GROOTERHORST
& PARTNER
RECHTSANWÄLTE MBB

NEWSLETTER 01/2014

Dear readers,

The new front page of our newsletter reveals: personalized consultancy characterizes our work. And this is exactly where we distinguish ourselves from capitalistically organized companies providing legal services. Our partners and lawyers are visible for you, even in this newsletter.

In our first edition 2014 we describe - on the basis of most recent rulings - the dynamics of real estate, in particular of the retail real estate market, the actors of which we offer consultation in terms of the "coming and going" of new tenancy agreement partners and of the manifold aspects under private as well as public law when developing new projects. We supplement these focal points with reports on the legal development in company and commercial law, for example investment law, labour law and in conducting legal proceedings as well as on internationally developing mediation.

I wish you some stimulating reading

Yours

Dr. Johannes Grooterhorst

Dr. Rainer Burbulla
Partner

Current News

Developments in commercial landlord and tenant law – (in)-effectiveness of clauses remedying written form deficiencies and (in)-validity of standard form rights of first refusal of the current tenant

A governing ruling of the Federal Supreme Court (BGH) concerning the (in-) effectiveness of clauses remedying written form deficiencies is due April 30, 2014. It is expected to be very significant for the legal practice under landlord and tenant law as well as under real estate law: Whether the right of notice to a tenancy agreement due to violations of the written form can be effectively waived by means of a contractual stipulation, although a tenancy agreement not observing the statutory written form (§ 550 German Civil Code (BGB)) can be prematurely terminated and the parties are not bound by the contractually agreed term. This can have massive consequences for both parties. Violations of the written form can, in fact, occur very quickly: First and foremost they offer an entrance ticket for the contracting parties to get out of an "unpleasant tenancy agreement". If, for example, the tenant no longer "fits to" the tenant/trade mix in a shopping centre, landlords try to prematurely terminate the tenancy agreement on the grounds of a violation of the written form.

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Importance of written form issues

If the rent is too high or the location of the rental space seems no longer attractive, tenants in turn try to invoke a violation of the written form. Violations of the written form imply, therefore, considerable risks for both contracting parties, but also opportunities. And not least because rulings themselves are, in fact, not consistent with respect to potential violations of the written form. In order to minimize the risks clauses remedying written form deficiencies have become quite common in contractual practice. These again are currently under the review of the Federal Supreme Court (BGH).

Validity of the standard forms – contract limitations of tenant rights

A further exciting topic in 2014 refers to the fact whether standard form rights of first refusal of the current tenant can be effectively agreed. This issue has not been dealt with at all for a long period of time. Last year concerns were increasingly raised in the literature. In a recent ruling the Landgericht Karlsruhe has for the first time deemed the standard form agreement of a right of first refusal of the current tenant invalid under specific circumstances. This topic, too, is of enormous significance in practice. Both issues will be outlined in the following.

I. Effectiveness or ineffectiveness of clauses remedying written form deficiencies, Federal Supreme Court (BGH), ruling of January 22, 2014 – XII ZR 68/10

New developments concerning the written form – attempts to remedy – structural considerations

Clauses remedying written form deficiencies include that parties cannot prematurely terminate the tenancy agreement in case of a violation of the written form but have to undertake everything possible to remedy the violation. Therefore clauses remedying written form deficiencies aim at a waiver of the statutory written form regulation of § 550 German Civil Code (BGB), which however is deemed mandatory law. For that reason, the validity of clauses remedying written form deficiencies is controversial. Various approaches have developed in practice (stipulation practice) as to how to deal with clauses remedying written form deficiencies.

To some extent clauses remedying written form deficiencies are considered to be valid, although the statutory written form regulation as set forth in § 550 German Civil Code (BGB) is not alterable by mutual consent. However, the party cancelling the contract and acting contrary to the clause remedying written form deficiencies could be understood violating the law by breach of trust (§ 242), since due to the clause remedying written form deficiencies the party first of all is to undertake everything possible to remedy the violation of the written form. Nevertheless clauses remedying written form deficiencies are generally deemed invalid on the grounds that they rule out the written form regulation of § 550 German Civil Code (BGB). Particularly, clauses in relation to a purchaser of real estate, because the statutory regulation of the written form as set forth in § 550 German Civil Code (BGB) aim at protecting a purchaser of real estate. The OLG Düssedorf has stressed this latter opinion in its ruling of November 29, 2012 (I-10 U 34/12). The appeal against this ruling is still pending at the Federal Supreme Court (BGH) (XII ZR 146/12).

The Federal Supreme Court (BGH) has already commented on this issue - to some extent in advance – in its ruling of January 21, 2014 (XII ZR 68/10). The court does at least not deem the termination by the purchaser of land to be in breach of trust. This suggests that the BGH (possibly) denies a purchaser of land the effectiveness of the clause remedying written form deficiencies and restricts the effectiveness to the parties of the original contract.

In practice, therefore, possible solutions are already being sought. The safest way for a tenant to protect itself against a termination for reasons of a violation of the written form is to stipulate an easement in favour of the tenant. With this the tenant has a right at hand which exists in addition to the right of use under the rental contract law of obligations. So if termination of the tenancy agreement occurs for reasons of a violation of the written form, the tenant can continue to use the rental space due to its easement of enjoyment resulting from the easement of the tenant.

Practical Considerations Easement in favour of the tenant

If the agreement of an easement in favour of the tenant cannot be taken into consideration, it is increasingly attempted to oblige the purchaser of land to agree on a (separate) clause remedying written form deficiencies in an addendum to the tenancy agreement. Then it might be argued that the clause remedying written form deficiencies has come into being between the (new) parties of the tenancy agreement, from which effectiveness emerges. Whether this current and already practised approach withstands final judicial control remains to be seen. The ruling of the Federal Supreme Court (BGH) due April 30, 2014 might possibly deny the effectivenss of a clause remedying written form deficiencies in the relationship between the first contracting parties and eliminate the aforementioned approach to an extended commitment clause.

Importance of the ruling due of April 30, 2014

Dr. Rainer Burbulla

II. Current tenant standard form rights of first refusal LG Karlsruhe, ruling of May 07, 2013 – 11 O 53/11

The LG Karlsruhe has for the very first time dealt with legal concerns regarding General Terms and Conditions of rights of first refusal of the current tenant in its ruling of May 7, 2013 – 11 O 53/11. According to the LG Karlsruhe an inappropriate discrimination of a contracting partner occurs in the event of some standard form right of first refusal of the current tenant, granting the user the right of first refusal for every case of renting out the property anew.

Standard form: inappropriate discrimination

Such an agreement leads to a permant quasi in rem effect of the current tenant of the right of first refusal. In case of the legally regulated type of contract of the right of first refusal (right of first refusal for all cases of sale) the effectiveness of such a permanent commitment presupposes a special act predicated on an agreement and entry in the land register (§§ 873, 1094 German Civil Code (BGB)). In case of a natural understanding only a one-time exercise of its right to use can be assumed.

Rights of first refusal of the current tenant are widespread in contractual practice – especially in standard form contracts of tenants with a "strong market presence". They entitle the tenant in case of a new tenancy, i.e. upon the conclusion of a new subsequent tenancy agreement between the landlord and a third party, to "enter into" the new subsequent tenancy agreement under the terms and conditions specified therein. In order to avoid a situation in which the landlord is exposed to the claims of performance of two tenants, he has to take precautionary measures in the new subsequent tenancy agreement (for example, a right of withdrawal if the current tenant exercises his right of first refusal or respective conditions precedent/subsequent). If the landlord enters with the new tenant into negotiations about such precautionary measures, the latter, as a rule, will not be automatically prepared to conclude a tenancy agreement or only on less favourable terms and conditions respectively: The new tenant has to

Widespread contractual practice – tenants with a "strong market presence"

expect at any time that the right of first refusal of the current tenant will be exercised and that his negotiation efforts will then, as a consequence, have proved worthless. For that reason the right of first refusal of the current tenant produces a true marketing obstacle, which, in fact, gives rise to also legal concerns (at least) regarding the General Terms and Conditions when agreeing some right of first refusal of the current tenant.

Individual contracts – standard form

Granting a right of first refusal of a tenant in individual contracts is acknowledged in rulings (comp. OLG Hamm, ruling of May 24, 1991 – 30 U 246/90). The question whether the rights of first refusal of the tenant can be readily agreed to on a standard form basis has not yet been decided by the highest court: There is the question of an inappropriate discrimination (§ 307 Sec. 1 Sent. 1 German Civil Code (BGB)). It also seems doubtful, whether rights of first refusal of the tenant can become an effective part of the contract at all taking into consideration its possibly suprising character (§ 305 c Sec. 1 German Civil Code (BGB)).

Practical Considerations

The ruling of the LG Karlsruhe seems acceptable. Agreeing a right of first refusal of the tenant for each and every case of a new tenancy, consituted a considerable encroachment on the principle of contractual freedom. This again suggested a violation of § 307 Sec. 1, Sec. 1 No 2 German Civil Code (BGB). Tenants should, therefore, refrain from such regulations in specimen tenancy agreements. Landlords should in case of “a new” tenancy always review the “old tenancy agreement” with respect to the existence of rights of first refusal of the current tenant. According to the LG Karlsruhe there should be no (principal) legal concerns with respect to the General Terms and Conditions when agreeing a “simple” right of first refusal of the tenant. In case the landlord overlooks in such a case an agreed right of first refusal of the current tenant and if he automatically concludes a new tenancy agreement with a new tenant, he runs the risk that – when the right of first refusal of the tenant is exercised – two tenancy agreements come into being and that he will be liable for damages in case of non-performance of one tenancy agreement.

Dr. Rainer Burbulla

Jörg Looman
Rechtsanwalt

B. Commercial and Company Law

Investment law – Prospectus liability – Damages in case of subscription to a (SCL - multi-partner) silent partnership

With two identical rulings of November 19, 2013 the Federal Supreme Court (BGH) has decided on a claim for damages resulting from incorrectly joining a so-called multi-partner silent partnership with a private corporation (file No.: II ZR 320/12; II ZR 383/12).

Silent partnership in a public limited company

The respective plaintiff signed a supscription as an atypical silent partner together with numerous other investors. The silent partnership had been established with a private limited company.

The plaintiff claimed compensation for damages both in the form of reversing his participation (“demanding his money back”) further indemnification on the ground of having being incorrectly informed prior to subscription.

The action has been unsuccessful before the Oberlandesgericht (OLG). The Federal Supreme Court (BGH) has annulled those decisions and asigned the legal dispute back to the Oberlandesgericht.

Winding up a participation in case of its deficient subscription

If a subscription in a (silent) partnership turns out to be deficient, the partnership is assumed to be a so-called defective partnership, effective at the beginning, but granting the right to all participants (partners) with deficient subscriptions to cancelling the participation and requesting "retransfer" of the participation as such against money compensation.

Indemnification and damages

The instance courts held, that the subscription had been infected by the incorrect information and awarded the compensation claim caused by the cancellation to the plaintiff. However, the instance courts had dismissed the action for payment of the "entire payment" i.e. the nominal value of the stake. The courts had stressed, that otherwise the danger of a so-called "greyhound race" might arise leaving the partnership with not sufficient assets, if several investors rescinded their respective stake on the same ground.

Imperative of the uniform satisfaction of all partners

The Federal Supreme Court (BGH) has objected these arguments. It pointed out that the investor was – first of all – entitled to termination compensation in accordance with the rules set forth in the articles of partnership. If the participant (investor) still had a claim for compensation for further damages exceeding the amount the partnerships contract granted to him, he could only ask a further indemnification if and so far as the assets of the partnership suffice to satisfy hypothetical claims for compensation resulting from disputes of the other silent partners (a proportional capital amount): Following the courts decision, the plaintiff should not be allowed to jeopardize the uniform satisfaction of the compensation claims and other claims of the remaining silent partners.

Practical considerations

It ist worth noting, that the federal court understands participation in partnerships as being socially related to all other partners: In case of prospectus liability claims against partnerships with a multitude of investors/partners it may lead to accepting a curtailment of individual rights of the respective partner in the social interest of all other partners. Claims are not pure individual rights but socially bound ones.

Jörg Looman

C. Real Estate Law

I. Private Building Law – litigation – independant proceedings for evidence – degree of detail of an expert opinion – legitimate questions relating to evidence

The Oberlandesgericht Hamm has ruled (decision of January 9, 2014 – 17 W 38/13) that questions relating to evidence can be legitimate even if directed at the creation of some renovation planning by the expert.

In the context of independent proceedings for the taking of evidence it is not unusual that questions occur as to the degree of detail an expert opinion needs to have when dealing with the amount of damage.

Construction of a warehouse for stainless steel coils

The client (CL) (CN/Applicant) had commissioned the constractor with the construction of a huge factory building and warehouse to store stainless steel coils weighing several tons. After having accepted the building and putting it into operation he realized, that the base plate developed cracks. Furthermore, it started to subside in places.

In the independent proceedings for the taking of evidence initiated by the Applicant one of the questions presented to the expert required him to identify the measures necessary for remedying the defect. Furthermore, the expert was to comment on the duration of renovation as well as on the expenditures related to it.

Ralf-Thomas Wittmann
Partner

The expert appointed by the court stressed, that he could only answer the questions addressed to him if a renovation plan suitable for the building was made available to him and if accompanying surveying actitivies and geotechnical examinations had been implemented.

By referring to a ruling of the Oberlandesgericht Düsseldorf back in 1991 the Landgericht held that the applicants questions were not permissible: Such comprehensive tasks could not be fulfilled within independent proceedings for the taking of evidence. The act of establishing a bill of quantities for remedying defects was not covered by the subject of independent proceedings for the taking of evidence.

No dependence of the legitimacy of questions relating to evidence on the type and extent of the expert activity

The OLG Hamm has annulled the first-instance ruling: The questions relating to evidence brought forward by the Applicant were legitimate. However, the expert only had to become active if the Applicant had paid in advance all costs to the court, which the expert had identified by means of a cost estimate.

Question concerning the scope of tasks in the independent proceedings for the taking of evidence

According to the OLG Hamm neither the type nor the scope of the expert activity offered could have an influence on the legitimacy of question relating to evidence in the context of independent proceedings for the taking of evidence. If the expert deemed comprehensive planning services necessary for answering questions relating to evidence addressed to him, they had to be provided.

Practical considerations

The case would have been factually different in the preparation of a bill of quantities by the court-appointed expert if the applicant had not intended to serve the purpose of securing evidence but to save expenditure for remedying defects. In other words: If the applicant had intended to use independent proceedings for the taking of evidence in order to save further expenses for establishing a renovation plan, such detailed planning made by the expert would not have been owed in such proceedings.

Ralf-Thomas Wittmann

II. Private building law – Architect's contract – phases – Application of the Official Scale of Fees for Works by Architects and Civil Engineers (HOAI 1996 versus HOAI 2009)

Time of the conclusion of the contract

The Oberlandesgericht Koblenz has ruled in its judgement of December 18, 2013 (10 U 344/13) that the concluding time was relevant regarding the question which version of the HOAI had to be applied. In case of a contract based on phases conclusion could only be assumed if the respective phase had been called up and not when the parties had concluded the (frame) contract and had left it open to the option of the owner at which day (and whether) the suceeding phases had been called up by the owner.

Signature of a general planner contract prior to coming into force of the HOAI 2009 – Calling up of successive phases 5 to 9 subsequent to the coming into force of the HOAI 2009

The ruling is based on the following facts: Prior to the coming into force of the HOAI 2009 the parties had concluded a general planner contract. The first part of this contract, consisting of the HOAI phases 1 to 4 had been immediately commissioned. The second part (HOAI phases 5 – 9) had stipulated in detail in the contract, but however stipulated to an optional calling up by the building owner. Subsequent to the coming into force of HOAI 2009 part 2 had been called up and executed. The contractor invoiced the works of part 2 on the basis of HOAI 2009. The client only paid the lower fees as set out in HOAI 1996.

Which version of the HOAI was applicable? Pursuant to § 55 HOAI 2009 this order does not apply to works contractually agreed prior to their coming into force. For that reason, the issue was relevant, at which time the contractual agreement hase been legally binding with respect to part 2 of the contract.

Difference between a "finally negotiated contract" and a contract based on phases

The Oberlandesgericht has ruled that the general planner contract did not constitute a binding contract with respect to the phases of part 2, because the commissioning of part 2 had been only "intended" and the contractor had been not entitled to any commission. Such contract based on phases did not constitute any contractual agreement on the works commissioned at a later stage, but had only specified certain details relating to contracts to be concluded in future. The contract regarding further works only came into being with their later commissioning. For that reason, HOAI 2009 applied to part 2.

Practical considerations – a further change to HOAI 2013

The question is highly topical again. As a matter of fact on July 17, 2013 the new Official Scale of Fees for works by Architects and Civil Engineers (HOAI) 2013 came into force. For contracts which have been concluded prior to the new HOAI, but which include work phases, the question as to which HOAI is applicable has to be answered. In the current situation this might be difficult to foresee. For the ruling of the OLG Koblenz is controversial. A clarifying ruling of the Federal Supreme Court (BGH) is to be expected in one year's time at the earliest.

Leonie Munz

Leonie Munz
Rechtsanwältin

III. Private building law – General Terms and Conditions – Types of collateral agreements in the general contractor agreement

In its judgement of September 24, 2013 (I-13 U 120/12) the Oberlandesgericht Düsseldorf has ruled on the relationship between securities regarding the performance of contracts (contract performance guarantees) and warranties for defect free works, amounts retained.

Marc Schwencke
Partner

In a general contractor agreement the client (owner) regularly expects to be granted securities for the performance of contract and for claims for defects of the works. This is done by retaining amounts from the instalments and eventually from the final payment. The general contractor may redeem the retentions by guarantees. In case various collaterals overlap in time, an inappropriate discrimination of the contractor may occur with the consequence that the collateral agreement turns invalid pursuant to the law regulating General Terms and Conditions (§ 307 German Civil Code (BGB)).

In the case ruled by the OLG Düsseldorf the client/owner and the general contractor had a dispute concerning both the costs for works and claims for damages (deficiencies) resulting from a general contractor agreement for a hospital building. The owner intended to retain a security deposit from the cost claim of the general contractor. That turned out to be wrong:

General contractor agreement as General Terms and Conditions of the client

The general contractor agreement represented General Terms and Conditions provided by the client/owner, which could be assumed with respect to its design and content: The stipulations in the general contractor agreement were consistently to the benefit of the owner and mainly comprised obligations of the contractor as typically included in General Terms and Conditions used by owners. In did not matter, that the general contractor agreement stemmed from planners commissioned by the owner. When it came to using a contract several times it was not relevant who was the user: General Terms and Conditions rules applied, even if a third party had the intention of using them several times. Those forms had to be deemed provided by the user (owner) even if they were made available by a third party belonging to the user's party.

Inappropriate discrimination of the contractor in case of a synopsis of contract performance security and defects warranty

The agreement about a security amount retained inappropriately discriminated the general contractor tanking into consideration the still existing contract performance guarantee: The contract performance guarantee in the amount of 10% of the gross inclusive price secured, among other things, claimes for defects and had to be returned subsequent to the "successfully completed acceptance". Furthermore, the owner was entitled to retain 5% of the gross total claim resulting from the final account as security for warranty claims. This stipulation lead to an accumulation of contract performance guarantee and security for the warranty. The contract performance guarantee had to be returned only subsequent to "successful" acceptance, which could be interpreted in the manner that the claim only became due if the client confirmed freedom from defects upon acceptance and if it was undisputed that there are, in fact, no defects upon acceptance. This could lead to the fact that both the contract performance guarantee and the security for the warranty continued to co-exist for a longer period of time. If, for example, it is disputed whether acceptance was "successful" or some defect was rightly assumed the dispute between the parties resulting hereof could last many years. This would inappropriately discriminate the general contractor who pursuant to § 641 German Civil Code (BGB) was principally entitled to the payment of the entire fee subsequent to acceptance.

Final invoice and amount of security

In addition to this, the decisiveness of the final invoice amount for the warranty security also discriminated the general contractor. If, for instance, the general contractor issued a final invoice that was too high – for example because of asserting unjustified supplementary claims -, he still had to accept a security amount retained, which was calculated on the (higher) final invoice, in spite of an lower cost claim. In consequence the security amount retained could substantially exceed a share of 5% of the cost claim, which again resulted in the inappropriateness of the regulation concerning security amounts retained.

Practical consideration: Linking securities by dissolving the contract performance guarantees or concurrent performance when returning the guarantees

If – as usual – security amounts retained from partial invoices as well as from the final invoice are agreed upon, both securities can be linked in the final invoice: in that invoice the building project is invoiced in its entirety, all payments actually made by the client are deducted and the invoice amount still outstanding will then be established. From this amount the security amount retained intended for claims for defects will be retained in the agreed amount (5% of the final invoice amount audited and acknowledged by the client). In doing so, the contract performance guarantees retained in the course of the term of contract will be dissolved and paid out with the final payment.

If guarantees are provided it must be stipulated that the security amount retained based on the final invoice amount for damage due to defect is only quid pro quo asserted from against the return of a potentially provided contract performance guarantee. This clause also comprises the case where the general contractor redeems the security amount retained for damage due to defects by a performance bond.

Marc Schwencke

IV. Private building law – Building contract law – building contract with a formal acceptance of building works – possibility of a a conclusive acceptance

In its ruling of December 17, 2013 (6 O 457/12) the Landgericht Frankenthal has decided that a conclusive acceptance had not taken place after having agreed formal acceptance in the building contract and a short-term notice of defects made by the building owner even if the building owner had already been living in the building for several years.

No acceptance – notice of defects after moving in – action on building costs two years later

The building owner and the contractor had agreed in the building contract that subsequent to the completion of the building project a formal acceptance would have to take place. Six weeks after moving into the constructed building the building owner requested the contractor to remedy existing defects within an appropriate period. If this had been completed successfully, formal acceptance could be carried out. The deadline set by the building owner expired without effect. Two years after the building owner having already lived in the building the contractor filed a suit for building costs on the grounds that the owner had now already been living in for such a long period of time that tacit acceptance could be assumed.

No conclusive acceptance

The LG Frankenthal has judged the legal situation in a different way. Since the owner had already notified substantial defects closely connected to the time of moving into the building, and since he had announced the acceptance of the works in the event of remedying those defects, the contractor could not invoke conclusive acceptance, even if the building owner had already been living in that building for many years. In this case it was also decisive for the court that the contractor had not even requested acceptance the building owner.

Since the building costs were not yet due for payment in default of an acceptance, the Landgericht Frankenthal has dismissed the action as unfounded.

Practical considerations

The assumption of a conclusive acceptance could have triggered further possibly drastic legal consequences for the building owner apart from justifying the maturity of the building cost claim: On the one hand the period of limitation for claims for defects would have started at the time of the conclusive acceptance. On the other hand the building owner would probably have been confronted with the problem that in case of the insolvency of the contractor it would have no longer been possible to successfully make use of a guarantee granting compensation of defects: A tacit deviation from the formal acceptance strukture represented an amendment to the secured principal obligation with the consequence that the guarantor would possibly be discharged from his obligation to provide guarantee; § 767 Sec. 1 Sent. 3 German Civil Code (BGB).

Ralf-Thomas Wittmann

D. Commercial Landlord and Tenant Law

I. Requirements regarding the written form of a contractual change between tenants – Federal Supreme Court (BGH), judgement of December 11, 2013 – XII ZR 137/12

Need of a clear reference to the tenancy agreement

With its judgement of December 11, 2013 the Federal Supreme Court has confirmed its opinion expressed in its judgement of January 30, 2013 (XII ZR 38/12 - see Newsletter 2/2013) and has clarified (again) that in case of a contractual change between tenants the written agreement signed between the former and the new tenant had to include a sufficiently clear reference to the tenancy agreement in order to observe the written form as set forth in § 550 Sent. 1 German Civil Code (BGB).

A written agreement between the former and the new tenant could also be seen in a (notarial) “purchase or transfer agreement about a share in the business”. In this case, however, the mere specification about location, landlord and rent to be paid (“location:..; landlord: A. GbR; rent: ….. accumulated 1.963.296”) did not meet the requirements posed to a sufficiently official reference to the tenancy agreement.

Practical considerations

It is the perspective of a potential purchaser of property, according to the Federal Supreme Court (BGH), which is to be understood decisive for a sufficient reference to the (original) tenancy agreement. The purchaser has to be able to regocnize which type of rental agreement he is entering into.

Dr. Rainer Burbulla

II. Pending effectiveness of indexation clauses stipulated prior to Price Clause Act 2007

In its judgement of November 13, 2013 – XII ZR 142/12 – the Federal Supreme Court (BGH) has ruled that according to "old" price clause law, (i.e. stipulated before 2007) pending ineffective indexation clauses are pendingly effective as of the coming into force of the Price Clause Act on September 14, 2007.

"Old" lease 1999 with automatic indexation clause – oral amendment of contract

In the facts underlying the ruling a lease existed between the lessee and the lessor dating back to the year 1999. A period of 5 years had been agreed with the additional option in favour of the lessee to extend the lease period by 5 years. The lease included an automatic indexation clause. In 2001 the parties orally agreed an amendment of contract (Amendment of the duty to pay service charges made by the lessor). The lessor asserted a rent increase due to a change of the index. The lessee deemed that invalid: The oral agreement had failed to meet the written form of the lease requirement and, therefore, the minimum legal commitment of ten years for the validity of such price clause (§ 3 Sec. 1 Price Clause Act (PrKG) had ceased to exist.

As of September 14, 2007 review regarding effectiveness pursuant to the new Price Clause Act

According to the Federal Supreme Court (BGH) the originally agreed indexation clause became pendingly effective for the future, i.e. the period starting September 14, 2007 (entry into force of the Price Clause Act) (§ 8 Price Clause Act (PrKG)). The lessor became entitled to demand a rent increase thereafter. For the period until September 13, 2007, however, the lessor had been not entitled to demand an adjustment of the rent, due to the oral agreement violating the written form of the tenancy agreement. As a consequence hereof the contract did not stipulate the necessary commitment of the lessor to the lease for at least 10 years. The assumption of approval of § 2 Price Indication and Price Clause Act (PaPkG) in connection with § 4 Price Clause Regulation (PrKV) did (also) not continue to be effective from the date of the violation of the written form. Since the coming into force of the Price Clause Act on September 14, 2007 the effectiveness of the indexation clause was governed by the (new) Price Clause Act.

Practical Considerations

The Federal Supreme Court has decided on the controversial question whether indexation clauses, which are pendingly ineffective according to old price clause law, are pendingly effective or totally ineffective as of the coming into force of the Price Clause Act: The Court has held, that there is no retroactive effect of the Price Clause Act. At the same time the Court has clarified that rent/lease adjustments in consequence of an indexation clause that runs counter to the Price Clause Act are valid until the very moment at which a court confirmed the ineffectiveness.

Dr. Rainer Burbulla

III. Written form by signing an annex only, OLG Koblenz, judgement of August 22, 2013 – 1 U 1314/12

Issue of a uniform contract by signing an annex only

In its judgement the OLG Koblenz has ruled that a tenancy agreement for commercial real estate also observed the written form if the parties had signed an annex on a separate sheet of paper completing the tenancy agreement, if the tenancy agreement itself included a clear reference to the annex and if in that respect a uniform contract being clearly obvious to both parties had been presented. The non-signing of the tenancy agreement form is then harmless and did not negate the existence of the written form.

An agreement existed between the landlord and the tenant covering pharmacy premises with a contractual term of 20 years. The completing annex 2 to the tenancy agreement had been signed by both parties, although the tenancy agreement itself had not been signed separately. The landlord sold the property. The property purchaser terminated the tenancy agreement by invoking a violation of the written form requirement because the tenancy agreement had not been signed.

Legal requirements

In order to observe the written form it is necessary that both contracting parties sign the tenancy agreement document (§ 126 German Civil Code (BGB)). The signature of the parties has to spatially complete the document text. A signature "signed in blank at the top" or a signature positioned to the left hand side of the document text is, therefore, insufficient (comp. Federal Supreme Court (BGH), judgement of January 21, 1992 – XII ZR 71/91).

"Visible" uniform contract

According to the OLG Koblenz the written form of the tenancy agreement had been observed. Annex 2 to the tenancy agreement had been signed by the (original) parties to the tenancy agreement. This was enough to observe the written form pursuant § 126 German Civil Code (BGB): annex 2 recognizably completed the regulations of the tenancy agreement, and the tenancy agreement itself included a specific reference to annex 2. Therefore, a uniform contract visibly existed for both contracting parties. The non-signing of the tenancy agreement itself was, therefore, harmless and did not negate the existence of the written form.

Practical considerations

It is not uncommon that parties do not sign the tenancy agreement on the signature line, but on the intended (completing) line for the paragraphs. In compliance with the regulation as set out in § 126 German Civil Code (BGB) and according to the OLG Koblenz this should be sufficient.

Dr. Rainer Burbulla

E. Public Law

I. Building permission law – Immission control law – Unacceptable immissions due to arrival and departure traffic regarding large-scale retail trade

The Verwaltungsgericht Hamburg has decided with its ruling of January 6, 2014 (9 E 2814/13) in summary proceedings that requirements of (noise and air pollutant) immission control law could lead to a limitation of the store opening hours of the large-scale retail trade.

Conflict situation between large-scale retail trade and residents in the inner cities

In recent years calls have grown louder from many corners that the large-scale retail trade should come back from the green fields to the inner cities in order to increase the attractiveness of inner cities: The conflict situation thus resulting was subject of the ruling:

A furniture store company intended to build a store in a densely populated part of the city. A core area use had been defined by planning law for the plot of land (the project). Adjacent to the project the planning law had determined “a general residential area”.

One of the key aspects of the legal dispute was the issue of the unacceptable immissions caused by arriving and departing traffic and its noise and pollution levels for the neighbourhood.

Immissions by traffic arriving and departing - principle of mutual consideration

Due to the estimated legal assessments of the case to be made in summary proceedings the Verwaltungsgericht has arrived at the conclusion that the furniture store violated the principle of mutual consideration with a high degree of probability.

The immissions related to the building project violated the principle of consideration if immissions were created which are prone in terms of type, extent and duration to cause dangers, substantial disadvantages or a considerable nuisance for the neighbourhood.

Insuffcient expert opinions about noise protection resulting from incorrect traffic assumptions

The court has assumed in particular that acceptable noise levels would be exceeded with a high degree of probability: The access to and exit from the car park of the furniture store had been insufficiently considered in the expert opinion regarding noise protection. The approving authority had argued that due to the inner city location considerably fewer customers would arrive in their own car than would otherwise be common practice at furniture stores. The court had not found a reliable basis for that assumption because, for example, there had been no restriction of the product range to easily transportable goods.

The court had the same concerns with respect to the immission of air pollutants, because even for that the expert opinions on traffic turned out to be insufficient.

Reduction of the store opening hours – Significance of the 8 pm limit

The court has ordered, therefore, that the furniture store was initially not allowed to open until 8 pm – as originally planned, but it already had to close at 7.30 pm. This limitation of store hours guaranteed that the main departing traffic had already occurred by 8 pm. However, then no additional allowance level had to be considered concerning the noise immission forecast. Pursuant to No. 6.5 German Noise Prevention Code (TA-Lärm) an addition of 6dB (A) is allowed for the time between 8 pm and 10 pm. When averaging this level over a period of 24 hours, the allowence increased by approximately 1,9 dB (A) for the period of a day).

Practical considerations

The ruling of the Verwaltungsgericht Hamburg reveals in an exemplary manner which conflicts could arise in a mixed situation of residential space and commercial use. It additionally demonstrates the significance of expert opinions, which have to be prepared with particular care in case of such mixed situations. The court furthermore points out that the administrative authorities may in such mixed situations also deviate from the otherwise applicable immissions guide allowances. This freedom for flexibility and maneuvering should therefore be used: In such a conflict situation even the residents are obliged to ensure consideration.

Dr. Johannes Grooterhorst

II. Planning law – Building regulations law – Illegal permit for a building project under the term shopping centre (§ 11 Sec. 3 Sent. 1 No. 1 Federal Land Utilization Ordinance (BauNVO)) - action of neighbourhood community

The Federal Administrative Court (BVerwG) has dealt in two rulings (December 18, 2012, 4 B 3/12 and October 16, 2013, 4 B 29/13) with the term shopping centre within the meaning of § 11 Sec. 3 Sent. 1 No. 1 Federal Land Use Ordinance (BauNVO): Shopping centres are by planning law only permitted in defined special areas and in core areas.

Approval of a non-large-scale retail trade in connection with other non-large-scale retail trades uses

The municipality had granted a building permit for a non-large-scale retail trade with a total sales area of approximately 1.100 m². The building owner had built several non-large-scale retail trades with a total sales area of 1.900 m² at the same location. Previous efforts of the municipality to determine special area for a shopping centre at that location had failed due to the objections of regional planning (Raumordnung). The expansion plan of the investor intended that the new buildings should be directly connected to the already existing buildings and – in addition – to the jointly used parking facility. The infrastructure was designed to allow for a common central access road to the Bundesstraße (federal road).

Action filed by the neighbouring municipality

The neighbouring municipality filed an action against that building permit granted.

Systematic centralisation of several retail trade businesses to one shopping centre: "grown shopping centre"

The court (Verwaltungsgericht) has annulled the building permit with the argumentation that the project had to be understood as a shopping centre within the meaning of § 11 Sec. 3 Sent. 1 No. 1 Federal Land Use Ordinance (BauNVO) not permittable in a commercial area. The Court of appeal (Obervewaltungsgericht) and the Federal Administrative Court (BVerwG) have confirmed the decision: The project had to be understood as a "grown" shopping centre not permissible in a commercial area. Actually the project comprised a systematic centralisation of several retail trade businesses to one shopping centre. This systematic cooperation already resulted from the area and building facts: Positioning the various buildings around a joint parking facility without keeping certain distances to each other communicated the impression of interconnected retail trade businesses. Furthermore, several observations indicated the systematic amalgamation of several various retail trade businesses: The history of the project, i.e. the (scl. failed) determination of a special area as well as the planning efforts by the building owner determining the construction as a centre in the application documents.

Dr. Steffen Schleiden
Rechtsanwalt

Due to those indicators the courts have concluded that this location with an overall sales area of approximately 3.000 m² already fulfilled the prerequisites for a shopping centre within the meaning of § 11 Sec. 3 Sent. 1 No. 1 Federal Land Use Ordinance (BauNVO) not permissible in a commercial area.

Practical considerations

This decision reveals that even smaller special market agglomerations with a sales area of less than 1000 m² may exceed the boarder lines to a shopping centre within the meaning of § 11 Sec. 3 Sent. 1 No. 1 Federal Land Use Ordinance (BauNVO) and could, therefore, be subject to considerable restrictions under planning law. It is therefore necessary already

in the run-up to planning such a project to check very carefully whether indicators existed for a shopping centre project. Given that, the planning has to be modified to such an extent that those indicators could be ruled out if possible. In such a review all circumstances of the individual case and, in particular, of the local facts and the scheduling of planning have to be taken into account.

Dr. Steffen Schleiden

III. Building permission law – No prohibition of use in spite of many years of unlawful use – knowledge of the administration

Eva Appelmann
Rechtsanwältin

The Verwaltungsgericht Göttingen has ruled in its judgement of July 4, 2013 (2 A 447/12) that the construction supervisory authority has to consider its positive knowledge about illegal conditions under building law and its non-intervention for many years when applying discretion so that possibly the discretion of the authority is reduced to zero: Prohibition of use as well as demolition are ruled out.

Use of the stable building for residential purposes – knowledge and no reaction of administration

The building subject of the dispute had been built at the beginning of the 20th century and approved as residential building at that time. It consisted of two full storeys and an extended stable building. From a certain point in time on the former owner and later the plaintiff and current owner, too, used the stable building for residential purposes. On the occasion of an inspection in 1993 the authority queried the plaintiff as to the residential use in the area of the former stable building, yet without intervening against it. In 2011, a neighbour of the plaintiff informed the authority about the unauthorized residential use. The authority took this occasion, after hearing the plaintiff, to prohibit the use of the former stable for residential purposes. The authority stated in its decision that the residential use of the stable building had not been officially approved and that the prohibition of use would be the suitable, necessary and appropriate means in order to first guarantee conditions in compliance with building law.

Formal and material unlawfulness under building law – No provision made to safeguard existing standards

The Verwaltungsgericht Göttingen held: The residential use in the stable building was formally unlawful, since it had not been approved. Furthermore, the use did not comply with the distance area under building regulation law, so that this use was not approvable. Correspondingly the plaintiff could not invoke provisions made to safeguard existing standards. If the construction supervisory authority had some positive knowledge concering illegal conditions under building law on a plot of land and if it did not intervene for some years, this had to be taken into account in the context of discretionary considerations. If the building supervisory authority had not made the years-long factual acquiescence of the illegal conditions under building law the discretionary considerations, were defective and the order of the building authority was subject to annulment. The deferral on the part of the authority created facts of trust worth protecting which had to be taken into consideration in case of any intervention against the building. If the authority was not able to provide factual reasons for its deferral in the individual case, there were good reasons to believe that the discretion of the authority had been reduced to zero and that it could no longer command prohibition of use or demolition.

Limitation or reduction of discretion due to tolerating conditions contrary to building law

Practical considerations

The ruling of the Verwaltungsgericht Göttingen reflects the permanent rulings of the highest courts: Intervention of an authority subsequent to years of asquiescence is only possible if it provides a factual reason for its discretionary considerations. The fact of trust derived in the course of time requires an existing objective reason for the previous deferral.

Eva Appelmann

IV. Planning law – Procedural law – Judicial review proceedings – Preclusion of objections

The Verwaltungsgerichtshof Mannheim has ruled in its judgement of July 5, 2013 (8 S 1784/11) that the yardstick applied should not be too tight regarding the review whether an applicant of judicial review proceedings had already duly presented his/ objections in preparation proceedings.

Change of a general residential area – adjacent public green area – sports area

The applicant of the application for judicial review was the owner of a plot of land located in the area of the defendant and governed by a legally binding land use plan (general residential area). The legally binding land-use plan under attack defines in the area of an already built sports area "a public green aea – sports area".

Public hearing – groups of applicants on two pages

In the context of proceedings of interpretation the municipality received two documents: In a letter a number of owners demurred and signed on the first page of this letter. Further space for signatures was not available on that page.

Treated differently as application "and collection of signatures"

On a second sheet of paper (page 2) the applicant and further owners declared their "support"…. for the "matter" of the owner presented on page 1. In a meeting of the municipal council the municipality treated the two documents as "statement" and "collection of signatures".

In the judicial review proceedings the defendant (municipality) invoked that the applicant had not presented objections in due time and that he would, therefore, be precluded in the judicial review proceedings.

No preclusion of objections presented – real sense (§ 133 German Civil Code (BGB))

The VGH Mannheim has ruled that the action regarding judicial review was valid and justified: The objective of a declaratory statement in the procedure of public participation, was to carry out an investigation based on the real will of the declaring person by means of interpretation (§ 133 German Civil Code (BGB)), unless already definitely understandable as objection according to its wording. For that reason and due to the considerable pertinence regarding constitutional rights the provision of preclusion should not be subject to too tight standards (Art. 19 Sec. 4 Grundgesetz (GG)/Art. 14 Sec. 1 GG).

Not too narrow interpretation (Art. 19 IV GG)

From the writing of the authors of the letter page 1 and from the list of signatures attached on page 2 it became suffiently clear and given a reasonable appreciation from the perspective of an objective receiver, that the respective signatures intended to assert the listed objectives on page 1 as their own and that they did not intend to only support other obejctions. This resulted from the recognizable fact that their own interests had been affected, from the spatial proximity and, taking a close look at both pages sent in one letter, also from the fact that there had been no space left for signatures on the first page. The introductory sentence on the first page thus formed the mental bridge to the first page on which the objections had been formulated.

Therefore, it was not to be seen as a collection of signatures, but as a petition asserting the "matter" of the owner of page 1 as their own application.

Practical considerations

The VGH Mannheim has clarified two aspects with in the ruling: In the context of public participation it is important that the municipality can suffiently understand the presentation of people affected as their own objections. The mere signature of another party's objection can lead to a preclusion of complaint. On the other hand the planning municipality has to comply with the common rules of interpretation (of the German Civil Code (BGB)!) and has to observe in the course of interpretation the protection of the applicant under the constitution and has, therefore, to avoid any assessment that is too tight. In order to avoid misunderstandings und unnecessary proceedings – as in the case ruled – it can be helpful if both the municipality as well as the applicant seek legal advice.

Dr. Moritz Ulrich

Dr. Moritz Ulrich
Rechtsanwalt

F. Labour Law

Significance of effective day regulations for special payments of a mixed kind: Time-proportional Christmas bonus in case of leaving the company prior to the effective date

The Federal Labour Court (BAG) has ruled in its judgement of November 13, 2013 (10 AZR 848/12) that an effective date regulation detrimental to the individual employee cannot be established by the general guidelines of the company.

Company guidelines: November payment and Christmas bonus – effective day of employment 31.12.

The plaintiff was employed at the defendant as controller. Every year the defendant paid out together with the November salary a special payment designated as Christmas bonus amounting to one monthly salary. According to the company guidelines issued by the defendant payment was made to members of the company who were in unterminated employment on December 31 of that year. If they commenced their employment in the course of the year they received 1/12 of the gross monthly salary for each month. Employees who had left the company prior to the effective date did not receive any bonus.

Leave by September 30

The plaintiff terminated his employment as of September 30, 2010 and demanded proportional payment of the special payment amounting to 9/12. The action remained unsuccessful in the first two instances. The Federal Labour Court (BAG) annulled the rulings dismissing the action of the first two instances and sustained the action:

Christmas bonus consisting of loyalty award and remuneration for labour

The Christmas bonus constituted a special payment of a mixed kind. On the one hand the special payment was intended to bind the employee to the company thus rewarding company loyalty. By proportionally remunerating the members of staff who only started at the defendant during the year the special payment also served the purpose of remuneration for labour carried out during the calendar year.

An effective date regulation in such a special payment of a mixed kind could not be effectively regulated in the company guidelines. If the special payment is also intended to remunerate work carried out during the year, it is unlawful to deprive the employee leaving the company in the course of the year of his reward earned as a result of this.

Practical considerations

When agreeing special payments particular regard has to be given that the objective of this special payment is clearly regulated. In fact, if only company binding is to be rewarded, an effective date regulation is principally possible. Furthermore, it has to be examined whether individual regulations instead of the general guidelines are possible, i.e. whether the regulation could not have been made part of the contract of employment.

Jörg Looman

G. Conducting Legal Proceedings and Mediation

I. Lawsuits regarding building projects – German Judicature Act (GVG) regulations since 2011 – Legal protection in case of an excessive length of legal proceedings

Problems with the duration of lawsuits regarding building projects

The Federal Supreme Court (BGH) has ruled in its judgement of December 5, 2013 (III ZR 73/13) that in the event of a review as to whether the legal dispute had resulted in an inappropriately long duration of the legal proceedings, a review of the individual case had to be made.

Empirical knowledge reveals that lawsuits regarding building projects take a very long time. On the one hand this has to do with the usual multitude of parties to the proceedings (possibly several executive bodies, architect, technical planner, possibly guarantors). However, this has also to do with the fact that almost no lawsuit regarding building projects manages to be conducted without obtaining expert opinions. When it comes to arranging a joint on-site visit this can already take a longer period of time bearing in mind the multitude of parties to the proceedings.

New version of § 198 Sec. 1 Sent. 2 German Judicature Act (GVG) as per end of 2011 (compensation)

At the end of 2011 the legislator had introduced a new regulation into the German Judicature Act (GVG) granting, under certain conditions, compensation for a party in case of an excessive length of the proceedings. Pursuant to " 198 Sec. 1 Sent. 2 German Judicature Act (GVG) the appropriateness of the duration of proceedings is based on the circumstances of the individual case, especially on the difficulty and the significance of the proceedings and on the behaviour of the parties to the proceedings and third parties.

Period of proceedings approximately 5 years

A building owner claimed compensation due to an excessive length of the legal proceedings based on the argumentation that he had filed a suit in June 2007 after some previous independent proceedings for the taking of evidence; however, because of various illnesses of several experts a judgement had not been reached until 2012 (it was not possible to get a supplement to the expert opinion, since the expert fell ill); in consequence the plaintiff then reached a settlement with the defendant.

No basic excessive duration of proceedings in case of a 5-years period of proceedings in the main lawsuit

All instances, including the Federal Supreme Court (BGH), have dismissed a compensation: Irrespective of the circumstance that 5 years had passed from opening the main proceedings until reaching a settlement, an inappropriate duration of proceedings could not be assumed.

– review of the individual case necessary – no statistical average assumption

It was decisive for the Federal Supreme Court (BGH) that there was no generally determination when proceedings could be deemed lasting inappropriately long. In § 198 Sec. 2 German Judicature Act (GVG) the legislator had expressly and consciously refrained from specifying a clear limit regarding the duration of various types of legal proceedings. Especially due to the fact that the legislator had not provided generally applicable standards of time, the appropriateness of the duration of legal proceedings could not be determined on the basis of statistically identified average data. At the same time it was not permissible to already categorize a specific duration of proceedings as such as inappropriate without a review of the individual case. Instead of that it was imperative to examine the reasons established in the individual case on which the duration of the proceedings had been based.

Practical considerations

When judging the question as to whether the duration of some legal proceedings is appropriate, the difficulty, extent, complexity of the case as well as the behaviour of the claimant have to be taken into consideration under the aspect of culpable responsibility. At the same time third party delays are to be ascribed to the court if the court has possibilities to avoid them, but does not use them. The excessive workload of the court falls into the area of responsibility of the nationally constituted administration. The federal states are responsible for providing sufficient material equipment and human resources and, if necessary, they have to react to longer periods of incapacity to work of the judicial members of staff by means of taking appropriate measures (according to the Federal Constitutional Court (BVerfG) in its ruling of August 13, 2012 – 1 BvR 1098/11).

Ralf-Thomas Wittmann

II. Lawsuit regarding rental issues – (In-)validity of an order of eviction against a third party (in commercial rental contract law) KG Berlin of September 5, 2013 – 8 W 64/13

Content and reason for the amending law of the rental contract law 2013 (§ 940 a Code of Civil Procedure (ZPO))

The legislator has provided by the amending law of the rental contract law – in residential landlord and tenant law – for a simplified implementation of an eviction claim of the landlord against third parties. The new regulation had been based on regularly occurring problems in the course of foreclosure, especially if third parties showed up as residents of the rental premises at the eviction. Then the landlord possibly had to attain a separate title against the third party in some main proceedings, which, however, were of no help for him if on the occasion of the renewed eviction new unknown third parties had material control over the rental premises.

Issue in dispute: Application to commercial tenancy agreements

Under the new law the landlord can also order eviction against an unknown third party by means of a temporary injunction under the conditions laid down in § 940 a Sec. 2 Code of Civil Procedure (ZPO). Whether the regulation of § 940 a Sec. 2 Code of Civil Procedure (ZPO) also applies to commercial rent is deemed controversial. The latter has been subject of a ruling:

Eviction against right of prossetion of a third party

The landlord attained an eviction title against the tenant of a shop area in a shopping centre. The eviction remained unsuccessful: A third party, to whom the eviction title did not apply, was in possession of the shop area.

No application of § 940 a Code of Civil Procedure (ZPO) to commercial rental premises

The landlord applied for a temporary injunction to be issued against the third party regarding eviction and surrender. The KG Berlin has rejected this application. An explanation concerning the reason for the injunction had been missing. A respective application of § 940 a Sec. 2 Code

of Civil Procedure (ZPO) or the citation of the policy of law mentioned therein was out of the question with respect to commercial rent. The clear wording of the norm ("eviction from residential space") and the systematics of the law spoke against it. The legislator classed the regulation of § 940 a Code of Civil Procedure (ZPO) in an existing norm with the official heading "Eviction of Residential Space". Even its legal reasoning was expressly based on the special situation of the landlord of residential space.

Practical considerations

The argumentation of the KG Berlin corresponds with the wording of the new regulation. Nevertheless the opposite view (for example, LG Hamburg judgement of June 27, 2013 – 334 O 104/13) appears more convincing. It should correspond to the spirit and purpose of the regulation: If an eviction order against third parties (owner) can be issued in the context of a residential rent with its distinctive social idea of protection, then it must also be valid for commercial rents in the context of a "First-Right-Conclusion".

Dr. Rainer Burbulla

III. Mediation – new ICC mediation rules as of January 1, 2014 – "Enemy images" as hindrance to the willingness to engage in mediation? – Willingness to engage in mediation due to gaining insight

Mediation clauses of the ICC as of January 1, 2014

Mediation and mediation law do develop – irrespective of some reluctance: With effect as of January 1, 2014 the International Chamber of Commerce (ICC) put new mediation clauses into effect and published them: "In order to meet the growing demand for an holistic perspective on dispute settlement proceedings, this brochure includes both sets of rules (arbitration code and mediation clauses"…").

Unilateral willingness to engage in mediation

The willingness to conduct mediation proceedings in case of a conflict still remains a difficult topic. Although surveys reveal that an out-of-court conflict-solving procedure such as mediation is generally deemed preferable, because it is more reasonable, more human, cheaper, more time-saving, and more target-oriented, a willingness to engage in mediation in case of conflict is often only shown by one conflicting party.

Mediation clauses

This is mitigated by the fact that mediation clauses are made part of the contract upon its conclusion – at least in case of long-term contracts. Thus it is not necessary in case of conflict to first of all establish a willingness to engage in mediation. The parties undertake already upon conclusion of a contract to put mediation proceedings first prior to potential legal proceedings. In fact, an action filed in spite of this prior to making use of mediation would be dismissed as inadmissible upon the objection of the opposing party (see Newsletter 4/2013).

Motives for mediation clauses

Prior to agreeing a mediation clause the parties clarify in a conflict-free state that they do not intend to act against each other in a confrontational manner. Motive for this is, as a rule, that the parties commence a cooperation which is wanted and which is deemed worthwile and profitable for both parties. The contracting parties appreciate each other. Even in the event of a conflict at a later stage, reaching a mutual contract objective, which was once deemed positive by the contracting parties, is mostly not questioned even in retrospect. Only changes in circumstances and in behaviour, which deviate at least according to one party from the original contractual basis, offer grounds for conflict.

From that moment on a chain of argumentation is triggered in the heads of the contracting parties which is supposedly logical:

Contentious dispute as allegedly logical consequence of a conflict

Initially the parties intended to reach a common objective. Now, according to them, facts have revealed in the meantime that a peaceful cooperation in compliance with the contract is not possible. From this they conclude that even the conflict cannot be solved peacefully, but only contentiously. Evidence for this is especially provided by the fact that the contract is no longer complied with considering the new life situation.

This train of thought is not logical since it has lost track of the former starting point, for example, to successfully and jointly manage one's cooperation. The long-term contractual relationship was future-oriented, otherwise the contract would not have come into being in the first place.

Enemy images as hindrance for an uncontentious solving of conflict

What is it, then, that impedes the conflicting parties in spite of changes in facts to solve the conflict by continuing to jointly having faith in the future and without any legal proceedings?

In order to find an answer, the mechanisms as to how conflicts proceed have to be examined carefully. In the course of conflict archaic images, so-called enemy images are triggered. Reason for this is that one contracting party is not able to understand the other party. It tries to find an explanation and, in doing so, as a rule thereby constructs an image of the other party with which the latter is described in a negative-hostile manner. During that process the party is not aware that with that description it intrudes on the reality of the other, thus changing it simultaneously.

Frequently the reason for such behaviour is a hurt sense of justice, thus triggering feelings of disappointment, helplessness, outrage etc. Resulting from this, the person hurt is no longer in a position to think in a differentiated and subtle manner but his/her emotions tempt him/her to divide the world into good and evil. In his/her point of view he/she must line up to fight the evil with a lot of energy.

In addition he/she distorts his/her perception through creating enemy images. Only the other party will be exclusively made responsible for events that occurred, one's own share is by no means taken into consideration. This one-sided perspective leads to the statement of both parties that the other party was culpable and the party itself reacted in a justified manner. In doing so, feelings, thoughts and behaviour are gradually getting deranged. For that reason any offer of communication made by the other party cannot be perceived as being friendly. The mistrust caused prohibits it to think about the other in a positive manner. Moments of some willingness for reconciliation and a cautious coming together can no longer be noticed. The insult thus initiated on the other side further heats up the conflict. This means that attributing blame to the other can lead to conflicts and that the hostile perception associated with this prevents the termination of the conflict.

As time goes by all acts in the context of the relationship are perceived under the aspect of the conflict and the encrusted behavioural pattern turns into a prison. The disruption of the contractual relationship firstly becomes obvious in unrestrained mutual criticism and in denying one's own part in the conflict. This is followed by condemning the other and by the silence of the other indicating the end of the relationship.

Dr. Ursula Grooterhorst
Rechtsanwältin & Mediatorin

If this mechanism is not recognized and broken up an initially factual conflict within a relationship also governs the personal level. More and more a kind of thinking develops in which the conflict only allows one solution, i.e. that there can be only one winner.

Gaining insight due to knowledge

Since we are due to the history of evolution on a high level of development, we are able to gain insight. That we gain insight can consist of the fact to know

- how enemy images develop and what they cause inside the human being;
- that human beings and, therefore, also their contractual relationsships are of a dynamic nature, i.e. that they can also develop into opposite directions due to different characters/ways of life/attitudes of the contracting parties. Regarding this, Arist von Schlippe recommends to adopt a "tragic world view (KonfliktDynamik, 2013, p. 212 et seq.). I rather prefer to term it a "realistic world" which knows that we are interconnected in our relationships and that frictions due to our diversity are to be taken as given and constitute even an inevitable part of our life. This also implies the awareness that you cannot change other people, but only yourself. Only if the dynamism of relationships is accepted, they do not freeze and can continue to develop;
- that enemy images make cooperation impossible and that the dynamism of contractual relationships are part of a realistic world view and that consequently good cooperation implies that some consensus has to be reached.

Willingness to engage in mediation by means of gaining insight

If conflicting parties actually know about the effects of enemy images and if they adopt a realistc view of the world, they can – due to this gaining of knowledge – say farewell to the possibility of initiating legal proceedings as soon as conflicts occur. The fight against each other is not in the foreground, but the contractual relationship. Mediation offers both parties the possibility to perceive the case of conflict unlike legal proceedings only under the aspect of a breach of contract, but to have a look at all circumstances which can successfully reactivate the contractual relationship while integrating their further positive as well as negative development which has taken place in the meantime. In the context of reaching this consensus all personal mental states, factual arguments, thoughts regarding justice and fairness, will be taken into consideration. Contract relationships do no longer have to be blocked or even smashed by using enormously aggressive energy. Instead of that the energy can be used in a positive manner to find a solution satisfying all contracting parties within the mediation process. This insight should be an occasion for both sides to get involved in mediation.

Dr. Ursula Grooterhorst

Events

January 27-29, 2014

10 Years of German Retail Property Congress
Workshop "Current frame conditions when renting out retail properties"
in Berlin, Swissotel
Chairman: Rechtsanwalt Dr. Johannes Grooterhorst
Partner, Grooterhorst & Partner Rechtsanwälte

March 5, 2014

Current Rulings in Commercial Landlord and Tenant Law
Contract Design and Reform of the Landlord and Tenant Law 2013
in Düsseldorf, MaxHaus
Speaker: Rechtsanwalt Dr. Rainer Burbulla, Partner
Grooterhorst & Partner Rechtsanwälte

April 10, 2014

Science meets Practice – Product Liability Insurance
Grooterhorst & Partner Rechtsanwälte mbB
and
insuralex (GLOBAL INSURANCE LAWYERS GROUP)
invite to the seminar
Current Developments in Product Liability Insurance
- Liability Law and Insurance Law -
in Munich, Künstlerhaus München, Lenbachplatz 8
Speakers: Univ.-Prof. Dr. Christian Armbrüster/Freie Universität Berlin
Univ.-Prof. Dr. Bernhard A. Koch LL.M./Universität Innsbruck
Moderation: Rechtsanwalt Ralt-Thomas Wittmann, Partner,
Grooterhorst & Partner Rechtsanwälte mbB

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