deterioration in the quality of the soil.

In the view of the Federal Supreme Court, this claim is spurious contrary to the intentions of lawmakers in a large number of cases if the short six-month statute of limitations under lease law is applied, the reason being that soil contamination which is caused by a tenant is generally very difficult to determine and is frequently only discovered a long time after the termination of the lease relationship (as in the case at hand). It was not the intention of lawmakers, held the High Court, to obligate every landlord to carry out an inspection of the soil after the return of a property "just in case" in order not to jeopardise a claim to compensation.

The new case law established by the Federal Supreme Court is in effect relevant to claims to damage for soil contamination which came about before 15 December 2004. In the case of later claims to damage, lawmakers already stipulated for the purpose of clarity in § 24, section of the Soil Protection Act that the short statute of limitations under § 548 of the German Civil Code did not apply.

The following should be kept in mind with regard to the lease:

Conclusions for leasing and return

Claims to compensation under § 24, section 2 of the Soil Protection Act (BBodSchG) only exist "if nothing to the contrary is agreed upon". In the opinion of the Federal Supreme Court, this can also happen within the framework of a lease agreement – for instance, when the tenant uses the leased property in accordance with covenants made with the landlord and hazardous contamination of the soil occurs as a result. If, for example, a property is leased "to operate a petrol station" and the landlord makes all the facilities available which are necessary for the operation of the petrol station, a corresponding claim to compensation may be waived. In this case the applicability of § 24, section 2 of the Soil Protection Act should have been explicitly arranged by the two parties.

If there is a possibility of soil contamination as a result of actual use of a property or the landlord is even aware of soil contamination occurring in the course of a lease relationship, the landlord must expressly reserve the right to claim compensation for damages in the property-return record. If no such reservation is made, there is a danger that the property will be returned to the landlord recognised as being in proper order, thus causing claims to damage or compensation being forfeited (see pursuant hereto Hamburg Regional Court, ruling handed down on 7 November 2000 – file no. 316 O 154/00).

Tobias Törnig

Imprint

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

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

Printed by
Krautstein & Hampf
Druck GmbH
Kappeler Str. 39
40597 Düsseldorf
Tel. +49/211/99 60 10
Fax +49/211/996 01 44