20 YEARS LAW FIRM GROOTERHORST & PARTNER

NEWSLETTER 04/2014

Dear readers,

The liability of the directors and officers of the boards of public limited companies and other corporations (board of management/managing directors/ supervisory board) has turned into an important and widely respected area of work of our law firm directly after its foundation in August 1994. The rulings of the Federal Supreme Court (BGH) in the "Garmenbeck" case (comp. p. 2 Sec. 7) were a milestone on the route of developing court rulings, legislation and public attention. In September 2014 the Deutscher Juristentag dealt with the current legal situation (de lege lata) and its further development, which was deemed necessary (de lege ferenda) on the basis of expert opinions, presentations and resolutions. We report on this under the heading "Current News".

Further topics of this second Newsletter in the year of our twentieth anniversary address – as usual – practical questions of company law, the further development of the international private law (law of the conflict of laws) by the European Union, private building law, cases dominating commercial landlord and tenant law. Public law puts an emphasis of our law firm on planning law, building regulations law and public procurement law. This will be supplemented by current rulings from the field of insurance law and private labour law.

As usual, I wish you some stimulating reading.

In gratitude for your staunch support

Yours

Dr. Johannes Grooterhorst

Current News

Company Law / D&O Liability – The Deutscher Juristentag 2014 and the legislator

The law governing D&O liability which is of particular importance for board members, members of the supervisory board and managing directors in their daily practice (§§ 93, 116 Stock Corporation Act (AktG), § 43 Limited Liability Companies Act (GmbHG)) has been the subject matter of numerous debates in recent months. In fact, it was especially the subject matter of the 70th Deutscher Juristentag which took place in Hannover in September 2014.

The Deutscher Juristentag passed numerous resolutions addressed to the legislator as a proposal for reform (de lege ferenda):

No restriction of D&O Liability

The majority of the participants rejected a statutory limitation of D&O liability to gross negligence. The Deutscher Juristentag equally disagrees with a statutory limitation of D&O liability regarding negligence by introducing maximum liability amounts. It can, therefore, be assumed that in future board members continue to be liable already for ordinary negligence.

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No general reduction of liability according to due discretion

Since D&O liability is principally unlimited, liability can assume existential dimensions. Considerations according to which a statutory regulation should be introduced whereby a court can reduce the liability in accordance with reasonable discretion, provided that this seems appropriate according to the circumstances of the case, especially with regard to the degree of culpability, the amount of damage and the pecuniary circumstances of the parties involved, were, however, rejected.

Possible limitation of liability by means of the articles of association

However, the Deutscher Juristentag sees some need for reform concerning the possibilities of design in the articels of association of a public limited company (AG). According to the resolutions made it shall be possible in future to be able to exclude the internal liability of board members regarding ordinary negligence in the articles of association or that a maximum liability limit will be introduced. The possibility of regulating the articles of association in this manner would have the advantage compared to a statutory regulation that each public limited company (AG) can introduce a regulation that is tailor-made to its specific needs. By contrast, in case of the statutory regulation the same legal situation applies to all companies without taking into consideration the specific needs of the company.

Moreover, the Deutscher Juristentag has also refused to extend the so-called “Business Judgement Rule” also to legal uncertainties, i.e. to an unclear legal situation.

No application of the Business Judgment Rule to legal uncertainties – departmental responsibility

On the other hand, it supported the view that a board member may principally rely on another board member duly fulfilling his/her departmental responsibility as long as there are no specific signs of any negative developments. This so-called departmental responsibility has so far only been shaped by court rulings, thus leaving room for any number of open questions.

More favourable regulations concerning the burden of proof

The apportionment of the burden of proof of § 93 Sec. 2 Sent. 2 Stock Corporation Act (AktG), which is very unfavourable for board members and which is also applied to managing directors of a private limited company (GmbH), should be dropped according to the opinion of the Deutscher Juristentag. According to this rule on the burden of proof the board member undertakes to provide proof that no breach of duty as well as no fault applied. The aggrieved company, by contrast, only has to provide specific evidence regarding the damage as well as to prove the possibility of a breach of duty.

Shorter statutory periods of limitation

What is more, the regulation concerning the statutory period of limation is intended be adjusted to the general rules regarding the statute of limitation. In that case, a three-year period of limitation would apply. The latter commences at the end of a calendar year in which the breach of duty was committed, at the latest, however – according to the Deutscher Juristentag – with the board member resigning from office. Compared to the current five-year period of limitation, this would possibly represent a significant reduction.

Discretionary decision of the supervisory board concerning claims arising against the board of management

In practice it is a controversial question as to whether the supervisory board has some scope of discretion when pursuing compensation claims against the management board members. Since the so-called “ ARAG-Garmenbeck” court ruling of the Federal Supreme Court (BGH) dating back to 1997 the majority is of the opinion that the supervisory board has the obligation to assert some compensation claim against members of the management board if this compensation claim is sufficiently founded. In the event that the supervisory board desists

from taking legal action in spite of sufficient prospects of success, the supervisory board itself becomes liable for damages. In practice a supervisory board rather takes “one legal action too much than the opposite” in order to prevent the risk of becoming liable for damages itself. Some discretion would enable the supervisory board to desist from taking legal action in well-founded cases in spite of sufficient prospects of success.

No privileged status of public companies

Articles of associations of public companies often provide some limitation of liability regarding intent. According to the opinion of the Deutscher Juristentag it should be made clear by law that some lesser degree of liability pursuant to the articles of association is only possible concerning intent and gross negligence. Furthermore, the costs accruing for some D&O insurance should not be borne by the public company.

Further developments

It remains to be seen in how far the legislator takes up these proposals for reform. This question is particularly fascinating with respect to those proposals positively impacting those management board members being claimed against. Actually, the social climate has increasingly turned against management board members and managing directors over the last years so that it remains to be seen in how far the legislator makes any amendments.

A practical case from private limited company law (GmbH)
Shareholder - managing director

The significance of D&O liability in practice is demonstrated in a current ruling of the OLG Naumburg of January 23, 2014 (2 U 57/13).

In the case ruled the defendant was managing director with the sole power of representation of the plaintiff of a private limited company (GmbH) and was exempt from the limitations of § 181 German Civil Code (BGB) (ban on self-dealing) of the plaintiff. At the same time the defendant held an interest of 48% in the share capital of the company. The purpose of the company was predominantly the operation of hotels and health-oriented hotels.

Three months subsequent to the foundation of the company the defendant in his capacity as managing director of the plaintiff concluded an agreement regulating two consulting relationships:

Project management contract with 1st private limited company (GmbH)

The first contract covered a “Service Agreement Project Support” with a private limited company (GmbH) whose sole shareholder and managing director was the defendant himself. With this project management contract the contractor undertook to examine and analyse the current management of the hotel and amongst other things with respect to the planned development. At first a period of contract of five years was intended. As remuneration a monthly lump sum amounting to 9,700.00 Euro was envisaged as well as an annual payment of a further 25,000.00 Euro

Contract of employment regulating a joint advertising arrangement with 2nd private limited company (GmbH)

On the same day the defendant concluded a further contract with another private limited company (GmbH) in which the defendant held a 50% share of its nominal capital and of which he was also the managing director with the power of sole representation. On the basis of this contract it was intended to enable a participation in the association of various hotels for the purpose of joint advertising. Performance obligations of the contractor had not been specified, but the client was only offered the possibility to acquire membership and to use a quality label for medically supervised wellness, provided that the client gained a respective certification within a specific period of time. That contract, too, was initially concluded for a period of five years and it provided as remuneration an annual lump sum of 9,900.00 Euro as

well as a monthly service lump sum amounting to 495.00 Euro. The defendant did not inform the majority shareholder about these conclusions of contract. The plaintiff only received the contract documents in the course of the legal proceedings.

One month subsequent to concluding the contracts considerable conflicts occurred between the defendant and the majority shareholder so that the appointment of defendant as managing director was terminated. On the day prior to his recall the defendant had in his capacity as managing director of the plaintiff transferred at the plaintiff's expense one remittance each in the amount of 3,500.00 Euro to the two companies with which he had concluded the two aforementioned contracts shortly before hand. At that point in time there were no invoices of the two contractors yet.

Repayment claim due to payments made

With the claim underlying the ruling of the OLG Naumburg the plaintiff requested the payment of the 7,000.00 Euro remitted to be refunded by the defendant.

The OLG Naumburg granted the claim to its full extent.

Violation of § 43 Sec. 1 Limited Liability Companies Act (GmbHG)

With respect to the project management contract the OLG Naumburg stated: Pursuant to § 43 Sec. 1 Limited Liability Companies Act (GmbHG) the managing director – with respect to his capacity as managing director – had to observe the due diligence of a prudent business man. If he disregarded that due diligence the managing director undertook to compensate for the damage caused hereof.

In doing so, the duty of care also comprised the observation of the company-internal allocation of responsibilities as well as the duty of loyalty of the managing director towards the company.

Competence of the general meeting of shareholders pursuant to § 46 Nr. 5 Limited Liability Companies Act (GmbHG)

When concluding the project management contract the managing director violated the company-internal allocation of responsibilities. Pursuant to § 46 no 5 Limited Liability Companies Act (GmbHG) the appointment and the recall of the managing director as well as the approval of the actions of the managing director were subject to the exclusive competence of the general meeting of shareholders. From this it was possible to derive the legislative decision that the general meeting of shareholders had the comprehensive and primary competence for all questions relating to the employment relationship of the managing director. In doing so, however, this not only referred to the actual conclusion of the employment relationship and its termination, but it also covered all further agreements relating to the employment relationship. This applied irrespective of the fact whether the managing director was exempt from the limitations of § 181 German Civil Code (BGB) or not.

The regulative idea of § 46 No. 5 Limited Liability Companies Act (GmbHG) is that the managing director was prejudiced regarding questions as to his employment and recall because he was in a considerable conflict of interests. If he concluded a contract with a company in which he acted in his capacity as managing director and if this contract involved services typically regulated in an employment contract of a managing director or which were at least content-wise directly in connection with the management, a constellation, therefore, comparable to § 46 No 5 Limited Liability Companies Act (GmbHG) applied, so that the general meeting of shareholders was also competent for the conclusion of such a contract. The assessment and analysis of the current management of the hotel actually represented the task of the managing

director. If he transferred that task to an external company of which he was the general owner, the managing director de facto acquired a second source of income for himself.

When concluding contracts under the law of obligations by exceeding his/her competences the managing director is principally to be made liable for the exemption from the liabilities incurred for the company.

As far as the contract of participation is concerned the OLG Naumburg stated: With respect to the position of the board member there was a particular mutual duty of loyalty between the defendant and the plaintiff, prohibiting the defendant from abusing the position as board member to his her personal advantage. The prohibition regulating such self-serving behaviour particularly also applied to a managing director exempted from the limitations of § 181 German Civil Code (BGB). In spite of being exempted from the prohibition of self-dealing a managing director was obliged to sufficiently consider the interests of the company when doing business with him-/herself.

No discretion to act in the case of self-dealing business transactions pursuant to § 181 German Civil Code (BGB)

When concluding contracts the managing director was principally entitled to exercise a considerable discretion to act. However, that did not apply in the event of self-dealing transactions within the meaning of § 181 German Civil Code (BGB), so that the managing director was subject to a particularly narrow judicial control. This especially applied with respect to assessing the appropriateness of performance and consideration. If the managing director claimed remuneration at the expense of the company without providing some equivalent consideration, he was in breach of his executive duties of loyalty and made himself liable for damages pursuant to § 43 Sec. 2 Limited Liability Companies Act (GmbHG). Since the duties of the contractor were so unspecified in the contract of participation, the plaintiff had de facto no enforceable legal claim. By contrast, the remuneration was clearly regulated.

For that reason the defendant was obliged to refund the remitted 7,000.00 Euro to the contractor.

Practical consideration

The aforementioned ruling impressively reveals that board members and managing directors have to exercise particular care when concluding consultancy contracts with companies in which they hold some substantial participation. Actually, as far as public limited companies are concerned, the supervisory board is pursuant to § 112 Stock Corporation Act (AktG) competent in representing the company if subject matters are to be dealt with regarding board members. In doing so, a corresponding application of § 112 Stock Corporation Act (AktG) is partially affirmed, if the subject matter is about the conclusion of a contract with a company on which the board member has a considerable influence (revision proceedings concerning this issue are currently pending at the Federal Supreme Court (BGH) under the file number II ZR 63/14).

For that reason especially the company-internal allocation of competences has to be taken care of. In fact, if the managing director or the board member is sued for damages because of a violation of the company-internal allocation of competences, the board member or the managing director respectively is denied the objection that the supervisory board of the general meeting of shareholders had given consent to the action if they had to rule on that issue.

Dr. Johannes Grooterhorst

Dr. Steffen Schleiden
Rechtsanwalt

B. Commercial and Company Law

I. Company Law – Private Limited Company Law (limited commercial partnership with a private limited company as general partner (GmbH & Co. KG)) – Prohibition of contracting with oneself

In its ruling of April 15, 2014 (II ZR 44/13) the Federal Supreme Court (BGH) has ruled that a managing director of a general partner in the form of a private limited company was also entitled to a pay rise if he concluded the contract by violating the prohibition of contracting with oneself pursuant to § 181 German Civil Code (BGB) and if at least one board member was cognizant of the fact that the managing director only continued his activity on the basis of that pay rise.

Contract of employment of a managing director with a limited commercial partnership

In the case to be ruled the plaintiff was managing director of the limited commercial partnership. E. was the sole limited partner of the limited commercial partnership. As managing director of the limited partner the plaintiff was exempt from the limitations of § 181 German Civil Code (BGB).

At first the managing director signed for himself as well as for the defendant, the limited commercial partnership, a contract of employment of a managing director. In the years to follow he concluded contracts regulating pay rises in the same manner. After having been recalled as managing director, he sued for salary still to be paid.

Employment relationship on the basis of a faulty contract

First of all, the Federal Supreme Court (BGH) made it clear in its ruling that the managing director was not exempted from the prohibition of contracting with oneself as set forth in § 181 German Civil Code (BGB) with respect to the relationship to the limited commercial partnership and that for that reason the contractual flow of the original contract of employment was provisionally invalid. At the same time, however, the managing director was entitled to the payment of the formerly agreed salary on the basis of the principles concerning the employment relationship on a faulty contractual basis. A prerequisite for this was that the managing director commenced his activity based on the contract of employment and that this had happened with the knowledge of the board member competent for the conclusion of the contract or at least with the knowledge of one board member. The Federal Supreme Court (BGH) deemed those requirements fulfilled. For that reason the agreement had to be treated for the period of the mangaging director activity in such a manner as if it was valid with all mutual rights and duties.

No obligation concerning damages when one board member was informed about it

As far as the agreements are concerned regulating the pay rises the Federal Supreme Court (BGH) clarified that even in that case the principles of a faulty contract of employment basically applied. However in those cases it was necessary that the managing director continued his activity with the knowledge of the board member competent for the conclusion of contract or at least with the knowledge of one board member about the pay rise. In that case it made no difference whether the respective board member was aware of the exact amount. However it did not suffice that a board member had only knowledge about the activity and the continuation of the activity without the fact of the pay rise. In those cases the managing director was not worth being protected.

Practical consideration

This ruling also reveals that even if a managing director of a general partner in the form of a private limited company in relation to the limited commercial partnership is not exempt from the prohibition of contracting with oneself pursuant to § 181 German Civil Code (BGB), he/she can still in the individual case conclude valid agreements between the limited commercial partnership and himself. In this context it is a prerequisite that at least one board member is informed about it. Therefore, it is of utmost importance that the individual board members exchange information in order to avoid that the knowledge of one board member causes the effectiveness of an actually invalid legal business transaction.

Dr. Steffen Schleiden

II. Private Limited Company Law – Invalidity of excluding compensation in the articles of association

On April 29, 2014 (II ZR 216/13) the Federal Supreme Court (BGH) has ruled that a provision in the articles of association of a private limited company (GmbH) according to which no compensation has to be paid in the case of a gross violation of the interests of the company or of the duties of the shareholder, was unethical and was principally not valid as contractual penalty.

Shareholder – managing director

The plaintiff was shareholder of the defendant private limited company (GmbH) holding an interest of 49,6% and at the same time managing director of the defendant.

The general meeting of shareholders decided the exclusion of the plaintiff for cause. Furthermore, the general meeting of shareholders made the decision that according to the articles of association no compensation was owed.

Exclusion of compensation in accordance with the articles of assocation

The articles of association included a regulation according to which the shares in the company could be withdrawn in the event of a gross violation of the interests of the company and without payment. If some payment was mandatory in the case of withdrawal for reasons of a gross violation of duty, then this had to be calculated as low as possible.

The plaintiff filed an action of annulment against those resolutions. The action against the withdrawal of company shares without compensation was successful before the Landgericht and Oberlandesgericht

Invalid resolution of refusing compensation – invalid contractual basis (§ 241 No. 4 Stock Corporation Act (AktG)).

The Federal Supreme Court (BGH) made it clear in its ruling that the decision according to which no compensation would be owed, was invalid according to § 241 No. 4 Stock Corporation Act (AktG) because the exclusion of compensation determined in the articles of association was unethical and invalid.

Actually, an exclusion of compensation under company law was principally unethical within the meaning of § 138 Sec. 1 German Civil Code and was only permissible in exceptional cases. In fact, the shareholder contributed with his investment and possibly with his cooperation to the value of his company share and of the company assets. The status of the shareholder must not be lost without compensating its value.

Exceptional exclusions of compensation

As an exception in exceptional cases in which some compensation can be excluded, compensation clauses in case of death or concerning shares of members of staff or managers concluded for a limited period of time are without any investment if an immaterial purpose of the company is pursued. Only in those exceptional cases an objective reason for the exclusion of compensation exists in the fact that the departing shareholders did not invest any capital or that - in the event of pursuing an immaterial purpose - they renounced directly from the beginning their right to increase their own assets in favour of the altruistic purpose dedicated to the company assets.

Until today it was controversial as to whether an exclusion of compensation was valid in the case of some behaviour of the shareholder that was in breach of duty. In part, a compensation that did not correspond in full to the value of the share in the company was deemed "some kind of contractual penalty" in the event of withdrawal for cause.

Inappropriate withdrawal of the investment without compensation

The Federal Supreme Court (BGH) has made it clear by now that the exclusion of compensation in the case of a withdrawal of the shares in the company in the event of grossly violating the interests of the company was invalid. For the exclusion of compensation led in particular to the inappropriate legal consequence that the company would have withdrawn the value of his/her cooperation and his/her investment without any compensation because of possibly one single (gross) breach of duty.

Furthermore, in such cases the exclusion of compensation cannot be categorized as contractual penalty. In fact there is a lack of standards to be able to review whether the measure is proportionate in the individual case.

Practical consideration

This ruling of the Federal Supreme Court (BGH) demonstrates that particularly regulations concerning the exclusion of the shareholder that are in accordance with the articles of association might be invalid in the individual case and that for that reason it has to be carefully reviewed whether such a regulation turns out to be valid and which legal consequences result from this in the event of invalidity.

Dr. Steffen Schleiden

C. Real Estate Law

I. Real Estate Law / International Private Law (Law of the Conflict of Laws) / Law of Succession / European Law as of 2014/2015

Coming into force of the European Regulation as to the Law of Succession (EuErbVO)
Law of succession relating to a "finca"

European Regulation as to the Law of Succession (EuErbVO) (internationale private law) as of August 17,2015 – Effects on European cross-border cases of succession.

On September 28, 2014 the Frankfuter Allgemeine Sonntagszeitung (No. 39, p. 28) published an article with the headline "Who inherits the finca?". It was quite correctly shown that particularly millions of Germans owning real estate abroad, especially in Spain, for instance on the Balearic Islands (Mallorca) have to pay attention to the new regulation of the EU when planning their succession.

Some important aspects of this regulation, the essential part of which will come into force in 2015, will be outlined in the following:

Regulation (EU) No 650/2012 of the European Parliament and of the Council of July 4, 2012 regarding the competence, applicable law, acknowledgement and enforcement of rulings as well as the acceptance and enforcement of public deeds concerning issues of succession for the introduction of a European Certificate of Succession (OJ No. 1, 2001, p. 107; ber. No. 1, 344, p. 3; 2013 No. 1/41, p. 16, No. 1160, p. 140) – C 6 No. 3 2012 R 0650 European Regulation as to the Law of Succession (EuErbVO)) comes into force pursuant to Art. 84 and Sec. 2 as of November 16, 2014 or as of August 17, 2015 respectively.

Dr. Detlef Brümmer
Of Counsel

The regulation is preceded by 83 recitals. According to that it is, amongst other things, about

General:

- A legal tool regarding cases of succession, especially addressing questions concerning conflict-of-law rules, competence, the mutual acknowledgement und enforcement for rulings with respect to cases of succession (recital No. 5);

- Areas are intended to be included which have not been covered so far, but which essentially characterize the everyday life of citizens, for example, the law of succession and wills by simultaneously taking into consideration the legal systems including the public order (Ordre Public) and the national traditions of the member states…. (recital No. 6);

Taking into account the Ordre Public and national traditions

- The field of application shall include all aspects under civil law concerning legal succession for reasons of death, i.e. any form of inheritance of assets, rights and duties for reasons of death, be it in terms of voluntary sucession by means of a last will and testament or by means of statutory succession (recital No. 9);

Every form of transfer of assets for reasons of death

General Exclusions:

- An important limitation is in included in No. 10 of the recitals: The regulation does not apply to tax issues (excursion: comp. more recently European Court of Justice (EuGH) of September 3, 2014 – C 127/12), nor to issues under administrative law which are of a public kind (recital No. 10);

No applicability to tax issues

- Also the law of matrimonial property including marriage contracts existing in some legal systems remain excluded, provided the latter do not regulate any questions under the law of succession and the qestion of the law of property due to conditions having an effect comparable to a marriage (recital No. 12);

No applicability to issues under family law

- Legal actions, too, in connection with the creation of functioning trusts or with their termination are excluded (recital No. 13);

No applicability to trusts

- The regulation also does not apply (pursuant No. 14) to processes other than the legal succession for reasons of death (for example by means of free gifts – for further reference see: the common equal treatment of processes of donation and of inheritance in German tax law will also be exluded for the area of application of this regulation);

No applicability to processes other than the legal succession for reasons of death

Individual Regulations:

Movable and immovable assets

- The regulation applies to the establishment or transfer of a right concerning movable or immovable assets in the context of legal succession (recital No. 15);

No questions under register law

- Questions under register law remain left aside (recitals No. 18 and No. 19);

Broad concept of the term "Court"

- It is also significant that the regulation intends to take account of various legal systems with respect to issues of succession and for that reason it wants to see a broad concept of the term "Court" so that not only courts in the strictest sense of the term, but also notaries and registration authorities and some member states exercising judicial function are covered; special rules also apply to administrators in succession and to creditors of the succession (recitals No 44 and No. 45);

Contracts of inheritance

- The particular problematic nature of contracts of inheritance has been considered (comp. for further reference the text recital No. 49) (which are not valid in all European legal systems – comp. Practical Considerations).

Rules of conflict of laws governing law of succession

Example of Germany

The fundamental German Conflict of Law on Succession (Deutsche Kollisionsnorm) is set down in Art. 25 Sec. 1 and 2 Introductory Act to the German Civil Code (EGBGB – International Private Law (IPR) (Law of the Conflict of Laws)):

(1) "Succession for reasons of death is subject to the law of that state to which the testator belonged at the time of his/her death."

(2) "The testator is entitled to choose for those immovable assets located in the domestic country a form of last will and testament for reasons of death under German law."
That implies: German citizens bequeath according to German law, non-German citizens can choose German law for their German assets.

Example of Spain

The Spanish conflict rule - with a finca serving as an example – results from Art. 8 of the Civil Code - Código Civil -, of which the first sentence reads as follows: "La sucesión por causa de muerte se regirá por la ley nacional del causante en el momento de su fallecimiento, cualesquiera que sean la naturaleza de los bienes y el país donde se encuentren."

Freely translated: Succession for reasons of death is based on the nationality of the causer (testator) at the time of his/her death, irrespective of the type of goods and irrespective of the country in which they are located.

German and Spanish law correspond in this respect: The law of the respective citizen applies.

EU law as of 2015: Decisive habitual residence

EU law regulates in the general conflict form pursuant to Art 21 Sec. 1 European Regulation as to the Law of Succession (EuErbVO): Upon succession for reasons of death the law of that state principally applies in which the testator had his/her habitual residence at the time of his/her death. Art. 28 European Regulation as to the Law of Succession (EuErbVO) Sec. 1 states: "Unless otherwise provided in this regulation, the entire succession for reasons of death is subject to that state in which the testator had his/her legal residence at the time of his/her death."

In the event that the state of the habitual residence is a third country (outside the EU), the collision-of-law rule of that third country applies by taking account of Art. 34 Sec. 1 European Regulation as to the Law of Succession (EuErbVO): Any referrals (renvoi) to the law of a member state always have to be complied with. Further referrals to the law of another third country are to be complied with, if the latter accepts the referral.

Closer connection to another state

An exceptional regulation is included in Art. 21 Sec. 2 European Regulation as to the Law of Succession (EuErbVO) (comp. also Practical Considerations). It states: "If it exceptionally results from the circumstances as a whole, that the testator at the time of his/her death obviously had a closer connection to another state than the one of which the law according to Sec. 1 would have to be applied, the law of that other state applies regarding succession for reasons of death."

Choice of law

Finally it is significant that the testator can also choose the law. According to Art. 22 Sec. European Regulation as to the Law of Succession (EuErbVO) the following applies: "A person is free to chose the law of that state for the succession for reasons of death to which the person belonged at the time of his/her death." Therefore, the current legal situation can remain unchanged (comp. conflict rule above), however, it has to be expressly regulated in the last will and testament.

Practical considerations

The new European possibilities sound tempting for some people. They talk about definitely relocating their place of residence to Mallorca now and bequeathing their finca according to Spanish law. In doing so, however, care has to be taken, as usual, if one moves into a legal order with which one is not familiar. It is imperative to thoroughly review both legal systems (the former and the "new") and to receive counselling about them regarding all the chances and risks involved.

Problem of local and foral laws

This is clearly reflected in the example of Spain (again: "the finca"). Spain does not know any uniform law of succession as it has become taken for granted for the German Civil Code (BGB) in Germany (in the following according to Brammen, in Kerscher/Krug/Spanke „Das erbrechtliche Mandat" ("The Mandate under Law of Succession"), 5th Ed. Bonn 2014, § 33). In fact, there are principally 17 (!) different local and foral laws in the autonomous communities of Spain. These can be summarized in 7 different legal systems with qualified rules, for example, the Basque country, Catalonia, Galizia, Aragon, Navarra, the Balearic Islands and, for the remaining part, civil law applying to the whole of Spain (at the place mentioned, marginal number 287). The consequence: It is necessary to not only obtain one single Spanish legal advice, but also one that deals with the regional legal situation if mistakes are to be avoided.

Problem of contracts of inheritance in the Roman legal sphere

Another problem addresses the issue which rules under the law of succession apply: Contracts of inheritance that are very popular in Germany because of their binding effect or – for spouses - joint last will and testaments are either unknown in Roman legal systems or – more correctly – invalid (forbidden) as a rule. This, for example, applies to Spain ("finca", at the place indicated, marginal number 297 ff.) or Italy ("Tuscany", at the place indicated, marginal number 235) or France ("Cote d'Azur", at the place indicated, marginal number 256).

People who have their permanent place of residence in those states cause pursuant to the European Regulation as to the Law of Succession (EuErbVO) the application of the local law with potentially completely unpredictable and undesired consequences (although the European Regulation as to the Law of Succession (EuErbVO) actually includes regulations concerning the contract of inheritance, comp. Art. 25). If no complete legal advice in the various legal systems (!) is available, desired or affordable, people have to consider with their German consultant whether it would be better for reasons of precaution to make use of the new European Regulation as to the Law of Succession (EuErbVO) (Art. 22, comp. above) in order to avoid laying a legal cuckoo's egg into one's own nest.

Dr. Detlef Brümmer

II. Private building law – Prohibition of set-off in the General Terms and Condition in the case of claims for a contract for works and deliveries (Werklieferungsvertrag)

In its ruling of August 20, 2014 (12 U 2119/13) the OLG Naumburg has declared the General Terms and Conditions of a builder's merchant invalid which excluded the set-off of the orderer (builder) with claims for defects.

Contract regarding ready-mixed concrete with a prohibition of set-off

A builder concluded a contract concerning the delivery of ready-mixed concrete with a builder's merchant. The General Terms and Conditions of the builder's merchant provided the following clause: "Set-off initiated by the purchaser with counterclaims irrespective of which kind is excluded unless the counterclaim which is being offset has not been contested by us or has been established by declaratory judgement."

Subsequent to the conclusion of contract the concrete was delivered at three different points in time.

Defects

Upon the occasion of one of the deliveries complications occurred when the concrete delivered by the builder's merchant was poured in place. After the concrete had been poured into the pouring pipe the reinforcement cage was also pulled out when pulling the casing tube. The cause for this was disputed between the parties.

The builder's merchant invoiced a total of 56,000.00 Euro for the three deliveries of concrete. The builder did not pay, the builder's merchant sued.

Set-off with compensation claim

The builder offset with compensation claims amounting to 49,000.00 Euro, since the first delivery of concrete had been defective. The builder's merchant invoked prohibition of set-off provided for by his General Terms and Conditions.

Disruption of equivalence by means of the prohibition of set-off pursuant to § 307 German Civil Code (BGB)

According to the opinion of the OLG Nürnberg the prohibition of set-off was inappropriate pursuant to § 307 German Civil Code (BGB) since being contrary to the principles of good faith and, therefore, invalid. The OLG based its ruling on a ruling stated by the Federal Supreme Court (BGH) of April 7, 2011 (VII ZR 209/07). According to that the orderer is forced by means of a prohibition of set-off of that kind to remunerate to its full extent a defective or incomplete work rendered, in spite of him being entitled to counterclaims in the amount of the costs for the remedy of defects and for completion. In doing so, the equivalence between performance and consideration created by the contract was impinged on in a manner unacceptable for the orderer.

According to the OLG Naumburg that ruling had to be applied irrespective of the fact whether the contracting party of the user of the General Terms and Conditions was a consumer or a businessman.

Prohibition of set-off also for users of General Terms and Conditions, consumers or businessmen

It was also not decisive whether only one of the deliveries being the subject matter of the legal dispute was defective.

Actually the clause used by the builder's merchant covered all counterclaims without distinction. It did not provide for any differentiation between counterclaims, which were in a relationship of mutuality (so-called synallagmatic claims) and further counterclaims.

An interpretation of the clause to the effect that it only affected claims, which were not in a relationship of mutuality, was not possible. That violated the fundamental principle of the law of General Terms and Conditions that a so-called reduction preserving validity (i.e. a limitation of the content and the legal consequences of the clause to the part still valid) was invalid. In fact, the clause of the General Terms and Conditions was invalid as a whole. Thus the prohibition of set-off became devoid of purpose.

No legally valid "Geltungserhaltdende Reduction"

However, court rulings do not offer a uniform picture in such a case: In fact the Kammergericht already ruled some years ago that both prohibitions of set-off agreed in individual contracts as well as in General Terms and Conditions could – if possible – be restrictively interpreted in such a manner that they do not cover any claims for defects which serve to produce the contractual work. Liquidated damages do not have the purpose of establishing the duty of principle contractual performance, but represent an independent promise of penalty only following the main obligation. The claim because of forfeiture of a contractual penalty is, therefore, covered by a prohibition of set-off according to which set-off is only valid on the basis of an undisputed and legally established claim. (KG, ruling of August 12, 2011 – 21 U 64/10).

Practical consideration

Ralf-Thomas Wittmann

Ralf-Thomas Wittmann
Partner

III. Private Building Law – Architect Law – Property supervision contractual duty also on the Christmas holidays

The OLG Munich has now finally decided in its ruling of November 27, 2013 (13 U 835/13) – acceptance of the non-admission complaint by the Federal Supreme Court (BGH) - that an architect commissioned with the supervision of a building project was not entitled to leave the building project to its fate during the Christmas and End-of-Year holidays.

Architect's contract with property supervision in the context of residential housing construction

Shortly before Christmas a construction meeting took place regarding the building project being the subject matter in dispute. According to eye witness accounts the architect had to reckon at that point in time with the fact that the heating system had to be put into provisional operation by the 2nd of January of the following year at the latest. The architect knew at the same time that the opening of the staircase to the roof area had not yet been closed.

Christmas and New Year holidays of the architect without supervision of the building site – Damage due to heating

Subsequent to the meeting the architect left for vacation. It was only mid-January that the architect returned to the building site.

Duty of coordination for trades

By means of an expert opinion obtained by court it was possible to clarify that the roof truss, which was not closed, had been massively infested with mould resulting from the heating. It had to be completely renewed. The building owner requested compensation for those costs from the architect. The architect's comment on this was that he was not occupied with the heating and plumbing, so that he could not be accused of any dereliction of duty.

Those comments did not help the architect. At first, in its introduction, the OLG Munich stated that an architect to whom the supervision was conferred upon had the duty to coordindate the various trades and to protect the building owner from any building defects or damage.

If an architect was aware of the fact that the shell construction had to be heated, although the opening of the staircase to the roof area had not yet been closed, he was not entitled – according to the OLG – to leave for his Christmas holidays and to leave the building "to its fate" without having taken precaution against developing mould. However, he would have had to be aware of the fact that the doors in the house would not have been permanently closed, thus sucking the heated-up air upwards just like in a chimney. In any case, he would have had to inform the building owner that the doors would have had to be closed. Since the architect did not comply with that obligation, he was liable for the costs of rebuilding the roof truss.

Practical consideration: Right to separate satisfaction of the aggrieved party in case of an insovency situation (§ 110 German Insurance Contract Act (VVG))

At the time when legal proceedings were instituted the architect was already bankrupt. For that reason the building owner took legal action against the insolvency administrator concerning the assets of the architect pursuant to § 110 German Insurance Contract Act (VVG). Under that provision an aggrieved party is entitled to a claim against the insolvency administrator for some separate satisfaction resulting from the coverage claim against the liability insurance of the debtor in insolvency.

As requested the OLG Munich sentenced, therefore, the insolvency administrator to pay to the building owner the amount awarded by the OLG from the indemnity claim of the debtor of insolvency against the respective liability insurance.

Ralf-Thomas Wittmann

D. Commercial Landlord and Tenant Law

I. Legal classification of mixed tenancies

In its ruling of July 9, 2014 (VIII ZR 376/13) the Federal Supreme Court has substantiated its case law with respect to the qualification of so-called "mixed tenancies".

Term "Mixed Tenancy" (Residential/Working)

Some mixed tenancy applies if the tenant is allowed to use premises for various purposes on the basis of a standardized rental agreement. In the case ruled by the Federal Supreme Court (BGH) the defendant rented a house from the plaintiff in which the plaintiff intended to run a hypnosis surgery on the ground floor and to live on the first floor above. The plaintiff terminated the tenancy without specifying reasons for termination. The action for eviction has remained unsuccessful before the Landgericht, whereas the Oberlandesgericht (OLG) has sustained it. The Federal Supreme Court (BGH) has annulled the ruling of the OLG and has dismissed the case because the Federal Supreme Court (BGH) deemed the tenancy a residential one.

The Federal Supreme Court (BGH) has stated that such a mixed tenancy constituted a uniform tenancy concerning residential and commercial premises and that the rental agreement with its entire content either had to be subjected to the provisions of residential landlord and tenant law or to those of commercial landlord and tenant law. For that decision it was decisive whether the commercial or residential part of the tenancy prevailed. For that classification it depended on the prevailing contractual purpose upon conclusion of contract.

Standardized tenancy – application of law based on the prevailing contractual purpose

According to the Federal Supreme Court (BGH) it depended on the specific circumstances of the individual case when reviewing which contractual purpose applied. The proportions of areas of the various types of use could be important indicators. Furthermore it had to be taken into consideration whether the contract form used was typical for one of the types of use and whether the total rent was split up into the individual types of use. If the period of contract had not been defined, it would rather be an indicator of residential tenancy, because in case of a commercial tenancy contractual relationships were typically of a temporary nature. In contrast to its former rulings predominance of the commercial part could not be justified by the fact that the tenant earns his/her living for the residential part in the business premises. The Federal Supreme Court (BGH) established this by emphasizing the high degree of importance dwelling has in today's society.

Jörg Looman
Rechtsanwalt

Finally, the Federal Supreme Court (BGH) stated that residential rent had to be assumed in cases of doubt if a prevailing commercial use could not be ascertained. Otherwise the mandatory special regulations that exist for the protection of the residential tenant would be undermined.

In cases of doubt application of the residential landlord and tenant law

The careful definition of the prevailing text of the contract is of immense economic significance for mixed tenancies. Actually the protection against eviction is considerably higher for a tenant in a residential tenancy than in commercial landlord and tenant law. The periods of notice as well as the validity of requesting rent increases also differ substantially. As fas as the attribution is concerned the actual circumstances are relevant so that the parties are not entitled to attribute the rental agreement to commercial landlord and tenant law if, in fact, residential tenancy dominates.

Practical consideration

Jörg Looman

II. Remedying violations of the written form of the main rental agreement by means of supplements

Effective compliance with the written form by means of supplements

In its ruling of June 2, 2014 (8 U 179/13) the KG Berlin has decided that it is not necessary for the compliance with the written form of a rental agreement (§ 550 German Civil Code (BGB)) that all the prerequisites of the written form have already been fulfilled in the first contractual document; it is sufficient that those are available by means of a supplement together with the first contractual document; the supplement has to be referred to in the first contractual document.

Commercial rental agreement concerning a "studio floor", supplements regarding partial areas

In the facts underlying the ruling there was a commercial rental agreement between the parties concerning a "studio floor". The rental object itself was only vaguely described in the rental agreement, since it still had to be separated from other partial areas on the "studio floor" rented out. The supplements to the rental agreement concluded did not include any information concerning the rental object. The landlord terminated the rental agreement and invoked some formal defect since the rental areas had not been sufficiently designated.

Remedying formal defects in the original rental agreement by means of supplements

The KG deemed the termination invalid. It is true that a formal defect could be assumed in the original rental contract because of an insufficient definition of the rental object. However, it had been remedied by the supplements concluded. At the time when the supplements were concluded the rental area on that floor had already been spatially separated from the remaining area for years and it was also possible to sufficiently define the rental object due to how it had been used. Furthermore, accounting of the operating and ancillary costs for those areas used had been made for many years. The current subject matter of contract of the (original) rental agreement was always referred to in them with the exception of the respectively deviating regulations of the supplements and had thus been made object of the supplements. It was harmless that no agreement on its own fulfilled the requirements of the written form. In fact, the subject matter of the contract resulted from the totality of the contract documents forming a coherent whole by reference. In order to comply with the written form it was not necessary that already the first contractual document itself had to comply with the written form. It was sufficient, if that prerequisite was fulfilled in the amendment agreement together with the contractual document to be referred to.

Dr. Rainer Burbulla
Partner

Practical consideration

According to established case law of the Federal Supreme Court (BGH) a violation of the written form can be remedied by means of a supplementary agreement in due form. For that it is quintessential that the supplementary agreement itself complies with the written form of § 550 Sent. 1 German Civil Code (BGB). This is the case if the supplementary agreement designates the parties to the contract, sufficiently refers to the original rental agreement and to all potentially existing supplementary agreements, if it lists all regulations amended and if it indicates that generally the provisions of the original rental agreement (possibly in addition to existing supplements) shall continue to apply. When drawing up supplementary agreements care has to be taken that reference is made to all – even to formally invalid – arrangements. While a supplementary agreement complying with the form can, in fact, remedy a rental agreement which does not comply with the form, a supplementary agreement, however, which was concluded by violating the written form requirement can indeed have the consequence that the original rental agreement, which complied with the written form, is deemed concluded for a premature time (so-called "infectious effect"). Even in that respect the parties should exercise due care when drafting supplementary agreements.

Dr. Rainer Burbulla

III. Interpretation of contract – Importance of discrepancies in areas after agreeing upon a so-called "real"per square metre rent

Term "real sqm rent" – no application of the so-called 10% clause

In its ruling of July 1, 2014 (5 U 1890/13) the OLG Dresden has ruled: The parties to a rental agreement arranged a so-called real per square metre rent, if they set down in the rental agreement that the rent resulted from the size of the rental object in square metres multiplied by a rent to be identified per square metre. If a per square metre rent was agreed, the amount of the rent owed was defined on the basis of the actual area. A payment of a higher rent based

on the erroneous assumption of a bigger area had to be clearly deemed an overpayment which could be requested back for reasons of unjustified enrichment, even if the discrepancy in the area amounted to less than 10%.

Rental agreement for an elderly people's home

According to the facts underlying the ruling a rental agreement was concluded between the parties concerning commercial premises for operating an old people's home. The floor space was specified according to DIN 277 with approximately 1,450 m². As far as the rent was concerned the parties agreed the following: „Approx. 1.450 m² Living-/ Floor Space x DM 23.50 = DM 34,075.00". Due to an indexation clause agreed upon in the rental agreement the landlord increased the rent several times. The tenant paid the rent without reservation. In 2007 the tenant arranged to accurately measure the area. According to that the living area amounted to 943,71 m² and the gross floor space to 1.334,45 m². The tenant refused the rent increase of 2008 and referred to the accurate measurement. The landlord sued for the rent to be paid; in turn, the tenant filed a counterclaim for repayment of the overpaid rent from January to June 2008.

Claim for repayment because of overpayment

The OLG Dresden has affirmed the claim for repayment. The parties had agreed a "real" per square metre rent in the rental agreement. For that reason the rent had to be calculated on the actually available square metres. It was irrelevant, whether according to the ruling of the Federal Supreme Court (BGH), such a substantial devation from the rental area existed that some defect had to be assumed (10% deviation, comp. Federal Supreme Court (BGH), ruling of March 24, 2004 – VIII ZR 295/03 concering residential rent and ruling of May 4, 2005 – XII ZR 254/01 concerning rent for business premises). In the case of a real rent per square meter every single deviation was crucial; reaching the threshold of 10% was irrelevant.

Practical consideration

It is dangerous to agree without sufficient knowledge an exact size of the rental area provided as basis of calculation in the rental agreement. It is not unusual that this occurs in practice. Frequequently it happens, for example, that area information from "old rental agreements" is adopted and used as a basis of area information in a new rental agreement. If parties in that case arrange a "rent on a square metre basis" and if some discrepancies in areas turn out to exist, it can result in rights of reduction and termination on the part of the tenant and also in claims of repayment. The OLG Dresden has clarified that in that respect the common threshold of "decisive" discrepancies in areas did not apply.

Dr. Rainer Burbulla

E. Public Law

I. Planning Law – Deficiencies of consideration – Relevance of a retail trade concept without the council being aware of deviations from the concept

Legally binding land-use plan – retail trade concept as miscellaneous planning within the meaning of § 1 Sec. 6 No. 11 German Building Code (BauGB)

In its recent ruling (ruling of September 1, 2014 – 10 D 5/13.NE) the OVG Münster has dealt with the validity of a legally binding land-use plan pursuant to 9 Sec. 2 a German Building Code (BauGB) for the strenghtening and development of central supply areas and supply close to the consumers. The legally binding land-use plan under review was invalid for various reasons at the same time, particularly because of a deficiency of consideration. A deficiency of consideration was assumed because the council of the planning municipality decisively invoked the facts included in the retail trade concept when identifying areas variously regulating the admissibility of retail trade use. In doing so, the council was obviously not aware of the fact

Isabel Strecker
Rechtsanwältin

that with the respective designations it considerably deviated from the retail trade concept. Although a retail trade concept is only classified as "miscellaneous planning" within the meaning of § 1 Sec. 6 No.11 German Building Code (BauGB) which only had to be considered when establishing urban land-use plans, but did not represent a preliminary decision binding on the council. Upon consideration the specifications of the retail trade concept were principally also allowed to come second. According to the OVG Münster, the council in fact misjudged the stipulations of the retail trade concept with respect to the definition of the local supply location which the council obviously intended to make the basis of its assessment and was, therefore, bound to not properly take into account in its decision all concerns that had to become part of their consideration based on the merits of the case.

Exclusion of retail trade pursuant to § 9 Sec. 2a German Building Code (BauGB) – Adoption of the new ruling of the Federal Administrative Court (BVerwG)

In the context of further explanations to its decision the OVG Münster has also addressed the requirements concerning the exclusion of the retail trade on the basis of § 9 Sec. 2 a German Building Code (BauGB). This regulation enables, according to its wording, designations to the effect that only specific types of valid structural uses in the unplanned area (§ 34 German Building Code (BauGB)) are valid or not valid. The 10th senate of the OVG Münster applied a very strict standard to such retail trade exclusions in previous rulings (for example, OVG Münster, ruling of April 26,2013 – 10 D 39/11.NE; ruling of February 15,2012 – 10 D 32/11. NE). However, the OVG Münster does not intend any longer to adhere to this strict standard given the new ruling of the Federal Administrative Court (BVerwG) (ruling of March 27, 2013 – 4 CN 7.11, (Newsletter 3/2013, E.): According to the explanations of the Federal Administrative Court (BVerwG) the necessity regarding urban development of individual designations, provided they are intended to implement a retail trade concept within the meaning of § 1 Sec. 6 No. 1 German Building Code (BauGB), have to be affirmed without a detailed review. A suitability of a retail trade exclusion in order to promote the protection of centres could principally be assumed if the product ranges are defined in the sense that they are decisive for the functionality of the respective supply centres and that they are, amongst other things, centre-forming and if those product ranges are excluded for an area outside the supply centres. In the interest of a uniform adjudication practice and spanning across instances the 10th Senate has now come into line with that adjudication practice (comp. also OVG Münster, ruling of January 28, 2014 – 10 A 152/13).

Practical consideration

As this decision demonstrates, a carefully elaborated centre concept forms an important basis for the municipal urban land-use planning. Deviations are possible if they are substantiated on the ground of urban development and if they are also recognized when deciding based on considerations.

Isabel Strecker

II. Planning Law – Scope of environment-related information

References to the scope of environment-related information when re-displaying the plan only with respect to those parts of the legally binding land-use plan to which comments can still be made

In a current ruling of the Federal Administrative Court (BVerwG) (ruling of May 7, 2014 – 4 CN 5/13) the Federal Administrative Court (BVerwG) has restricted its ruling of July 18, 2013 (4 CN 3.12, comp. our Newsletter 4/2013 p. 14): Last year the Federal Administrative Court (BVerwG) ruled that the announcement of displaying the draft version of an urban land-use plan according to § 3 Sec. 2 Sent. 2 German Building Code (BauGB) also had to include a keyword kind of characterization as to which types of environment-related information were available. According to the new ruling statements could only be made on the amended or supplemented parts when announcing to re-display an amended or supplemented draft ver-

sion of an urban land-use plan. In that case only those types of environment-related information had to be referred to which were available particularly regarding those amended or supplemented parts of the draft version of the plan.

Renewed display of the legally binding land-use plan subsequent to amendment with reference to § 4 Sec. 3 Sent 2 German Building Code (BauGB)

In the case newly ruled upon the city amended individual regulations of a draft version of a legally binding land-use plan and it re-displayed the amended draft version of the plan. The announcement of re-displaying the draft version of the legally binding land-use plan determined, pursuant to § 4 a Sec. 3 Sent. 2 German Building Code (BauGB), that statements could only be brought forward with respect to the amended parts of the draft version of the plan. An application for judicial review against the legally binding land-use plan was amongst other things about the fact whether the reference to types of environment-related information in the renewed announcement of the legally binding land-use plan was insufficient.

Leonie Munz
Rechtsanwältin

Restrictive interpretation of § 3 Sec. 2 Sent. 2 German Building Code (BauGB)

The Federal Administrative Court (BVerwG) has ruled that the renewed announcement did not require any reference to the existing types of environment-related information because there was no environmental information concerning the amended parts of the draft version of the plan. Even if § 3 Sec. 2 Sent. 2 German Building Code (BauGB) unrestrictively applied to the renewed display of an amended or supplemented legally binding land-use plan, the requirement could be restrictively interpreted in terms of its meaning and purpose. The reference necessary upon first display was sufficient for that part of the draft version of the plan not affected by the amendment.

Practical consideration

As an exception the reference to available environmental information can, in fact, be reduced and can even be totally omitted in individual cases, if upon display it is specified that according to § 4 a Sec. 3 Sent. 2 German Building Code (BauGB) only statements are possible concerning the amended part of the draft version of the legally binding land-use plan. However, this only applies if the possibility of making a statement is restricted to the “new” part of the draft version of the plan and if only specific or no environment-related information is available for that part. In cases of doubt, the reference should still be comprehensively designed because otherwise the invalidity of the legally binding land-use plan threatens to occur.

Leonie Munz

III. Building Regulations Law – Provision to safeguard the existence of a building permit in spite of years of interrupted use

In an important decision of the OVG Münster already ruled on August 8, 2013 (2 A 2520/12) but not published to date, the OVG Münster has dealt again with the question whether an interruption of use lasting several years of a permitted use resulted in the building permit becoming devoid of valid purpose. This would have had the consequence that the original use after many years of interrupted use could not resumed without having to apply for a new building permit.

Approved project – vacancy – resuming use after interruption of use for 6.5 years

If an originally approved building project has remained empty for several years, the question arises on the occasion of resuming its use whether that use is still covered by the originally authorized building permit or whether a new building permit has to be approved. This question is particularly decisive if the planned use could no longer be approved due to the currently existing planning law, but is still covered by the original building permit.

The specific case dealt with the question whether an interruption of use covering a period of six and a half years annulled the legalizing effect of the building permit. The owner of a casino business, approved on the basis of a building permit, did not operate the business for 6.5 years. Subsequently he resumed the operation of the casino business based on the original building permit.

Building permit does not become void of legal purpose just by time lapse - without intent to waive

With respect to that issue the OVG has stated that the original building permit for the casino business also covered the resumption of use. A building permit remained in force until and as much as it was not taken back, revoked or otherwise annulled or become void of purpose due to time lapse or by any other means (comp. § 43 Sec. 2 Administrative Procedure Act (Verwaltungsverfahrensgesetz NRW (VwVfg)). A building permit did not come to an end because of a passage of time. Apart from the aspect of time the aspect of circumstance had to be considered in addition. The owner of the building permit had to express unambiguously to permanently waive the building permit. As long as no unambiguous and permanent intent of the property owner to waive the building permit was given, the latter continued to exist. A use based on the old building permit could be resumed at any time. However the court had not mentioned any criteria in its ruling that indicated a permanent intent to waive:

No direct application the "Time Model Ruling" of the Federal Administrative Court (BVerwG)

The OVG Münster has stated that the "Time Model" developed by the Federal Administrative Court (BVerwG) concerning building structures in the outer area (Außenbereich) could only be applyied as a rough rule of thumb for the fact when an intent to waive possibly applied. However, this ruling could not directly be transferred to cases relating to the planned inner area (überplanter Innenbereich). The time model of the Federal Administrative Court (BVerwG) implied that within the first year after giving up the use one had to reckon with the fact that the previous condition had to be restored. Within the second year the prevailing opinion suggested that restoration had to be expected. This legal presumption, in fact, could be rebutted in the individual case. After a period of two years the assumption was reversed in that respect that a restoration of the former use was no longer expected.

Practical consideration

Eva Appelmann
Rechtsanwältin

As far as practice is concerned this implies that a longer (partial) interruption of the originally approved use not necessarily results in the invalidity of the building permit. Even after years of interrupting the use, it can be resumed based on the original building permit. The building permit only turns invalid if to the aspect of time also the aspect of circumstance is added. The owner of the building permit must have unmistakebly expressed his intention to permanently waive the provision to safeguard the existence of the building permit.

If the original use is resumed after years of interruption of use, it has to be diligently reviewed whether a new building permit is necessary. According to the Federal Administrative Court (BVerwG) there is currently reason to believe that in many cases the formerly approved building permit is still valid.

Eva Appelmann

IV. EU Public Procurement Law – Rental agreements with obligation to build subject to tendering

In its ruling of July 10, 2014 (C-213/13) the European Court of Justice (EuGH) has decided that a contract having as subject matter the construction of a building and meeting the requirements mentioned by the principal, represented a public-sector construction contract and

that an obligation of tendering did not cease to exist even if the contract included an obligation to rent out the respective building.

Bari/Italy – Contract concerning a building complex for courts – offer of a developer for the sale and letting of the property

According to the facts underlying the ruling the city of Bari (Italy) had published the announcement of a "market survey" for the fastest possible construction of a new uniform, suitable and appropriate residence for all courts of Bari. The announcement included an annex which was intended to provide a "complete framework of the structural, functional and organisational requirements ("frame of requirements") for the construction of the planned court complex". The city of Bari chose the offer of the tenderer Pizzarotti. It included that one part would be sold for 43 Mio. Euro to the city of Bari and the remaining part would be rented out for an annual rent of 3 Mio. Euro to the same. The Ministry of Justice informed the city of Bari that the available financial means for the project had been reduced to 18,5 Mio. Euro. Upon request Pizzarotti submitted a revised offer, which was not awarded by the city of Bari. Pizzarotti sued for the continuation and termination of the procedure. The Consiglio di Stato entrusted with the proceedings referred a question to the European Court of Justice (EuGH) as to whether a contract concerning the letting of a future property in the form of a declaration of commitment in spite of the existence of characterstic features of a rental agreement was identical to a construction contract.

Public-sector construction contract pursuant to Art. 1 II Directive 2004/18/EC

The European Court of Justice (EuGH) has affirmed a public-sector construction contract within the meaning of the rules of the EU (Art. 1 II of Directive 2004/18/EC). According to that public-sector construction contracts were contracts concerning either the implementation or at the same time the planning and implementation of building projects or of a building or the execution of some building work by a third party, irrespective with which means according to the requirements specified by the public contracting authority. The latter had to be assumed if the public contracting authority had taken measures to define the characteristic features of the building work or to have at least a decisive influence on the building work. The European Court of Justice (EuGH) affirmed that because the "frame of requirements" specified in detail the various technical and technological features of the planned building and because it also allowed the city of Bari respective possibilities of reviewing them. It was not decisive that the draft version of a "declaration of commitment to letting" also included characteristic features of a rental agreement, particularly in the form of a financial compensation of the administration in terms of the "annual rent". On the contrary, the main subject matter was decisive for the classification of the respective contract and not the amount of remuneration of the entrepreneur or the type and manner of payment.

Practical consideration: New EU public procurement law 2014

The ruling of the European Court of Justice (EuGH) was based on European public procurement law dating back to 2004. On February 26, 2014 directive 2004/17/EC was substituted by Directive 2014/24/EC (the regulation of Art 1 II of Directive 2004/18/EC is included in Art 2 (1) No. 6 lit a) to c)). With the new version of Directive 2004/18/EC the European legislator took up recent requirements of case law regarding public-sector building contracts in more detail (comp. on national law also § 99 Sec. 3 Restriction of Competition Act (Gesetz gegen Wettbewerbsbeschränkungen (GWB)). The European Court of Justice (EUGH) did not have to comment on the new directive. However, the new regulations have to be taken into account for more recent (building) projects. The new ruling of the European Court of Justice (EuGH) again demonstrates the importance of public procurement law also in the field of "landlord and tenant law". If public contracting authorities intend to rent buildings which are to be specifically tailored to their needs and if respective building obligations are agreed, such rental

agreements represent a public-sector construction contract subject to tendering if the structural requirements are in focus because of the purpose of use of the building. In practice this is often disregarded (comp. for instance OLG Düsseldorf, ruling of August 7, 2013 – VII Verg 14/13 "Police Station"). Then serious consequences may arise which range from the invalidity of (rental) agreements to the potential compensation claims against the Federal Republic of Germany (comp. European Court of Justice (EuGH), ruling of Octover 29, 2009 – C-536/07 "Trade Fair Halls Cologne").

DR. RAINER BURBULLA

F. INSURANCE LAW

INSURANCE CONTRACT LAW – PAYMENT PROTECTION – DISABILITY INSURANCE, APPLICATION OF § 306 SEC. 1 GERMAN CIVIL CODE (BGB)

DISABILITY INSURANCE TO SECURE A LOAN CONTRACT

In its ruling of May 20, 2014 (4 U 253/13) the OLG Jena has rejected concerns of a policy holder because of an alleged invalidity of a clause in the General Policy Conditions. The clause in the General Terms and Conditions of a so-called disability insurance granting payment protection (for securing a loan contract) specified that the claim for incapacity benefits became void if the person insured became unfit for work and unable to earn his/her living for an unlimited period of time.

The policy holder instituted legal proceedings with the objective to establish that he continued to be entitled to the benefits from that insurance.

NO VIOLATION OF THE REQUIREMENT OF TRANSPARENCY – NO INAPPROPRIATE DISCRIMINATION

The OLG deemed the concerns of the policy holder unfounded: The clause neither violated the requirement of transparency nor did the policy holder experience some inappropriate discrimination.

However, it was particularly decisive for the senate that an invalidity of the clause did not have by any means any effect in favour of the policy holder.

SCOPE OF § 306 SEC. 1 GERMAN CIVIL CODE (BGB)

In fact § 306 Sec. 1 German Civil Code (BGB) regulates the general principle that the contract remains otherwise effective if General Terms and Conditions are not made part of the contract as a whole or in parts or become invalid.

UNREASONABLE HARDSHIP PURSUANT TO § 306 SEC. 3 GERMAN CIVIL CODE (BGB)

However the contract becomes nul and void pursuant to § 306 Sec. 3 German Civil Code (BGB), if adhering to the contract represented some unreasonable hardship for a contracting party.

That was exactly the case according the OLG.

APPLICATION OF § 306 SEC. 3 GERMAN CIVIL CODE (BGB) AS EXCEPTIONAL CASE WITH RESPECT TO § 306 SEC. 1 GERMAN CIVIL CODE (BGB)

The OLG has stated that it had to be determined by weighing up interests whether some unreasonable hardship applied. Not only the adverse changes to the exchange conditions for the user of the General Terms and Conditions were decisive. In fact, also the justified interest of the other party regarding the continuation of the contract had to be taken into account. Since § 306 Sec. 3 German Civil Code (BGB) represented an exceptional case with respect to § 306 Sec. 1 German Civil Code (BGB) special reasons had to apply if that exceptional case had to be effective.

Unreasonableness of adhering to the contract in the case of a fundamental disruption of the balance of contract

Adhering to the contract could be deemed unreasonable if due to the invalidity of a General Terms and Conditions clause the balance of the contract was fundamentally disrupted. Not every single economic disadvantage of the user was already sufficient. Instead a drastic disruption of the relationship of equivalence was required thus making it unreasonable to adhere to the contract. Unreasonableness could apply if it was clear that the user had not concluded the contract without that clause.

Transferring this to the specific case the senate stated that due to an invalidity of the General Policy Conditions only an unreasonable "torso of contract" remained for the insurer in the declaration of entering the payment protection insurance. That declaration only suggested that the borrower intended to secure his/her payment obligations and that he/she applied for entering a group insurance contract.

Furthermore, adhering to the contract did not necessarily imply an improvement of the legal position for the policy holder. Undue hardship might result from the fact that the contractual content decisive subsequent to the dropping of the General Terms and Conditions – as was the case in the legal dispute - became unclear from the point of view of the customer and that some uncertainty and dispute regarding mutual rights and duties arose.

No statutory regulaton of the payment protection insurance in the Insurance Contract Act (VVG) - no recourse to § 306 German Civil Code (BGB) (subsidiary statute law) Practical consideration

Since there was no statutory regulation of the payment protection insurance in the Insurance Contract Act (VVG), recourse could, therefore, not be made to subsidiary statute law pursuant to § 306 German Civil Code (BGB).

With that argumentation the OLG declared the insurance contract invalid.

The Federal Supreme Court (BGH) has already decided in its ruling of September 11, 2013 (IV ZR 303/12) that a clause in the General Terms and Conditions of the disability insurance granting payment protection, which provided that the claim for benefits regarding incapacity to work lapsed if the insured person became unable to work and unable to earn his/her living for an inlimited period of time, violated neither the requirement of transparency of § 307 Sec. 1 Sent. 2 German Civil Code (BGB) nor did it represent an inappropriate discrimination of the policy holder pursuant to § 307 Sec. 1 Sent. 2 German Civil Code (BGB).

On the other hand, according to the OLG Hamburg (ruling of July 15, 2013 – 9 U 157/12) a clause in the payment protection insurance excluding "potential illnesses" from insurance coverage, violates the requirement of transparency and is, therefore, invalid.

Ralf-Thomas Wittmann

G. Labour Law

I. Contract of Employment – Period of notice pursuant to § 622 German Civil Code (BGB) – Age discrimination

Period of notice pursuant to German Civil Code (BGB) – no age discrimination

In its ruling of September 18. 2014 (6 AZR, 636/13) the Federal Labour Court (BAG) has decided that the incremental periods of notice according to seniority provided for in § 622 Sec. 2 German Civil Code (BGB) did not include any invalid indirect discrimination because of age.

The plaintiff being 28 years of age

The plaintiff who was 28 years of age at the time of termination had been in the defendant's employment for approximately three years. Then the defendant terminated the employment with effect from the end of the following month in compliance with § 622 Sec. 2 No. 1 German Civil Code (BGB). Due to the low number of members of staff the Dismissal Protection Act (Kündigungsschutzgesetz) was not applicable. The plaintiff, in fact, did not challenge the termination as such, however she considered the short period of notice an indirect discrimination of age.

No indirect discrimination by potentially not reaching the – incremental – phase of long periods of notice

Background to that was that § 622 Sec. 2 German Civil Code (BGB) staggered the period of notice to be complied with by the employer according to the length of employment. Provided that the employment did not last longer than, for example, two years, the period of notice amounted to one month, in case of ten years of seniority it amounted to four months and twenty years of seniority implied a period of notice of seven months. The plaintiff argued that it was impossible for her due to her young age to reach twenty years of seniority and, therefore, the seven-month period of notice connected to it. That implied an indirect discrimination because of age. For that reason she requested compliance with the seven-month period of notice.

The action remained unsuccessful before the Federal Labour Court (BAG).

Reasonable staggering of the periods of notice

The Federal Labour Court (BAG) was of the opinion that staggering the periods of notice served the legal purpose to grant improved protection against dismissal by means of longer periods of notice to long-term employees and, thus, to those employees loyal to the company, who are typically older. Staggering the periods of notice was also required and appropriate to reach that improved protection against dismissal.

Practical consideration

With this ruling the Federal Labour Court (BAG) has confirmed its previous rulings. This is to be welcomed because it provides legal certainty for companies.

Jörg Looman

II. Contract of Employment Law – Action regarding protection against dismissal – Frequent short-term illnesses as permanent facts of the case

With its ruling of January 23, 2014 (2 AZR 582/13, NZA 2014, 962) the Federal Labour Court (BAG) has decided on the question whether and in how far frequent short-term illnesses justified a reason for instant dismissal for cause.

Average absence 2000 bis 2011: 75,25 days p.a. – termination pursuant to § 626 German Civil Code (BGB)

In the case ruled the plaintiff was employed with the defendant as assistant gardener and due to regulations in compliance with a collective agreement the ordinary right to terminate was excluded. Since the year 2000 the plaintiff was repeatedly unable to work because of various illnesses. After the plaintiff was incapacitated for work for more than one month at the end of 2011, the defendant terminated the employment extraordinarily pursuant to § 626 German Civil Code. The defendant justified its termination on the grounds that the plaintiff had been absent from work on average 75,25 working days in the years 2000 to 2011 and that the defendant was, therefore, entitled to a negative prognosis. The plaintiff instituted a claim for protection against dismissal and stated that her diseased musculoskeletal system had been healed after having undergone surgeries.

The action for protection against dismissal was successful before the Federal Labour Court (BAG).

Short-term illnesses as permanent facts of the case – Question relating to the negative health prognosis

The Federal Labour Court (BAG) stated that frequent short-term illnesses could justify permanent facts of the case which could principally represent an important reason for extraordinary termination. The reason for termination would then be a negative health prognosis and a considerable negative effect on the company's interest resulting from it. The reason for termination occurred for the first time at the point at which the short-term illnesses, which had occurred so far, allowed such a negative health prognosis for the very first time. The reason for termination ended at the point at which the short-term illnesses of the past did no longer support a negative prognosis for the first time. The negative prognosis, therefore, did not come to an end directly after the last illness, but only if enough time lapsed thus eliminating the originally negative health prognosis.

Such a negative health prognosis can – according to the Federal Labour Court (BAG) – also occur if the absence is not based on one and the same underlying illness.

Strict standards for notices of termination pursuant to § 626 German Civil Code (BGB) – prognosis – considerable negative effect on the company's interests – imbalance between performance and consideration

In the opinion of the Federal Labour Court (BAG) an important reason necessary for an extraordinary termination pursuant to § 626 Sec. 1 German Civil Code (BGB) could only be taken into consideration in some highly restricted cases because a strict standard had to be applied for this purpose. For that reason an important reason only applied if the frequent short-term illnesses in the past would forecast a respective future development. Furthermore substantial negative effects on the company's interests would have to exist on the basis of the absences predicted. As a third prerequisite it was also necessary to weigh up interests as to whether the negative effects on the employer could no longer be reasonably accepted. This would require a drastic imbalance between performance and consideration. This only applied if the employer was obliged to pay considerable remuneration – if applicable over years - and if he/she was no longer in a position to usefully and reliably plan the integration of the employee due to his/her absences for reasons of illness. The Federal Labour Court (BAG) was of the opinion that such a drastic imbalance did not apply if absences amounting to 76,25 days p.a. were predicted. Actually in that case the employee was still fit for work two thirds of her annual working time.

Practical consideration

In its ruling the Federal Labour Court (BAG) confirmed its previous rulings according to which a permanent illness can, in fact, principally constitute an extraordinary reason for termination. However the Federal Labour Court (BAG) demonstrates at the same time that very high standards have to be applied to this, which in practice may cause considerable problems of proof for employers.

Jörg Looman

Events

October 21, 2014
6. German Specialty Store – Real Estate Conference 2014
in Wiesbaden, Dorint Pallas Hotel
Talk "Legal Framework for the Development of Specialty Stores Demonstrated on the Basis of Current Case Studies"
Speaker: Rechtsanwalt Dr. Johannes Grooterhorst, Partner
Grooterhorst & Partner Rechtsanwälte mbB

October 22, 2014
IMMOEBS Working Group Rhein-Ruhr
in Düsseldorf, Königsallee 53-55, 18.00 Uhr
Specialist Lecture: "Commercial Landlord and Tenant Law – Up-to-Date and Compact"
Speaker: Rechtsanwalt Dr. Rainer Burbulla, Partner
Grooterhorst & Partner Rechtsanwälte mbB

November 14, 2014
Conference DVAG German Association for applied geography
in Hannover, Handelshaus, Hinüberstraße
Lecture "Waffengleichheit zwischen stationärem Handel und E-Commerce – rechtliche Steuerungsmöglichkeiten"
Speaker: Dr. Johannes Grooterhorst, Partner
Grooterhorst & Partner Rechtsanwälte mbB

November 25, 27, 2014
3. German Factory-Outlet-Congress 2014
in Baden-Baden, Kurhaus Casino
Lecture on planning law „Radiusklausel – Planungsrecht – LEP in NRW"
Speaker: Rechtsanwalt Dr. Johannes Grooterhorst, Partner,
Grooterhorst & Partner Rechtsanwälte mbB

November 27, 2014
Specialist Lecture "Fire Protection Gone – Tenant Gone?"
in Düsseldorf, specialist book shop Sack, Klosterstraße 22
Speaker: Rechtsanwalt Dr. Rainer Burbulla, Partner und
Lawyer Niklas Langguth, Partner
Grooterhorst & Partner Rechtsanwälte mbB

January 28, 2015
Düsseldorfer AnwaltService GmbH
in Düsseldorf
Specialist lecture "Current Commercial Landlord and Tenant Law 2015"
Speaker: Rechtsanwalt Dr. Rainer Burbulla, Partner
Grooterhorst & Partner Rechtsanwälte mbB

January 28, 2015
11th German Retail Trade Real Estate Congress
Swiss Hotel, Berlin, Kurfürstendamm
Panel Talk: "Consequences under Building Law of the Boom in the Online Trade"
Panel Speaker: Rechtsanwalt Dr. Johannes Grooterhorst, Partner
Grooterhorst & Partner Rechtsanwälte mbB

Should you be interested in participating in one of our events,
please contact the speakers: www.grooterhorst.de

Publications
New Releases

Rainer Burbulla, Current Commercial Landlord and Tenant Law –
Rulings and Contract Design
Author: Rechtsanwalt Dr. Rainer Burbulla,
Partner Grooterhorst & Partner Rechtsanwälte mbB
2nd completely revised and substantially enlarged edition,
Berlin 2014

Ursula Grooterhorst, Power of Attorneys in the Companies
Author: Dr. Ursula Grooterhorst,
Rechtsanwältin und Mediatorin Grooterhorst & Partner Rechtsanwälte mbB
6th revised and extended edition,
Berlin 2014

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