GROOTERHORST
& PARTNER
RECHTSANWÄLTE

NEWSLETTER 01/2013

Dear Readers,

At the beginning of 2013 we review important legal developments of the previous year 2012: The European and the German legislator initiated new evolutions in procedural law and in cross-border foreclosure. The highest federal courts (BGH and BVerwG) as well as some courts of appeal announced interesting rulings which influence some fields of activity of our law firm – in commercial and company law, in private construction law as well as in commercial landlord and tenant law. Problems and consequences of building projects also extend to legal relationships with insurers. Time and again, planning law has to solve conflicts between investors or public interests respectively arising within the context of local, regional and state-wide project planning. The possibilities of mediation can be made clear particularly in contrast to traditional settlement negotiations.

Also for this year 2013, I wish you some stimulating reading of our quarterly newsletter.

Yours
Dr. Johannes Grooterhorst
Rechtsanwalt

Content

A. Current News

Conducting legal proceedings: New European law: 1. Foreclosure without exequatur; 2. Containment of abusive impediments of actions (so-called torpedo actions)

Legal basis EuGVVO

The judicial competence within the member states of the European Union and the execution of judgements and court rulings from one EU member state in another member state is regulated according to the so-called Brussels I Regulation, in Germany also referred to as "EuGVVO". At the end of December 2012 the European legislative bodies passed a revised version of the Brussels 1 Regulation with effect from 10 January 2015 [Regulation (EU) No. 1215/2012 of the European Parliament and the Council of 12 December 2012 concerning the judicial competence and the recognition and execution of rulings in civil and commercial matters, (Abl. 2012, L 351 ff.)].

In order to conduct legal proceedings two elements of the reform are of particular importance: no express authorisation of the enforcement and protection against impediments of the proceedings in civil actions.

1. Elimination of the enforceability procedure

To date: Time and cost-intensive writ of execution

To be able, for example, to execute a ruling delivered in France against a defendant domiciled in Germany, a so-called writ of execution by the LG (Landgericht) at the legal domicile of the defendant is necessary due to currently applicable law, art. 38 of the Brussels I Regulation in connection with § 3 Par. 1 a AVAG (exequatur). Such proceedings may take weeks, possibly months.

New: Mutual trust in the administration of justice

Pursuant to the recitals of the amendment of the Brussels I Regulation, the mutual trust rested in the administration of justice within the member states of the European Union, however, justifies the principle that a ruling delivered in one member state is recognized in all member states without necessitating special proceedings for this. Furthermore, the planned reduction of time and costs in case of cross-border legal action justifies the elimination of the writ of execution.

A ruling delivered by the courts of one of the member states should thus be treated as if delivered in the requested member state.

In future no exequatur

For that reason, the Brussels I Amendment provides that a writ of execution is no longer required in future.

Practical effects

A ruling delivered in France, for example, can be directly executed in Germany as of 2015. This requires that the plaintiff submits to the executing body a copy of the ruling to be executed as well as a certificate of the French court according to which the ruling is enforceable including information specifying the refundable costs of the proceedings and the calculation of interest (art. 39, 42 of the Brussels I Amendment).

This measure should lead to a considerable acceleration and, therefore, to an efficiency of execution of foreign rulings within member states of the European Union.

2. Containment of abusive impediments of actions because of delaying procedures in third countries (so-called torpedo proceedings)

Negative declaratory action in a "suitable" foreign country as an impediment measure in legal proceedings

An action is defined as torpedo action if a potential defendant attempts to block an action for payment brought against him by filing for a negative declaratory action in another EU country. Reason for that is the current regulation of article 27 EuGVVO. That article requires that, if actions for the same claim between the same parties are pending at courts of various member states, the court subsequently invoked shall officially stay the proceedings until the competence of the court invoked first is established.

„Attractive" countries with long duration of proceedings

Torpedo actions frequently occur especially in the area of commercial trademark rights. The potential defendant takes advantage of the fact that an extremely long duration of proceedings is common practice in some member states. In the past Italy and Belgium turned out to be particularly "attractive" in this respect, so that in the jargon one often talks about the so-called "Italian torpedo", or sometimes the "Belgium torpedo". These cases regularly justify no competence in Italy or Belgium. However, due to the regulation of article 27 of the Brussels I Regulation the creditor has to wait with the active enforcement of his rights in these cases until the Italian or Belgium court delivered a legally binding ruling about its lack of competence. During that period of time the debtor tries to hide his financial assets or to benefit from this gain in time otherwise. Current legislation of the European Court of Justice sets relatively few limits to these torpedo actions.

Objective of the new regulation: avoiding abusive litigation tactics

Now even the European legislator has realized this problem and has stated in its recitals concerning the amendment of the Brussels I Regulation that it is necessary to avoid abusive litigation tactics and to provide an exception from the general rule of pendency in order to find a satisfying regulation.

Therefore, the revised version of the Brussels I Regulation requires that principally the subsequently invoked court officially has to stay the proceedings, until the competence of the court invoked first has been established.

Importance of a choice-of-forum agreement

In the event, however, that the parties concluded a choice-of-forum agreement, the court invoked first has to stay its proceedings until the court invoked on the basis of the choice-of-forum agreement has declared that it is not competent pursuant to the agreement.

In doing so, the European legislator has now - in the event that the parties have concluded a choice-of-forum agreement – put a stop to torpedo actions.

Practical considerations: Avoiding possible abuse by means of choice-of-forum agreements

Furthermore, the following possibilities of abuse might still exist, if the parties did not conclude a choice-of-forum agreement. In that respect some more courage of the European legislator would have been desirable in order to put an end to torpedo actions.

Ralf-Thomas Wittmann

B. Commercial and Company Law – Labour Law –

Legal capacity of a works council – effective conclusions of contract – personal liability of an acting member of the works council as representative without power of attorney

In its judgement of October 25, 2012 (III ZR 266/11) the BGH ruled that a member of the works council ("Betriebsrat") can be made personally liable for his mandate to a consultant if this mandate was not necessary in the sense of the BetrVG and if the contractor did not know and did not have to know that there was no necessity.

Consultancy agreement of the works council with a consultant in the event of changes within the company

In the case underlying the ruling the chairman of the works council commissioned a consultant with the business consultancy concerning a reconciliation of interests connected to changes in the company pursuant to § 111 Sent. 2 BetrVG. This assignment was preceded by a resolution of the works council. The company refused the release (payment) pursuant to § 40 Sec. 1 BetrVG since the contract and its content had not been necessary. The action of the consultant was brought against the works council (as committee) and against individual members of the works council.

(Partial-) legal capacity of the works council only in the event of necessary/ refundable contracts with a third party

The BGH ruled that the works council has a (partial) legal capacity for those activities in legal relations that are refundable as necessary costs according to the requirement of § 40 Sec. 1 BetrVG. Within this scope the contracts concluded by the works council are also effective: a consulting contract intended to support the works council in the event of changes in the company pursuant to § 111 Sent. 2 BetrVG is, however, only effective if the agreed consulting activity is necessary for the works council to fulfil its tasks and if the money agreed is customary to the market and if the works council has, therefore, a claim against the employer to get the costs refunded and to be released pursuant to § 40 Sec. 1 Works Constitution Act (BetrVG).

Analogue application of § 179 German Civil Code (BGB) to an acting member of the works council in case of a lack of legal capacity of the works council

It is true that the consultant had in this case concluded a(n) (unnecessary) contract with a "non-existing" person (that has no legal capacity or that has partially no legal capacity). There is also no accessory liability under company law (§ 28 German Commercial Code (HGB)) or under the law of associations (§ 54 Sent. 2 German Civil Code (BGB)) for members of the works council. The acting member of the works council, however, is liable in analogue application of § 179 German Civil Code (BGB) as representative without power of attorney: this liability is not only a possibility - directly – in case of a lack of representing power, but also, by analogy, in case of non-existence of the "person represented", unless the contracting party (in this case: the consultant) had known or had to know the lacking necessity of the consultancy.

Practical Considerations

The ruling makes it clear – for the case ruled – how the "triangular relationship" between a company principally liable to make refunds, the works council principally entitled to refunds and the contracting parties of the works council, has to be judged in business activities concerning legal relations. Contracting parties are well advised to assure themselves about refundable costs. For general business operations the risk situation for the representative of a non-existent person or a person that has only a partial legal capacity and his contracting parties becomes once again clear when broadly applying § 179 German Civil Code (BGB).

Dr. Steffen Schleiden

C. Real Estate Law

Private Construction Law: Scope of the power of attorney of an architect – upon acceptance – Architect's obligation to provide advice

Initial Situation: Contractual penalty only in the event of reservation concerning acceptance

Pursuant to § 11 No. 4 VOB/B, 341 Sec. 3 German Civil Code (BGB) the customer is only able to assert contractual penalty, if he expressly reserves the right to do this upon acceptance. In its judgement of December 6, 2012 the OLG Bremen (3 U 16/11) had to rule on the question whether it is incumbent upon the architect to inform the building owner about the necessity to clarify the reservation of contractual penalty in the course of acceptance.

General power of attorney of building owners to architects only for construction work, not for asset-related interests (contractual penalties)

At first the OLG referred to the fact that according to established case law the supervising architect acting on behalf of the client cannot necessarily be considered entitled to assert the reservation concerning contractual penalty. As a matter of fact, contractual penalties first and foremost serve the asset-related interests of the client. Therefore, it does not have anything directly to do with the construction work and hence with the activity of the architect.

Necessity of a special power of attorney for acceptance

If an architect shall nonetheless explain the reservation of the contractual penalty, a special authorisation by the client is required for that purpose. For this a special power of attorney for the contractual acceptance suffices which then covers the power of attorney concerning the reservation of the contractual penalty. The common architect's power of attorney, which only refers to the areas of performance as specified in the Fee Regulations for Architects and Engineers (HOAI), does not replace the power of attorney necessary for asserting the reservation of contractual penalty.

Reference to contractual penalties - Problems as part of the architect's obligation to provide advice

The OLG was of the opinion that no special power of attorney did exist. However, an architect's violation of duty giving rise to liability can be assumed, if he violated an obligation to provide advice. If, in fact, it was known to the architect that the parties of the building contract had concluded contractual penalty agreements or if that had to be known to him, then it is part of the architect's advisory and supervisory obligation to ensure by means of expressly communicating information to the building owner that, on the occasion of a formal acceptance, the necessary reservation of contractual penalty is not inadvertently omitted. This does not apply if the client has sufficient expertise himself and is competently provided with advice. It can be expected that an architect as a competent consultant and supervisor of the building owner has - in the field of civil engineering - considerable knowledge of the law on contracts for work and services, of the German Civil Code (BGB) as well as of respective regulations specified in the VOB/B. This also includes knowledge of the fact that a contractual penalty has to be reserved upon acceptance.

For that reason the architect sued is to be made liable. He was unable to prove that the client himself had the necessary professional expertise, especially because no ongoing legal advice of the building owner took place.

Practical Considerations – Observing statutory periods of limitation

Nevertheless the action was dismissed. As a matter of fact, the plaintiff allowed too much time to pass between realizing that the architect omitted the reference to the reservation of contractual penalty and the action itself. The architect was able to provide evidence to the court that the 3-year-standard period of limitation applicable to that particular case pursuant to § 195 German Civil Code (BGB), expired prior to the building owner filing a suit.

Ralf-Thomas Wittmann

D. Commercial Landlord and Tenant Law

I. Interpretation of a rent adjustment agreement in the case of the suspension of the "cost-of-living index of a 4-person employee household of the middle-income group in the Federal Republic of Germany"

Supplementing contract interpretation in case of index elimination

In its judgement of November 7, 2012 (XII ZR 41/11) the BGH ruled that the loophole that came into being due to the elimination of the cost-of-living index (4-person employee household of the middle-income group) in the Federal Republic of Germany has to be closed in a commercial lease by means of supplementing contractual interpretation ("ergänzende Vertragsauslegung"). At least in cases where the period underlying the adjustment started on 1 January 2000, it has to be aimed at the consumer price index with effect from the base year 2000.

Demand for a rent increase

In the facts underlying the ruling the parties were in dispute about a demand for a rent increase of the landlord. The commercial lease dating back to the year 1985 included an indexation clause according to which a rent adjustment was possible if the cost-of-living index of a 4-person employee household of the middle-income group in the Federal Republic of Germany increased or decreased by 10%. In May 2006 the landlord claimed a rent increase, because the index level of the consumer price index (VPI), basis 2000 = 100, increased by more than 10% since the last rent adjustment. The tenant refused the payment of the increased rent. He was of the opinion that the consumer price index can only be referred to as from 1 January 2003. Actually the cost-of-living index of a 4-person employee household of the middle-income group in the Federal Republic of Germany had since December 2002 no longer been calculated.

Elimination of various cost-of-living indices in the year 2002

In December 2002, the Federal Statistical Office eliminated various price indices for special household types (amongst others, the price index for the costs of living of a 4-person household of workers and employees with a middle income). Only the price index for the costs of living of all private households in Germany was continued as consumer price index (VPI) for Germany. (Old) leases referring to a non-continued price index reveal a loophole due to the discontinuation of the price index, which – provided that the lease does not include a replacement clause – has to be closed by supplementing contractual interpretation. In doing so, the consumer price index has to be referred to as applicable replacement index. It is in dispute whether the threshold value of the consumer price index as from the base year 2000 has to be considered or whether the time of the termination of the index referred to (December 2002) is decisive.

Rent increase pursuant to the alleged intention of regulation of the contracting parties when concluding the contract

The BGH deems the rent increase of the landlord justified. For the calculation of the relevant index change of the consumer price index the entire underlying period since the last adjustment as from June 2000 has to be considered: The contracting parties had intended to make a continuous index the basis of a possible rent adjustment, calculated according to a uniform standard for the entire period under consideration. By referring to the base year 1980 = 100 at the time when concluding the lease in the year 1985 the contracting parties had referred to an obsolete base year. For that reason the parties had not made any refer-

ence to the cost-of-living index according to the fixed weighing scheme and to the base year 1980 with the agreed percentage clause, but to the cost-of-living index according to the respectively valid base year. Therefore it had to be considered that the cost-of-living index continued until December 2002 was terminated according to the base year 1995 and that this weighing scheme, too, did no longer represent an appropriate reflection of the consumption habits in the years 2000 until 2002. Moreover, this statistical imprecision did not cease to exist due to the replacement of the cost-of-living index by the consumer price index. The differing calculation occurred when linking the consumer price index at the turn of the year 2002/2003 instead of a uniform calculation according to the base year 2000 were, therefore, not based on diverse weighing schemes and consumer baskets, but only or mainly on the distorted results displayed by the Federal Statistical Office due to a changed methodology. If the parties had considered this, they would have also agreed on the validity of the current weighing scheme of the base year 2000.

Practical considerations

The BGH extends its ruling concerning rent adjustment in the event of discontinuation of a price index and of continuation with the consumer price index as well as with so-called points clauses (comp. BGH, ruling of 4 March 2009 – XII ZR 141/07) and also in case of percentage clauses to the decisive calculation period to 1 January 2000.

Dr. Rainer Burbulla

II. Ineffectiveness of the clause remedying written form deficiencies in the lease with regard to a purchaser of property – exclusion of termination

In its ruling of November 29, 2013 (I-10 U 34/12) the OLG Düsseldorf decided that a clause remedying written form deficiencies unfolds no binding effect on the purchaser of the property. A purchaser of property is, therefore, also entitled to terminate a commercial lease because of a violation of the written form, although the contract obliged the landlord to remedy the written form.

Written form deficiency because of an insufficient allocation of rental space

In the case underlying the ruling a tenant rented sales and shop areas in a shopping centre. In the lease the rental object has been described as follows: “Premises to be used as sales/shop areas on the ground floor 1, level 3, 75 m², pursuant to the plan of the rental areas attached as addendum 1”. The plan specifying the rental areas only features clearly allocated areas of 11.00 m² for “storage” and 17.37 m² for “sales”, however not the area exceeding this of approximately 46.63 m². The latter had to be allocated to the communal area. It is regulated in the lease that the parties had to undertake in case of non-compliance with the written form of the lease to bring it about subsequently and not to terminate it prior to that moment because of its deficient form. The (original) landlady sold the rental object to the plaintiff. The plaintiff cancelled the lease and invoked a violation of the written form because of the insufficient denomination of the rental areas and brought an action for eviction. The tenant took the view that the plaintiff had not been entitled to termination because of the “remedy clause” of the lease.

The OLG Düsseldorf deemed the plaintiff's action for eviction justified. The court stressed: Neither the plan defining the rental areas nor miscellaneous circumstances specify which areas have effectively been rented out to the tenant. This particularly applies to communal areas. Of course, communal areas can also be (co-)rented out. However, their exact – or at least determinable – definition in the lease is required.

Remedy clause as violation of the protective purpose of the legal written form – protection of the later purchaser of the property

The plaintiff (the purchaser) shall not be prevented from declaring termination because of a violation of the written form. The "remedy clause" does not oppose termination. It violates the protective purpose of the legal written form (§ 550 German Civil Code (BGB)) and is deemed ineffective as General Terms and Conditions (§§ 307 Sec. 1 No. 1, 310 Sec 1 German Civil Code (BGB)). The protective purpose of § 550 German Civil Code (BGB) first and foremost intends to ensure that a later purchaser of the property who enters by law on the part of the landlord into a rental relationship of more than one year (§ 566 Sec 1 German Civil Code (BGB)), is aware of the Terms and Conditions arising from the written lease. For this it is necessary that the agreement required for concluding the contract – especially with respect to the rental object, the rent as well as the period and the parties of the rental relationship – is materialized by virtue of a document signed by both contracting parties. This fact can also not be changed because of the fact, that the purchaser is able to obtain knowledge of the remedy clause by being able to inspect the lease. He would then know that in case of a written form deficiency he has to participate in making up for it in due form. However, this clause does not provide him with any knowledge about the form deficiency as such.

Practical considerations: Risk of clauses regulating redress, provision of the written form or remedying written form deficiencies

In current commercial rental and leasing contracts remedy clauses are found frequently. They commit the parties in case of non-compliance with the written form pursuant to § 550 German Civil Code (BGB) to bring it about subsequently and not to give notice of termination prior to this moment in time due to a lack in form. The question whether such clauses regulating redress, provision of the written form or remedying written form deficiencies are effective in General Terms and Conditions, is controversial. A clarification by the supreme courts is still pending. The OLG Düsseldorf is, however, of the opinion that clauses remedying written form deficiencies do not apply in the case of a purchaser of property. The parties of a commercial lease should, therefore, be aware of the risk that a clause specifying such provisions might not stand up to a final consideration of the BGH. They should, for that reason, pay particular attention to the compliance with the written form and, in case of doubt, they should rather conclude a supplementary agreement than to rely on the effectiveness of a "remedy clause".

Dr. Rainer Burbulla

III. Written form and indexation clause (oral addenda)

In its judgement of November 17, 2012 (Az.: 3 U 75/11) the OLG Brandenburg ruled that a violation of the written form leads to a premature cancellation right of the lease contract concluded for a longer period of time; consequently, an indexation clause is ineffective as it presupposes a contractual period of 10 years.

Amendments of the rental contract (refunding ancillary rental costs) by an oral supplement

In the case underlying the ruling the parties concluded a lease contract for a nursing home with a period of 5 years in 1999 plus an option for the tenant to extend the lease contract by another 5 years. The lease contract included an indexation clause. All ancillary rental costs should have been borne by the tenant. However, he should only pay certain ancillary rental costs to the landlady, whereas apart from that the other costs should be made directly to the respective (utility) company. Subsequently the parties orally agreed that the tenant should pay all ancillary rental costs (only) to the landlady. Due to an index change the landlady asserted an increase of the rent by way of an action.

Violation of the written form requirement in the event of substantial amendments of contract

The OLG Brandenburg dismissed the case. The subsequent oral agreement between the contracting parties was to be understood as a substantial amendment of the mode of paying the ancillary rental costs and, consequently, a considerable amendment of the lease contract. Substantial amendments of contract did, in fact, require the written form pursuant to § 550 German Civil Code (BGB) which was left unconsidered by the two parties. Consequently the lease contract could have been prematurely cancelled within the statutory period of notice. As a further consequence, the agreed indexation clause turned out to be ineffective, too. Indexation clauses required a contractual period of at least 10 years was agreed (comp. § 3 Price Clause Act (PrKlG)). The parties had, in fact, agreed a binding period of 10 years (period of contract: 5 years plus option: 5 years). However, that period lapsed due to the premature cancellation right. The landlady, therefore, was not entitled to increase the rent.

Terminability breaches the minimum period of years in case of indexation clauses

Practical considerations

Especially in the case of long-term (rental/lease) contracts it often occurs that the contracting parties agree on amendments, without being aware of “destroying” the written form. Often this is done on the basis of letter exchanges or oral agreements (for example, when assigning parking spaces, adjusting the rent, adjusting ancillary rental costs, etc.). A violation of the written form does not only lead to a premature terminability of the contract, but at the same time “infects” all clauses which for their part also require a specific minimum period of contract, such as, for example, indexation clauses.

Dr. Rainer Burbulla

E. Public Law

I. State Building Law: Building permit for a garden centre in proximity to an incident-prone facility

In its judgement of December 20, 2012 (Az.: 4 C 11.11 and 4 C 12.11) the BVerwG ruled that the requirement of appropriate distances within the meaning of the EU Seveso-II Directive (Directive 96/82/EC) has to be considered in the context of building permit proceedings.

Objection of an incident-prone facility (EU Seveso II) against the outline building permit for a garden centre

The case was about issuing an outline building permit ("Bauvorbescheid") for a garden centre in the unplanned developed area in direct proximity of an incident-prone facility within the meaning the EU Seveso-II Directive. The incident-prone facility filed an objection against the granted outline building permit. It justified the objection by stating that the project under application would not comply with the so-called appropriate distances as laid out in the EU Seveso-II Directive and would, therefore, be contrary to the law. As the authority competent for dealing with objections had not made a ruling about the objection, the plaintiff brought an action for failure to act. The VG Darmstadt (judgement of November 27, 2007, Az.: 9 E 2454/05 (3) , 9 E 2454/05) and the Hesse VGH (judgement of December 4, 2008, Az.: 4 A 882/08) admitted the action. The BVerwG first of all submitted the question to the European Court of Justice in the context of the procedure for preliminary rulings whether within building permit proceedings the building permit had to be mandatorily granted if the risks of settlement within the appropriate distances had not been sufficiently appreciated (ruling of December 3, 2009, Az.: 4 C 5.09, judgement of the EuGH).

Order for reference of the BVerwG concerning distance requirement

Judgement of the EuGH: Distance requirement even in building permit proceedings

In its ruling of September 15, 2010 (Az.: C-53/10) the EuGH answered this question in that the distance requirement of the Seveso-II Directive also has to be considered in building permit proceedings. This distance requirement indeed includes that a building permit has to be mandatorily refused if the appropriate distances are not complied with. However, a building permit may also not be issued without the risks of a settlement within the distance limits being sufficiently appreciated in the phase of planning or approval (for this, comp. our Newsletter 4/2011, S.11).

Ruling of the BVerwG: Directive-compliant interpretation of § 34 Sec. 1 German Building Code (BauGB) – Justifications for deviations?

Subsequent to this ruling of the EuGH the BVerwG ruled that these directives under Union law can be taken into account by the directive-compliant interpretation of the imperative of consideration as set forth in § 34 Sec. 1 German Building Code (BauGB). A prerequisite for this, however, is that the new settlement does not cause any tensions as regards urban development that can only be mastered by planning. At the same time the BVerwG referred the case back to the Hesse VGH. This court now has to review, first, which distances are deemed appropriate in the specific case by considering all incident-specific factors and whether the garden centre is located within these distance limits. Provided this is the case, the Hesse VGH has to make an evaluative decision within the requirement of consideration as to whether circumstances of particular importance exist which justify the approval of the project within the distance limits.

Practical considerations

With this ruling the BVerwG offers the possibility of a solution how the requirements under European law of the EU Seveso-II Directive, formulated by the European Court of Justice in its judgement of September 15, 2012, can be implemented in German law. This ruling is of particular significance for practical applications, because a considerable number of building projects for buildings designed for public purposes, which also include shopping centres, are intended to be built or refurbished in the context of revitalisation measures in so-called melanges. Quite often these are grown structures between residential use and public buildings in direct proximity to so-called incident-prone facilities. In its ruling the BVerwG made it clear that not each and every deviation below the appropriate distances inevitably leads to a refusal of granting a permit, but that an appropriate balance of interests has to be found in the context of an evaluative decision.

Dr. Steffen Schleiden

II. Planning Law: Requirement of proper assessment when presenting concentration zones for wind energy use

Special construction sites for wind energy use in the preparatory land-use plan

In its judgement of December 13, 2012 (4 CN 1.11 and 4 CN 2.11) the BVerwG confirmed the rulings of the OVG Berlin-Brandenburg of February 24, 2011 (2 A 2.09 and 2 A 24.09) concerning the ineffectiveness of the preparatory land-use plan for partial areas "wind energy use" of the municipality of Wustermark. The case dealt with the presentation of concentration zones for wind energy use in the municipality of Wustermark. In its preparatory land-use plan the municipality presented four special construction sites for wind energy within the area of the municipality. This presentation brought about the effect that the construction of wind energy plants outside these special construction sites was regularly ruled out. The claimants whose plots of land are located within the excluded area objected to this.

Multi-level proceedings – taboo zones – areas of potential – weighing-up result

The OVG Berlin-Brandenburg stated that, for determining concentration areas for wind energy use with exclusion effect for wind power plants in the remaining area of the municipality, "hard" and "soft" taboo zones would have to be defined in a first step in the context of an urban land-use planning weighing-up and in multi-level proceedings. In a second step, with reference to the remaining so-called areas of potential, a weighing-up of the wind energy use with competing public interest matters has to be made, and finally, in a third step, it has to be reviewed on the level of the weighing-up result whether space for wind energy is created in a substantial manner.

"Hard taboo zones" are such areas where the installation and the operation of wind energy is absolutely ruled out for factual or legal reasons; "soft taboo zones", in contrast, are those areas where the construction and operation of wind power plants is factually and legally possible, but where no wind power plants are to be set up according to the concept of the municipality.

The municipality of Wustermark had not properly complied with this multi-level procedure. The municipality of Wustermark did not differentiate between "hard" and "soft" taboo zones, but instead took out the taboo zones in total from the existing spaces of the outer area. According to the courts this led to the fact that the council of the municipality of Wustermark had a wrong idea about the size of the areas principally suitable for wind energy when deciding about the preparatory land-use plan with respect to the topic of wind energy use. The weighing-up of the preparatory land-use plan was, therefore, incorrect, since it could not be ruled out that the council would have made the dimension of the areas for wind energy use bigger if it had realized that the suitable areas for wind energy use had been bigger than assumed.

Practical considerations

In the municipality of Wustermark the cards will, therefore, be reshuffled: The municipality of Wustermark will re-identify and re-assess the question of potential areas for wind energy use in its municipality and will have to repeat the weighing-up according to the specifications of the OVG Berlin-Brandenburg and of the BVerwG.

Isabel Strecker

III. Planning Law: Regional planning specifications not stricter than corresponding objectives of state planning

Specifications of objectives in the regional plan vs. specification of objective in the state planning

The VGH Mannheim had to review in a current judgement the effectiveness of the regional plan specification of the association Region Stuttgart for controlling the large-scale retail trade. The VGH Mannheim made it clear in its judgement of November 15, 2012 (8 S 252/09) that a specification of objectives on the level of the regional plan cannot be stricter than the superordinate specification of objectives concerning state planning. The existing regulation regarding regional planning with respect to the spatial concentration of retail trade businesses – agglomeration – was thereby assessed as to being effective.

State planning for retail trade businesses: rule-exception structure

Claimant in the proceedings was a city in the administrative district Esslingen in the urban agglomeration Stuttgart that was designated as a small centre in the applicable regional plan. Pursuant to the specifications of the federal state planning for controlling large-scale retail trade shopping centres, large-scale retail trade business and further large-scale trade business for end-users "are as a rule only allowed to be designated, built or extended in regional, middle or sub- centres". In the state development plan two exceptions are expressly provided for according to which even locations in small centres and municipalities without a centrally located function can be taken into consideration, if (1) this proves advisable according to the facts concerning spatial structure to ensure the supply of basic needs or (2) if these are located in urban agglomeration areas and have grown together with settlements of neighbouring regional, middle or sub- centres.

Regional planning: Ineffective constriction due to mandatory regulation

Even stricter in this case, the hierarchically subordinated regional plan of the association Region Stuttgart stipulated that retail trade businesses, shopping centres and other trade businesses for end-users with a sales area of more than 800 m^2 as well as the extension of existing facilities are only permissible in "regional or middle and sub- centres". The VGH Mannheim stated that this regional planning specification violates state planning law, because the corresponding objective of land-use planning had not been observed in the hierarchically superordinate state development plan. The concentration requirement concerning state planning specified within a rule-exception structure prescribes a "final, balanced frame of differentiation". Discretionary scope in regional planning only exists for the spatial and factual forming

of the rule-exception structure. Subordinated levels of planning are denied to choose a milder, but also a stricter forming of the frame given by federal state planning. The regional planning requirement to be assessed confines the rule regulation of the target specification concerning state planning to a mandatory regulation and tacitly rules out deviations which can be taken into consideration according to the expressed will in state planning. Thus, the regional planning specification is ineffective.

Valid regional regulations (agglomeration) in the event of an absent state planning specification

In contrast, the agglomeration regulation formulated by the regional plan is effective, since the superordinate state development plan neither regulates the agglomeration of retail trade businesses by its own specifications, nor does it rule out such specifications by means of the subordinated planning. Therefore, in consequence, the VGH Mannheim also followed the ruling of the BVerwG, which had also already confirmed in an individual case the specifications for controlling retail trade agglomerations as binding objectives of land-use planning (comp. Newsletter 3/2012, p.13.)

Practical considerations

It was once again demonstrated that constricting target specifications could be ineffective on the regional planning level. It has been made clear that specifications in the regional plans can, in fact, not be stricter than the corresponding specification of the superordinate state planning.

Isabel Strecker

F. Insurance Law

I. Public liability insurance and private building law: Direct claim for coverage of an aggrieved party in case of interest in a declaratory judgement

Liability for construction defects of the – insolvent – building company

The judgement of the OLG Celle of July 5, 2012 (8 U 28/12) dealt with the following case: The building owners commissioned a building company B, the policyholder of the defendant public liability insurance to carry out bricklayer's and reinforced concrete work for their building project. This company built a defective base plate. Due to the defects at the base plate damage was caused at the prefabricated house built on it by a third party. The latter had to be demolished and to be re-built including the base plate.

Refusal to release the indemnification and coverage claim by the insolvency administrator

The building company B went bankrupt. The building owners asserted the compensation claims to be listed the table, the insolvency administrator fixed a claim in the amount of approximately € 452.700 according to the table. The building owner asked the insolvency administrator to release the indemnification and coverage claim of the insolvent building company B towards the defendant public liability insurance. The insolvency administrator did not comply with this request. The indemnification and coverage claim ran the risk of becoming time-barred.

Direct declaratory action of the building owner against insurance companies

Consequently the building owners directly brought legal action against the defendant insurance company for declaration that the latter has to pay insurance cover according to the Terms and Conditions as set forth in the third party insurance contract between the insurance company and the insolvent building company B for the disputed defects, except for the so-called claim for performance or performance substitutes respectively (here: the costs for removing and depositing the base plate as well as the costs for a new base plate).

The defendant objected to this action by submitting that the building owners would not be able to assert their own rights from the insurance contract.

The LG complied with the claims of the plaintiff.

Entitlement to direct declaratory action in case of an action for coverage or of an interest in a declaratory judgement: social obligation of the third party insurance

The appeal of the defendant insurer remained unsuccessful. The OLG explained that a third party that suffered damage could assert the coverage claims towards the insurer by way of an action, if the third party has a so-called interest in a declaratory judgement. This interest in a declaratory judgement results from the so-called social obligation of the third party liability insurance. The provisions set forth in the Insurance Contract Act (VVG) regarding a third party liability insurance (amongst others § 110 Insurance Contract Act (VVG) new version) revealed that the intention of the legislator was to protect the third party against any damage caused by the policy holder. The insurance payment is intended to be of benefit to the third party that suffered some damage. Corresponding with this ruling and its substantive legality in nature the third party that suffered damage can, in case of the inactiveness of the policyholder, take legal action against the insurer who may derive no cause to privilege due to the inactiveness of the policyholder.

Practical considerations

Pursuant to the ruling of the OLG Celle building owners do not have to accept that the insolvency administrator allows indemnification and coverage claims of the insolvent building company to become time-barred. On the other hand, the insurers should not be able to take advantage of the behaviour of the insolvency administrator.

Ralf-Thomas Wittmann

II. Legal expenses insurance law and building law: Scope of the building-risk-exclusion in the legal expenses insurance

General Terms and Conditions of the Legal Expenses Insurance (ARB) 2002: No legal protection in case of a new building project

Pursuant to § 3 Sec. 1 lit. bb) subparagraph (bb) of the General Terms and Condition of the Legal Expenses Insurance (ARB) 2002 there is no legal protection for safeguarding legal interests that have a causal connection with the planning or construction of a building or a part of the building, which is owned by or is the property of the policyholder or that the latter intends to purchase or to take possession of.

In the case underlying the ruling of the OLG Karlsruhe of October 2, 2012 (12 U 99/12 – not legally valid) the policyholder commissioned a project developer to build a semi-detached house. In doing so, the policyholder assumed that the project developer would himself build the house by his own work. In fact, the project developer assigned those works to a company carrying out the structural work.

Action for damages against the project developer because of fraud concerning the obligation to perform

The policyholder intended to bring an action for damages against the project developer because of fraud. The project developer had systematically deceived him about the content of the obligation to personally perform the construction work. For this action the policyholder requested insurance cover from his legal expenses insurer.

Both the LG as well as the OLG dismissed the action. Even if the action is based on accusations of fraud, the necessary qualified reference to the building risk clause does not cease to apply. It is decisive whether the circumstances underlying the accusation of fraud are in a necessary connection with the planning and construction of the building or whether they relate to a process directly accompanying the planning and construction of the building. The legal protection risk must be represented as a typical building risk.

Building risk clause even in the event of accusations of fraud in connection with the planning and construction of a building, "typical building risk"

Pursuant to the opinion of the OLG the accusation of fraud expressed by the building owner is based on the conscious deception concerning the type and scope of the obligation concerning the planning and construction of the building. The risk exclusion of § 3 Sec 1 b subparagraph bb General Terms and Conditions of the Legal Expenses Insurance (ARB) 2002 is not limited to the risks of executing contracts regarding planning and construction services.

Practical considerations

In each individual case it has to be ascertained whether the building risk clause is relevant. Therefore, for example, the action for damages against a notary with the accusation of having breached official duties in the context of purchasing a plot of land is not protected by the risk exclusion clause (AG Düsseldorf, judgement of March 01, 2010 – 231 C 16404/09, BauR 2010, 1114).

Ralf-Thomas Wittmann

III. Professional Liability Insurance for Architects and Building Law: The so-called breach-of-duty clause ("Pflichtwidrigkeitsklausel") in the professional liability insurance for architects and engineers

Risk exclusion in the event of behaviour that consciously breaches the law, provisions or other duties

In practice, the most important facts about risk exclusions in the professional liability insurance for architects and engineers are to be found in the so-called Special Risk Descriptions A. clause 4.8 (BBR/Arch). Pursuant to these provisions claims based on damages are excluded from insurance cover, if they were caused by the architect due to a behaviour that was consciously in breach of the law, provisions or other duties.

This breach-of-duty clause was subject matter of a legal dispute before the OLG Dresden (ruling of August 14, 2012 – 4 W 734/12).

Duty of the architect to pay damages because of failed construction work due to false progress reports

In the case underlying the legal dispute the applying architect requested legal aid for an action against his professional liability insurance aimed at being granted insurance cover. A lawsuit about damages preceded this in which the purchaser of a developed land successfully sued the architect for damages in the amount of approximately € 190,000.00. Background to the action filed by the purchasers was the accusation that the architect produced false progress reports for the property developer. In the progress reports the architect stated that the structural work had been completed. The property developer passed on the reports to the purchasers; in consequence, their financing bank then ordered the second instalment to be paid out pursuant to § 3 Sec. 2 Real Estate Agent and Property Developer Ordinance (MaBV). As a matter of fact, only the existing building had been cleared and some scaffolding had been put up. The purchasers, who were not local residents, did not notice that. The property developer became insolvent and the building project was not completed. The damage caused by the purchaser consisted in the payment of a remuneration that had no counterpart in the form of a respective construction.

The liability insurance refused to grant insurance cover by referring to the breach-of-duty clause.

No insurance cover because of the architect's violation of duty

Both the LG Leipzig and the OLG Dresden agreed with the insurer. The lawsuit for damages revealed that the progress reports of the architect were obviously false. A completed structural work consists of all the work necessary to be able to directly commence with the interior fittings. The architect should have known that the progress reports traditionally serve the purpose of providing evidence for the preconditions of maturity of the next instalment as set forth in the Real Estate and Property Developer Ordinance (MaBV). Since the OLG Dresden was convinced that the architect had known about the incorrectness of the progress reports and since it could also be assumed that he had known about their purpose relating to the purchasers and their respective bank, the OLG was of the opinion that a consciously duty-violating behaviour as set forth in the Professional Liability Insurance for Architects and Engineers (BBR) existed.

Practical considerations

This result is especially severe for the purchasers, since they are not only confronted with an incomplete building, but also with an insolvent property developer and, provided that the architect cannot remedy the damage with his own means, with a damages award that is economically of no value to them and are, therefore, left with the damage. However, it is part

of the fundamental principles of the professional liability insurance that there is no insurance cover, if the policyholder caused the damage with intent or by consciously violating his duties. The following applies to the building owner: "It is difficult to protect oneself against fraud. This is the risk of the building owner."

Ralf-Thomas Wittmann

G. Mediation and Conducting Legal Proceedings

Mediation instead of settlement negotiations between representatives of interested parties[1]

The end of mediation proceedings leads to the final agreement fixing a satisfying result for both conflicting parties. This agreement represents a settlement in the legal sense pursuant to § 779 German Civil Code (BGB). What is the additional value of mediation, if an out-of-court settlement with the support of a lawyer can also be a reached? Both in court proceedings as well as in out-of-court negotiations satisfying settlements are often concluded with the assistance of competent lawyers. They form the result of a contradictory discussion. If it is an issue of complex conflicts, this cannot always be taken into account by mere settlement negotiations. Here mediation, as a rule, pursues a comprehensive approach to conflict management.

Self-responsible settlement negotiation by the parties themselves

First of all, the difference to a settlement with a lawyer is that the parties negotiate the settlement themselves in mediation proceedings. In mediation proceedings the parties first and foremost speak for themselves and develop the solution. This can be done in the presence of the party representatives, who can assist with legal advice and who can inform their respective party in how far they waive enforceable rights due to the mediation agreement. The self-responsible effort of both parties based on their own initiative leads to sustainable satisfaction.

Advantages of regulated mediation proceedings

The settlement at the end of mediation proceedings is materialized by way of regulated proceedings. The advantages are obvious:

Neutrality and multipartiality of the mediator

a) The proceedings are carried out with the support of a neutral third party, the mediator. This means that the parties are treated identically in an impartial conduct of negotiations. The mediator does not take sides for any of the parties involved. Furthermore, the mediator is multipartial, i.e. he is equally committed to the interests of each party. Legal advisors cannot readily achieve neutrality and multipartiality, because due to their professional nature they are, indeed, representatives of interested parties, who unilaterally safeguard interests without considering the interests of the other. At first, lawyers face each other contradictorily in legal proceedings. Due to the so far disputable course of the proceedings they are often not readily prepared and not in a position to give up this role in settlement proceedings for the sake of a common cause. Often it is difficult for the representatives of the parties not only to satisfy their own client, but additionally to have an eye for the objective of also satisfying the other party as much as possible. In contrast to this, conflicting parties negotiate in the context of mediation proceedings with the supporting negotiation style of a mediator in their own interest, but for a joint objective.

1 Continuation of the contributions about the new law on mediation, for which a judicature is currently not available.

Consideration of all – not only legal - interests

b) Mediation proceedings guarantee that by applying the various mediation techniques definitely all interests and, furthermore, also emotions of the conflicting parties can be vocalized which do not play a major role when asserting legal claims. If emotions result from a conflicting party being hurt, the presence of a mediator and his structured intervention ensure that no new emotional harm occurs. By highlighting backgrounds and reasons for the respective action mutual understanding of the parties can be created so that all needs can be made an integrated part of the solution-finding process. Such a comprehensive consideration of all interests of both parties can, as a rule, not be achieved in an out-of-court settlement without a mediator, since the case in dispute essentially only addresses the facts, which then again define the legal position. That the representatives of the parties are informed to the full about the interests of both parties presupposes, in fact, that the parties have comprehensively explained their objectives and interests to them as well as the underlying facts, which does not always happen.

Broader settlement result due to the confidentiality of mediation proceedings

c) The confidentiality of mediation proceedings offers a protected space for negotiations and encourages the frankness of the parties. It is agreed at the beginning of mediation proceedings and ensured by the interdiction of means of evidence. Thus the parties are able to disclose many aspects contributing to finding a solution, which could not be addressed without this guarantee of confidentiality.

In a settlement process with a lawyer but without mediation it can often not be expected that one party entirely opens up towards the counter party; actually the party does not really have a guarantee that utterances made are not used to its disadvantage, in case the settlement fails and the legal proceedings are continued. If the parties are not entirely frank a settlement arranged by a lawyer on this basis relies on less mutual information than a settlement concluded at the end of mediation proceedings. All in all, mediation proceedings generally lead to a broader settlement result due to considerably more mutual information.

Practical considerations

In order that a mediation agreement can be declared enforceable, it has to be concluded in the form of a lawyer's settlement.

Dr. Ursula Grooterhorst

EVENTS

14. March 2013

Current rulings in the commercial landlord and tenant law by considering the reform of landlord and tenant law 2013, RICS (Rhein-Ruhr)
Düsseldorf, Königsallee 53-55
Speaker Rechtsanwalt Dr. Rainer Burbulla
Partner, Grooterhorst & Partner Rechtsanwälte

22. March 2013

9. German Congress on Commercial Real Estate
in Berlin, Esplanade Grand Hotel, Lützowufer 15
Retail property in planning law – Current legal developments
Speaker Rechtsanwalt Dr. Johannes Grooterhorst
Partner, Grooterhorst & Partner Rechtsanwälte

22. May 2013

Seminar Düsseldorfer Anwaltsservice GmbH
Current rulings in commercial landlord and tenant law and consequences of the reform law concerning landlord and tenant law on commercial landlord and tenant law
Speaker Rechtsanwalt Dr. Rainer Burbulla
Partner, Grooterhorst & Partner Rechtsanwälte

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