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NEWSLETTER 02/2013

Dear Readers,

The legal topic for this quarter is the Landlord and Tenant Law Reform Act, which came into force on May 1, 2013. Tenants and landlords – contrary to the first and public impression, even of commercial real estates (!) – have to familiarize themselves with amendments in mainly four areas of the landlord and tenant law: maintenance and modernisation measures, heat contracting, enforcement of rental and eviction claims by court action as well as limitations to terminate rental agreements in the case of division ("the Munich Model"). New rulings, amongst others in labour court proceedings, Securities Takeover Act (WpÜG), architect's law, commercial landlord and tenant law, planning law as well as insurance and procedural law, pertain to the areas of work of our law firm. We would be pleased, if you, as addressees of this newsletter, could gain some stimulus from it for your daily professional work.

I wish you some encouraging reading.

Yours
Dr. Johannes Grooterhorst
Rechtsanwalt

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A. Current News

Landlord and Tenant Law Reform as of May 1, 2013

1. Maintenance and modernisation measures; 2. Heat contracting; 3. Procedural facilitation of rental and eviction claims; 4. Limitations of termination in the event of conversions in the Munich Model

On May 1, 2013 the law on the energy-efficient modernisation of rented-out residential property and on the simplified enforcement of an eviction title (Landlord and Tenant Law Reform Act) became effective (BGB1, p. 434). Basically four areas of landlord and tenant law are involved. First, the implementation of maintance and modernisation measures; second heat contracting, third the (procedural) enforcement of rental and eviction claims as well as fourth, creating protection against unwarranted eviction against the "Munich Model". The Landlord and Tenant Law Reform Act mainly affects residential tenancies. However, the Landlord and Tenant Law Reform Act has an impact on commercial lease agreements, too.

1. Implementation of maintenance and modernisation measures

Revisions of §§ 555 a – 555 f. German Civil Code (BGB)

Residential as well as commercial landlord and tenant law are affected by the revisions regulating maintenance and modernisation measures (§§ 555 a to 555f German Civil Code (BGB)). In doing so, two objectives are aimed at: On the one hand, the law concerning maintenance and modernisation measures is intended to be made clearer by revising it. On the other hand, enforcing maintenance and modernisation measures is designed to be facilitated.

Limited exclusion of rent reduction of 3 months, § 536 Sec. 1 a German Civil Code (BGB)

The most controversial regulation in the legislative procedure in conncection with the implementation of maintenance and modernisation measures is the limited exclusion of rent reduction (§ 536 Sec. 1 a German Civil Code (BGB)). According to this, the reduction for reasons of energy-saving modernisation remains excluded for a period of 3 months. The landlord is, therefore, bound to swiftly implement modernisation (comp. official Bundestag Paper 17/10485, p. 18). On the other hand, he should not suffer a "cashflow" loss.

Future questions of doubt

In future, questions of doubt might arise in case of interruptions of work, such as, for example, breaks in which the tenant does not suffer any impairment. Given the spirit and purpose of this regulation such interruptions should (probably) not be made an integral part of the three-month period. In fact, the "interconnected" duration of the impairment will have to be determined. In this context it might also be open to debate whether the three-month exclusion of reduction applies, if the landlord carried out several successive energetic modernisation measures. It is then questionable, whether the period of three months applies successively to each individual measure. In this case, the limit might (well) be the abusive behaviour of the landlord, for example, if - against the principles of a proper building owner - the landlord "stretches" the work in the project for no good reason. Further practical difficulties might occur, if the landlord in addition to the energy-saving modernisation also carries out (normal) maintenance measures. Then those impairments occurring under the respective individual works have to be specified and to be estimated, if necessary (§287 Code of Civil Procedure (ZPO)). The latter is probably only possible to be accomplished by experts.

Facilitation of modernisation measures: No prevention by tenants, § 535 d Sec. 2 Sent, 2 German Civil Code (BGB)

A further objective of the Landlord and Tenant Law Reform Act is the actual facilitation of implementing modernisation measures. Under the previous law tenants were able to assert economic hardship resulting from rent increases to be expected subsequent to the modernisation already at the point when the modernisation measure was announced, and thus preventing

modernisation. Now economic hardship has principally only to be considered at the point of a rent increase (§ 555 d Sec. 2 Sent. 2 German Civil Code (BGB)). Consequently, the landlord is able to implement the modernisation as intended. Whether he can then obtain an increased rent (559 German Civil Code (BGB)) remains reserved to the demand for rent increase (the possibility to increase the rent subsequent to modernisation measures only exists in residential landlord and tenant law).

Exceptional right of termination in case of modernisation for commercial tenants, § 555 e German Civil Code (BGB)

Already the announcement of a modernisation entitles the tenant to exceptional termination (§ 555 e German Civil Code (BGB)). A commercial tenant, too, has this exceptional right of termination (§ 578 Sec. 2 in connection with § 555 e German Civil Code (BGB)). Landlords of commercial premises are well advised to take care in future rental agreements to exclude the exceptional right of termination in order not to risk the premature termination of a long-term commercial rental agreement in case of potential modernisation work, if modernisation measures are scheduled.

2. Revision for heat contracting

Facilitated cost allocation, § 556 c German Civil Code (BGB)

The second key area of the Landlord and Tenant Law Reform 2013 covers the so-called heat contracting (§ 556 c German Civil Code (BGB)). The revision of § 556 c German Civil Code (BGB) shall enable the facilitated cost allocation of commercial heat supply (contracting) within an existing rental relationship. Technical details will be regulated in an ordinance to be newly created (§ 556 c Sec. 3 German Civil Code (BGB)).

Whether the revisions concerning heat contracting actually lead to a facilitation of allocating operating costs is rather doubtful. According to previous rulings of the Federal Supreme Court (BGH), the landlord was able "to charge the costs of the independent commercial supply" to the account of the tenants without any limitation, provided that in the rental agreement the version of attachment 3 of § 27 of the II. BVO since March 1, 1989 or the current BetriebskostenVO respectively – and if only by means of general reference – had been agreed (comp. Federal Supreme Court (BGH), judgement of July 16, 2003 – VIII ZR286/02). The cost neutrality now required by § 556 Sec. 1 No. 2 German Civil Code (BGB) is not likely to be really achieved.

Problem of the fictitious calculation of previous operating costs

In this context (also) a further question is likely to come up in future. If the requirements of § 556 c German Civil Code (BGB) are not fulfilled, the landlord can only demand from the tenant the previous operating costs to be (fictitiously) calculated for the supply of heat and/or warm water, in particular the fuel and maintenance costs, however not other costs of the energy supplier. Still, § 556 c German Civil Code (BGB) does not provide how those fictitious sums are to be calculated.

3. Procedural facilitation when enforcing rental and eviction claims

"Berlin Eviction" pursuant to (§ 885 a Code of Civil Procedure (ZPO))

The third key area of the Landlord and Tenant Law Reform Act extends to (procedural) amendments concerning the facilitated enforcement of rental and eviction claims. First of all, § 283 a Code of Civil Procedure (ZPO) provides the new possibility of an ordinance prompting securities in order to protect the landlord against (further) rental losses. In enforcement law the "Berlin Eviction" has now been regulated by law (§885 a Code of Civil Procedure (ZPO)). Accordingly, an enforcement order of the creditor is limited to the release of the rental areas. A lessor's lien does not have to be asserted (anymore); however the bailiff undertakes to document the items found. In order to meet the danger of complicating or frustrating enforcements

New intelocutory injunction (§ 940 a Code of Civil Procedure (ZPO))

of evictions, there is still the legal possibility of an interlocutory injunction against a third party (§940 a Code of Civil Procedure (ZPO)). Accordingly, the third party shall be expelled from the property by means of an interlocutory injunction, if it has possession of the rental areas, and without the knowledge of the landlord, and if an eviction title against the tenant already exists. Pursuant to § 940 a Sec. 3 Code of Civil Procedure (ZPO) the creditor (the landlord) shall also be able to enforce the eviction of a tenant within an injunctive process, if the landlord terminated the rental agreement for reasons of default in payment and filed an action for eviction.

4. Limitations of termination in case of conversion into residential condominium ownership (so-called "Munich Model", § 577 a German Civil Code (BGB))

No avoidance under company law of the limitation to terminate a rental agreement

The fourth key area of the Landlord and Tenant Law Reform Act 2013 refers to the limitation to terminate a rental agreement when converting residential real estate into condomniums (§ 577 a German Civil Code (BGB)). With the revision of § 577 a German Civil Code (BGB) the legislator intended to eliminate "arrangement possibilities" of "clever purchasers" who let the limitation to terminate a rental agreement pursuant to § 577 a German Civil Code (BGB) old version run idle (so-called "Munich Model"). In doing so, it was possible to circumvent the factual conditions of § 577 a Sec. 1 German Civil Code (BGB) old version by means of a construction under partnership law, in which in a first step the plot of land was sold to a partnership, which – directly afterwards – asserted personal need for their interestholders prior even to the division into condominium residential property (comp. also Federal Supreme Court (BGH), judgement of July 16, 2007 – VIII ZR 231/08). As of now the limitation of terminating a rental agreement pursuant to § 577 a Se. 1 German Civil Code (BGB) applies to any sale of rented residential property to partnerships and purchaser groups. This wide extension of the limitation to terminate rental agreements is then limited again by the catalogue of exceptions in § 577 a Sec. 1 a Sent. 2 German Civil Code (BGB).

Practical Considerations

Like any law reform the Landlord and Tenant Law Reform Act settles some issues in dispute from the past, at the same time, however, it raises new questions. Therefore it remains to be seen how practice reacts to it.

Dr. Rainer Burbulla

B. Commercial and Company Law – Procedural Labour Law –

I. Competence of civil jurisdiction in case of giving notice of termination to a managing director of a private limited company (GmbH) subsequent to a preceding labour employment relationship

Pursuant to a ruling on February 4, 2013 (10 AZB 78/12) the BAG (Bundesarbeitsgericht) has ruled that not the labour courts but the civil courts are competent if a managing director of a private limited company wants to have the effectiveness of his termination reviewed.

Since 2009 the plaintiff was employed with a private limited company on the basis of a contract of employment. By means of an informal agreement he was appointed managing director in 2011. A particular contract of employment was not concluded in writing. In 2012 insolvency proceedings were initiated about the assets of the private limited company. The defendant insolvency administrator terminated the employment relationship with the plaintiff and irrevocably released him from work until expiry of the notice period for termination. A recall of the plaintiff as managing director did not take place.

Futile attempt to bring action "before the ArbG (Arbeitsgericht)"

As a result the plaintiff sought to ascertain the ineffectiveness of the termination at the ArbG (Arbeitsgericht/labour court). The ArbG referred the legal dispute to the civil court (LG). The plaintiff appealed against this referral. After the latter had been successful before the LAG (Landesarbeitsgericht), it was annulled by the Federal Supreme Labour Court (BAG), so that the referral to the LG became effective.

Legal representatives of corporations are not considered labour employees

The ArbG are pursuant to § 2 Sec. 1 No. 3 Labour Court Act (ArbGG) competent for legal disputes between labour employees and their employers. According to the meaning of § 5 Sec. 1 Sent. 3 ArbGG those persons are not deemed labour employees of a corporation who – by virtue of law, by statutes – individually or as members of a representative body are appointed as legal representatives of the corporation.

No status of a labour employee for the underlying employment contract

According to the ruling of the BAG the exclusion of § 5 Sec. 1 Sent. 3 ArbGG also applies to the legal relationship underlying the executive body, i.e. the contract of employment.

Exceptions in case of further legal relationship

The exclusion of § 5 Sec. 1 Sent. 3 ArbGG does not apply only if the legal dispute does not relate to the contractual relationship underlying the corporation representation, but if a further legal relationship exists. This is, for example, the case if after the recall from the position as managing director the non-terminated labour employer-employee relationship is – again - converted into a labour employment relationship.

Exception in case of a continued previous labour employment relationship

Furthermore the competence of the ArbG can be seen as given, if - after being recalled as executive member - the managing director asserts claims from a labour employment relationship which had not been terminated during his time as managing director. A continuation of the employment relationship is, for example, possible if an employee is appointed managing director of a private limited company on the basis of an informal agreement, because the effective termination of an employment relationship requires the written form pursuant to § 623 German Civil Code (BGB). If the managing director will then be recalled at a later stage, he is entitled to assert claims from this contract of employment (such as, for example, further remuneration etc.) before the ArbG. Since in the case decided upon the managing director was not recalled, but his employment was terminated, the competence of the LG was given.

Practical Considerations

The BAG (Bundesarbeitsgericht) has defined its previous rulings more precisely and has sharpened the delimitation of litigation competences between labour courts civil courts concerning the termination of activities as managing director of a private limited company. Therefore, in any case a diligent review is necessary as to what kind of legal relationship is affected. Even some "political" competence of the ArbG intended by the managing director has not been established.

Jörg Looman

II. Stock Corporation Law/ Takeover Bid: temporal and capital requirements concerning the right of a bidder to take over remaining shares (so-called Squeeze-out) or right of the shareholders of the target company to tender

In its judgement of December 18, 2012 (II ZR 198/11) the Federal Supreme Court (BGH) ruled that a right of takeover of the bidder regarding the remaining shares of a company (target company) pursuant to § 39 a Sec. 1 Securities Takeover Act (WpÜG) and, therefore, a right of a shareholder of this target company to tender pursuant to § 39 c WpÜG only existed, if the bidder had exceeded the threshold of 95% of the shares within the periods (period and grace period) provided for in § 16 WpÜG.

Dependence of right of tender on the right of takeover

The ruling of the Federal Supreme Court (BGH) and its underlying objective will become understandable, if it is assumed – like the Federal Supreme Court (BGH) did– that the right to tender (§ 39 WpÜG) strictly conforms to the right of takeover pursuant to § 39 WpÜG: "Only if the bidder (still) has a right of takeover, the individual shareholder, too, can have a right to tender", (Federal Supreme Court (BGH), reference as above).

The issue was about the privatisation of a regional bank held by public authorities: the defendant limited commercial partnership (a single-purpose entity particularly created for the bidder/privatisation proceedings) acquired 80% of the shares of the regional bank. Thereupon it submitted a voluntary takeover offer concerning the remaining shares. The acceptance period expired in October 2007 und was extended to November 2007 pursuant to § 16 Sec. 2 Sent. 1 WpÜG. Upon the expiry of the extended acceptance period the defendant held 88,01% of the shares in the bank that had been taken over. On January 1, 2008 a subsidiary of the defendant took over another 10% of the shares in the bank, which had been held by a shareholder of the defendant before. One day later, on January 2, 2008 the plaintiff offered the defendant his shares in the bank. The defendant rejected that.

The claim to accept the transfer of the shares against the defendant remained unsuccessful in all instances.

It is and was contentious within which period the bidder has to achieve the legally required minimum amount of 95 percent of the shares. Some opinions argue that the acceptance period in accordance with § 39 a Sec. 1 Sent 1 WpÜG should be decisive for it. Others stressed that a close temporal connection with the expiry of the acceptance period should be sufficient or that it depended on the period in accordance with § 39 a Sec. 4 Sent. 1 WpÜG, according to which the bidder had to file an application for the implementation of the takeover within 3 months subsequent to the expiry of the acceptance period.

Majority requirement within the given period

The Federal Supreme Court (BGH) shared the first opinion. However, it left it expressly open whether the acceptance period pursuant to § 16 Sec. 1 WpÜG would be decisive or whether the extended acceptance period according to § 16 Sec. 2 WpÜG would be relevant, since in the case decided upon both periods had expired. The Federal Supreme Court (BGH) justified its decision – based on the takeover right (exclusion/squeeze-out right) of the bidder, with which the right of the shareholder to tender corresponded – as follows: minority shareholders must - according to the legislative concept –be given sufficient time of reflection on their decision (acceptance of the takeover offer or tender). If it were possible to reach the minimum amount of 95 percent of the shares even during the three-month period pursuant to § 39 a Sec. 4 Sent. 1 WpÜG, the decision-making period would be reduced accordingly. If the mini-

mum amount of 95 percent of the shares had been achieved only at the end of this period, then the reflection period would possibly cease to apply completely. Since the defendant only held 88.01% of the shares in November 2007, there was no right of takeover pursuant to § 39 a WpÜG for it, and consequently no right to tender for the minority shareholder either, in accordance with § 39 c WpÜG.

Acting in concert not significant

The Federal Supreme Court (BGH) deemed it insignificant whether the defendant and its parent company coordinated their procedure concerning the additional 10% of shares acquired at a later stage (so-called "acting in concert"): According to the wording of § 39 a WpÜG such coordinated behaviour were insignificant as far as the takeover (and therefore also the right to tender pursuant to § 39 c WpÜG) is concerned.

Practical Considerations

The Federal Supreme Court (BGH) created a pleasant degree of clarity. The bidder cannot "obtain" a takeover right by means of acquiring shares subsequent to the expiry of the legal periods. However the minority shareholder also has to accept that his right to tender thus lapses. If he had wanted to sell at the – voluntary - takeover price, he would have had to accept the takeover offer.

Jörg Looman

III. Corporate Law/D&O liability/Management board of a (bank) public limited company

In its judgement of January 15, 2013 (II ZR 90/11) the Federal Supreme Court (BGH) has confirmed its legal opinion, that a management body acted in breach of its duty if it were engaged in business activities not covered by the company purpose.

Business transactions of the management relating to interest rate derivatives

The judgement joins a number of rulings in connection with banking transactions: The defendants were members of the management board of a public limited company, the plaintiff. Subject matter of the plaintiff's company was pursuant to § 2 Sec. 1. of its statutes the operation of a mortgage bank within the meaning of the Mortgage Bank Act. Between January 1, 2001 and June 30, 2002 the plaintiff - based on the decision of the defendant management board members - concluded business transactions relating to interest rate derivatives (amongst others interest-swap transactions) and forward-rate agreements, the volume of which far exceeded the volume of the original mortgage bank business.

Decisive Company purpose

The Federal Supreme Court (BGH) has emphasized, as it had already done in previous rulings, that an executive body carrying out business transactions which are not covered by the company purpose, acts in breach of its duty. In doing so, the Federal Supreme Court (BGH) referred to the legal situation in connection with the conclusion of interest rate derivative transactions applicable until June 30, 2002 (Mortgage Bank Act): Mortgage banks were only allowed to carry out interest rate derivative transactions if they served the purpose of securing interest risks arising from the main business or from the permissible ancillary business.

The imperative of clarifying facts

The Federal Supreme Court (BGH) has not considered the issue as ready for a ruling and referred it back to the court of appeal for reasons of re-hearing and ruling. The Federal Supreme Court (BGH) has not deemed it sufficiently clarified whether the individual interest rate derivative transactions as a whole or in part served the purpose of securing the risks of change in interest rates related to the main business or to permissible ancillary business transactions.

Practical Considerations: Distinction of individual cases of business transactions that are either contrary or according to duty

The judgement of the Ferderal Supreme Court (BGH) clearly has indicated that the courts have to focus on the individual cases when dealing with the assumption of the management board acting in breach of its duty by operating business transactions that oppose the company purpose. One single standard could not be applied to all the respective individual cases, as already shown by several cases as for instance IKB dating back to 2009 (OLG Düsseldorf confirmed the violation of the company purpose anchored in the statutes by means of subprime-related investments) und the sale of Dresdner Bank to Commerzbank dating back to 2010 (OLG Frankfurt am Main rejected the breach of duty of the management board members). In the context of this complex subject matter of banking transactions the clarification of the finding of the facts is of utmost importance. Since a subjective standard for discharging the management board is applicable, thus depending on an ex-ante point of view, management board members are well advised to carefully document their corporate decisions and their weighing-up processes. Otherwise discharging the management board might often prove successful only with some difficulties.

Johanna Westermeyer

C. Real Estate Law

I. Private Building Law/Architect's Law: Maximum limit of construc-tion costs as quality stipulation in the architect's contract

Changing architects (subsequent to phase 1 to 4 HOAI (Fee Ordinance for Architects and Engineers) old version) for phases 5 to 8 HOAI old version because of an announced failure to stick to the building owner's budget

The client (CL) commissioned the architect A with the planning of three car dealerships. After architect A familiarized himself with the given facts and developed first planning activities he informed the CL that the construction of three car dealerships involved construction costs of 10 to 12 million DM.

Since the CL only disposed of a budget of 6,5 million DM, he put architect A on hold and asked architect K whether it was possible to stay within a cost frame of 6,5 million DM based on the planning drafted by architect A and including all outside facilities and all ancillary construction costs. Architect K was provided with the prepared planning documents and those necessary for the building licence application.

After a meeting the CL commissioned architect K with delivering works of phases 5 to 8 within the meaning of § 15 HOAI (Fee Ordinance for Architects and Engineers) old version, i.e. the preparation of tender documents until and including construction works supervision. The background to this was that architect K was expected to continue with his own works those of architect A, who had already developed building application documents and building applications.

Legally effective termination of the second architect's contract because of refusal of performance in connection with part payments

Subsequently, a dispute arose between the parties about the calculation of part payment claims. As a consequence architect K stopped the construction works supervision. The CL, subsequent to previously setting a deadline for resuming work, gave notice of termination of the architect's contract for cause.

Architect filed a court action to determine that the termination for cause was ineffective. The superior court (OLG Cologne) dismissed that action in a legally binding manner in 1999.

Action for the recovery of fees

After that architect K brought legal action against the CL to pay a contractual fee amounting to € 335,952.89. He argued that the underlying costs had increased compared to his original

estimate. Architect K also charged fees for works of phases 1 to 4 HOAI. He submitted that he was entitled to do so after it became evident that the original works had not been sufficient for approval.

The Landgericht dismissed the architect's action for the recovery of fees. The appeal lodged against that remained unsuccessful.

According to the opinion of the OLG Cologne the parties agreed a binding upper cost limit in the amount of DM 6.5 million for the entire construction project and consisting of three individual objects. Therefore, the architect's invoicing is limited to the chargeable construction costs in the amount of DM 6.5 million. An agreed upper cost limit constituted a quality stipulation, which formed the upper limit of the fee.

No undermining of the legal fees – no lump sum fee

Exceeding the upper cost limit were a defect with the consequence that the architect could not demand more than what arose from the agreement of the upper cost limit. The upper cost limit constituted a quality agreement stipulation. The legal prohibition of falling below the minimum fee did not oppose to either. Furthermore, it were not a form-binding lump sum fee. The stipulation of an upper cost limit did not imply that it had to be invoiced according to those costs. Architect K could have and had been allowed in case of lower chargeable costs to bill only on the basis of those costs.

Procedurally, the architect bore the burden of proof for the fact that an upper cost limit had not been agreed upon.

According to the opinion of the court already the details of the way of commissioning of the architect indicated a binding cost commitment. The contact between the litigation parties came into being when it turned out that the first architect was not able to comply with the budget specifications. It was clearly obvious right from the very beginning, and even prior to his/her commissioning, that the CL only disposed of a limited budget and that it was important for the latter that this budget was adhered to.

No – tacit – supplementary agreement

Architect K could not invoice work phases 1 to 4 HOAI. He had never stated himself that a written supplementary agreement covering service phases 1 to 4 HOAI had been concluded. Such an agreement never came into existence even tacitly. Architect K received the order because he promised the CL to be able to work on the old planning. Prior to being commissioned he had the opportunity to comprehensively review the documents, which he did. If in this context errors and inadequacies turned up necessitating a re-working and, if necessary, even a new planning, this fell into the sphere of the architect according to the contractual risk allocation. In fact, the pre-planning reviewed by him formed the basis of a separate commissioning.

Practical Considerations: Amendment of the agreed upper cost limit only by means of supplementary agreements

If the architect realizes that the upper cost limit for the construction costs cannot be adhered to, and if he wants to avoid the limitation of his fees related to the calculation on the basis of the chargeable costs according to the upper cost limit, he has to bring about an – contractual! – increase of the upper cost limit. The mere fact that the building owner releases a change of plans is not sufficient. The mere release of the planning does not have to mean for the CL that he/she is at the same time aware of increased construction costs resulting hereof. It rather requires an amendment of contract. This can, in fact, be done in an implied manner. This,

however, regularly results in difficulties in providing evidence. Therefore, it is urgently recommended in the event of changes to planning leading to increased costs, to point out additional costs and to bring about in writing the consent of the client concerning the changes to planning and the increase of the upper cost limit.

Ralf-Thomas Wittmann

II. Private Building Law/Architect's Law: No limitation of the supervisory duties of the architect commissioned with object supervision due to the client's own expertise

Recourse proceedings between planner and sub-planner

In its judgement of March 28, 2013 – 12 U 96/12 – the OLG Brandenburg has sentenced the sub-planner (works phase 8 HOAI old version) of an architect (works phases 5 to 9 HOAI old version) to pay damages.

A building owner (BO) commissioned the plaintive architect (K1) to deliver works phases 5 to 9 pursuant to § 15 HOAI old version. K1 commissioned the delivering of works phase 8 (construction works supervision) within the context of a sub-planner contract to the defendant architect B.

Due to errors in planning and object supervision BO claimed damages from K1. KI served B the notice of a dispute. K1 was sentenced to pay damages to BO.
Then K1 asserted recourse claims against B. As far as the subject matter was concerned B submitted that since a monthly remuneration was owed, the sub-planner's contract could only be qualified as contract of service and not as contract for works. Furthermore, it had not been his task to review the planning of K1 with respect to being free of defects.

Sub-planner's contract as contract for works even in case of monthly remuneration

Transferring works phase 8 of § 15 HOAI had the consequence that the defendant owed a specific success. This success was reflected in the supervision of the construction works together with the accompanying basic works as well as visits to the competent building authorities, utilities and the city administration regarding coordination to be made concerning building permit, partial acceptances, work on supply and development jobs. To exclusively transfer construction works supervision according to the requirements of HOAI principally took place on the basis of a contract for work and services. The form of remuneration had, therefore, been irrelevant.

Obligations of supervision of the sub-planner towards the main planner

Apart from supervising the companies in charge of building works B also owed a review of the planning activities of the plaintiff. It is the task of the architect, who is in charge of the construction supervision and who has a distinctive position among the people involved in the construction process, to ensure a flawless implementation of the building project. This implies inspecting the suitability of the plans to see whether on their respective basis a flawless construction of the project is possible. In order to guarantee service phase 8 pursuant to § 15 HOAI old version it is required to review the planning as to whether it is in compliance with the generally accepted rules of technology as well as with the relevant regulations.

No reduction of obligations due to expert knowledge of the main planner

In fact, a reduction of these requirements does not take place because it is not the BO who is the contracting party of B, but the architect who was commissioned by BO to carry out service phases 5 - 9. In this case, too, the proper rendering of the mentioned basic service of service phase 8 of § 15 HOAI old version presupposes that he reviews, when implementing the plans, their compliance with the technical regulations as well as with other regulations.

Liability of the sub-planner for planning errors of the main planner

The defendant is not exonerated by the fact that he is a civil engineer but not an architect. If and to the extent that he has taken on the services of service phase 8, he has to render them completely and in due form. Still, planning errors can be attributed to the plaintiff (planner). However, breaching duties of review and of notification by the defendant (sub-planner) are not to be trivialized. As a rule they also constitute, in fact, an important cause for damage at the building structure so that a complete withdrawal from liability of the sub-planner in charge of the construction supervision due to an insufficient supervision of plans in relation to that person who has to bear the responsibility for the incorrect preparation of the plans, can only be taken into consideration in exceptional cases.

Practical Considerations: Legal situation in architect's law is similar to that in building contract law (VOB/B)

The information of the contractor about the expert knowledge of the principal seldom results in a limitation of the contractor's obligations concerning notification and review activities. Using § 4 No. 3 VOB/B (duty of information of the entrepreneur) as an example, rulings decided that in principle these duties never even lapse if the principal is advised by an expert (comp. OLG Düsseldorf, judgement of April 29, 2005 – 23 U 157/04). Furthermore, the contractor remains obliged to review the specifications of the principal regarding "eye-catching defects" and to express reservations, if necessary.

Ralf-Thomas Wittmann

D. Commercial Landlord and Tenant Law

I. Written Form and Partnership under Civil Law: Permissible signature of only one partner of a partnership under civil law plus additional stamp

In its judgement of January 23, 2013 (XII ZR 35/11) the Federal Supreme Court (BGH) has ruled that adding a stamp to the signature of a partner, showed that the person who signed was authorized to sign on behalf of the partnership and that a statement made in this manner satisfied the written form requirement pursuant to § 550 German Civil Code (BGB): A regional law firm organised as a partnership under civil law (GbR) concluded a commercial rental agreement as tenant with the landlord. On the part of the tenant, the rental agreement was signed by only one partner. A stamp of the law firm was added to the signature. The contracting parties also signed and stamped supplement No. 1 in the same manner. The tenant terminated the rental agreement prematurely and referred to a violation of the written form. With its action it requested the declaratory decision that the tenancy came to an end due to the notice of termination.

Printed stamp sufficient legitimizing effect

The Federal Supreme Court (BGH) dismissed the action. In the senate's view the written form of the rental agreement had been observed. In case of a majority of persons it is, in fact, required that principally all partners have to sign the rental agreement or, if one representative provided his/her signature, this had to be made clear by an additional note on his/her representative function. A stamp, indeed, is sufficient to serve as an additional note on representation. By adding a stamp to a signature, the person making the signature were identified as being entitled to giving a signature for the originator of the stamp. As a matter of fact, business operations attribute to a business stamp (such) a legitimizing effect.

Practical Considerations

The Federal Supreme Court (BGH) resolved the dispute in the rulings of the OLG as to whether a stamp is sufficient for observing the written form (in the negative: OLG Hamm, judgement of February 16, 2011 – 30 U 53/10; in the positive: OLG Cologne, judgement of December 14, 2004 – 22 U 117/04), if only one of several partners signed the rental agreement. The ruling of the Federal Supreme Court (BGH) is appropriate and practice-oriented und aims at legal certainty concerning rental agreements with a partnership under civil law.
Dr. Rainer Burbulla

II. Written Form: Requirements concerning a change of tenants – complete and unambiguous reference

In its judgement of January 30, 2013 (XII ZR 38/12) the BGH has stated that an agreement about a change of tenants between a leaving tenant and an entering tenant had to refer in an unambiguous manner to the original agreement and to any and all supplements, if any, in order to observe the written form. The approval of the landlord concerning the change of tenants could take place informally.

Purchase and transfer agreement concerning a share in a business

There was a rental agreement concerning a commercial plot of land for operating a logistics company. At a later stage the tenant concluded a "purchase and transfer agreement concerning a share in the business" with the purchaser. According to that the purchaser was intended to enter, among other things, into all existing continuing obligations of the tenant, which had been all listed in an addendum to the purchase contract. With respect to existing rental agreements the addendum included a list of "Rent for Rooms 2000" by naming the rental objects and specifying the location, landlord and the rent to be paid. The addendum states, among other things: "Location: Hamburg; Landlord G GbR; rent 2,900". At first the purchaser paid to the landlady the rent, the ancillary cost accounting as well as a rent increase. Then he terminated the rental agreement by referring to a violation of the written form.

Difference between – effective – entrance into the lease and satisfaction of the written form requirement

In the opinion of the Federal Supreme Court (BGH) the termination was legitimate. In fact, due the concluded "purchase and transfer agreement" the purchaser entered into the rental agreement as tenant. The latter, however, did not observe the written form and, therefore, the purchaser was able to terminate it prematurely. With the "purchase and transfer agreement" the parties agreed on a change of tenants. The landlady informally approved it by accepting the rent, the ancillary costs as well as the rent increase which was paid to her. However, the reference made to the rental agreements listed in the addendum to the "purchase and transfer agreement" was not sufficient in order to observe the written form. The written form would have only been observed, if the parties had unequivocally referred to the original agreement and to all additional (supplement) certificates. The addendum to the "purchase and transfer agreement" did not meet those requirements. There it had not been expressly referred to the original agreement. Furthermore, in the addendum any kind of information concerning the specific rental object, the original parties to the rental agreement as well as the date of the rental agreement were missing.

Practical Considerations

A change of parties concerning tenants can take place by means of a three-party agreement between all contracting parties, or by means of a two-party contract, which the other party (informally) agrees to. In case of a two-party contract, it is necessary that this contractual document observes the written form pursuant to § 550 Sent. 1 German Civil Code (BGB). Such a contractual document can also be a notarial (plot of land) purchase agreement or – as in this case – the "purchase and transfer agreement about a share in the business" ("Asset-Deal"). Such contractual documents only observe the written form, if they refer in a sufficiently exact manner and "without gaps" to all rental agreements in an unambiguous way.

Dr. Rainer Burbulla

III. Enforcement of a duty to operate the business by means of an interlocutory injunction

In its judgement of January 28, 2013 (8 W 5/13) the KG Berlin has ruled that a landlord can enforce a contractually agreed duty to operate the business by way of an interlocutory injunction.

Rental agreement with a duty to operate the business in a shopping mall

In the facts underlying the ruling a jeweller rented rental areas in a shopping centre. The rental agreement included a regulation concerning the duty to operate the business. According to that, the business had to be operated without interruption from Monday to Saturday from 10.00 am to 8.00 pm. Temporary closures (for example, because of lunch breaks, days of rest, stocktaking) were not permissible without the consent of the landlord. Protection against competition was not granted to the jeweller. The jeweller terminated the tenancy for reasons of substantial financial losses. The landlord sought the implementation of the agreed duty to operate the business by way of an interlocutory injunction.

Protection against competition clause – interlocutory injunction proceedings

The KG Berlin has issued the requested interlocutory injunction and imposed on the tenant the obligation to operate its business during the agreed business hours. A duty to operate the business could be effectively agreed in a commercial rental agreement in the form of General Terms and Conditions. The effectiveness of the regulation concerning the duty to operate the business were not affected just because the tenant had not been granted protection against competition. The combination of a duty to operate the business while at the same time excluding any protection against competition is permissible. It were also not harmful that temporary closures during opening hours had principally not been permitted. As a matter of fact, closures were (in exceptional cases) permitted with the consent of the landlord. The landlord were also entitled to enforce the duty to operate the business by way of an interlocutory injunction. The purpose of a duty to operate the business, which is to keep the shopping centre attractive for customers by providing an offer of shops that is as big and diverse as possible, would be thwarted, if the landlord were to be referred to having to wait with the enforcement of the duty to operate the business until the conclusion of the proceedings in the main subject matter. Furthermore, the duty to operate the business does not preclude that the business of the tenant turned out to be economically unviable and that the expected profit does not materialize. The lack of profitability always belongs to the scope of risk of the tenant as entrepreneur.

Practical Considerations

The interlocutory injunction offers the landlord a fast and effective means to urge the tenant to continue his/her business operation, in case the latter should not fulfil his/her duty to operate the business. However, the landlord should apply for an interlocutory injunction very promptly, because otherwise the urgency for seeking an injunction might no longer apply. Furthermore, he has to consider the damage recompensation risk of preliminary proceedings pursuant to § 945 Code of Civil Procedure (ZPO).

Dr. Rainer Burbulla

E. Public Law

I. Planning Law: Re-use of vacant buildings as criterion when weighing up: OVG Koblenz confirms the effectiveness of the legally binding land-use plans for a shopping centre in the city centre of Kaiserslautern

The OVG Koblenz has confirmed with its judgement of April 17, 2013 (8 C 10758/12.OVG) the effectiveness of legally binding land-use plans creating the building right for the construction of a shopping centre in the city centre of Kaiserslautern.

Re-use of a vacant department store

The planning related to the re-use of a currently vacant Karstadt department store as well as of an adjacent open space by a shopping centre with a sales area of 20.900 m² and additional service and catering areas. An owner located next to the planning area and a competitor, who also pursued his own development concept for building a shopping centre in the city of Kaiserslautern, opposed this planning. Substantial impairments of the central supply area of the city of Kaiserslautern were put forward as an essential line of attack.

Weighing up impact on the retail trade, market changes, and re-use even when accepting adverse effects

Those attacks have remained unsuccessful before the OVG Koblenz: The weighing up of the respective public and private concerns initiated by the city of Kaiserlautern could not be objected to. In particular, the potential impacts on the existing retail trade had been appropriately and sufficiently considered. The city had considered the market changes to be expected due to the shopping centre; in doing so it had induced in a non-objectionable manner the fact that the shopping centre in its major part represented a re-use of the Karstadt property. The city of Kaiserlautern saw a benefit of the shopping centre at that location and expected a positive reciprocal effect for the entire city centre. According to the court, it could not be objected to if the city, therefore, accepted expected adverse effects.

Practical Considerations

Once before, the OVG Koblenz had clearly emphasized the fact that intra-municipal shifts in turnover could be accepted in individual cases by means of a satisfactory weighing up (judgement of January 20, 2011 – 1 C 11082/09.OVG, comp. Newsletter 2/2011). In doing so, the city of Kaiserslautern managed to successfully defend, according to its opinion, a promising re-use of a large department store property.

Isabel Strecker

II. Planning Law: No interim legal protection in the absence of secured planning

In a current ruling the VGH Munich (ruling of January 21, 2013 – 22 CS 12.2297) has confirmed the first-instance ruling of the VG Munich of October 5, 2012 (M 1 S 12.3896) according to which a wind power plant was allowed to be built and to be operated in spite of an action against its approval under immissions law.

Application for interim legal protection

The city of Dachau brought an action against this approval and applied for interim legal protection – without success. The city of Dachau was of the opinion that the application for approval for the wind power plant had to be postponed, since the city was currently working out a partial preparatory land-use (Teilflächennutzungsplan) plan together with several other municipalities of the Landkreis, intended to outline those areas permissible or not permissible respectively for wind power plants.

No secured planning without allowing substantial space for the use of wind power – no "alibi planning"

The VG Munich as well as the VGH Munich have stated that the prerequisites for a postponement did not exist. The requirement for this was that the municipality had decided to prepare, amend or supplement a preparatory land-use plan (Flächennutzungsplan) intended to create so-called concentration zones for the outer area, and that there was reason to fear that the implementation of the planning would be made impossible by the project or considerably more difficult. The scope of application of the postponement would have been only established if the planning concepts were not still completely open; it was an absolute minimum standard that the planning did not come across as mere "alibi planning". Thus, it had to be foreseeable that the use of wind energy had been granted space in a substantial manner by means of the preparatory land-use plan, otherwise secured planning did not exist. In the case to be ruled, the two courts did not consider the latter as given: In the biggest part of the Landkreis less than 1% of the developed area were intended to be used for wind energy, and in the city of Dauchau no area at all. Due to that, the use of wind energy had not beem provided with space in a substantial manner, so that secured planning did not exist.

Relationship between preparatory land-use plan and land-use plan

The VGH Munich made it clear that the city of Dauchau were wrong by objecting to the fact that the specification in the preparatory land-use plan (Flächennutzungsplan) only constituted a rough specification still to be corrected in subsequent land-use plans. In doing so, the city of Dachau misunderstood that although the concentration and exclusion planning for the outer area (Konzentrations- und Auschlussplanung für den Außenbereich) formally had a preparatory land-use plan (Flächennutzungsplan) as subject matter, the latter had a function similar to that of a final land-use plan (Bebauungsplan), because the representations in the preparatory land-use plan – different compared to other contexts – not only served a preparatory representation, but initiated a directly effective duty of consideration.

The approval under immissions law for building a wind power plant may, therefore, be used, although the main suit is still pending.

Practical Considerations

In order that the securing instrument of a postponement (§ 15 Sec. 3 Building Code (BauGB)) becomes effective, the planning ideas of the municipality on the level of the preparatory land-use plan (Flächennutzungsplan) have to be specified in sufficient detail. When representing concentration zones for the use of wind power in the outer area (Außenbereich) it must already become obvious at the time of the postponement that the use of wind power has been attributed substantial space by means of the preparatory land-use plan (Flächennutzungsplan), otherwise a postponement cannot be taken into consideration.

Isabel Strecker

III. Planning Law/large-scale retail trade: Reference to the validity of the judgement of the VGH Mannheim of November 15, 2012 (Newsletter 1/2013, p. 12 et.seq.)

Specifying objectives on the basis of the regional plan not stricter than the superordinated specification of objectives planning at federal state level

As reported in the Newsletter 1/2013, the VGH Mannheim has reviewed in a current ruling concerning the effectiveness of the specifications in the regional plan of the Verband Region Stuttgart for controlling the large-scale retail trade und determined its partial ineffectiveness (judgement of November 15, 2012 – 8 S 252/09): A specification of objectives could not be stricter on the level of the regional plan than the superordinated specification of objectives of planning at federal state level. The existing regulation regarding regional planning with respect to the concentration of retail trade businesses – agglomeration – was ruled to be effective by the VGH Mannheim.

Practical Coniderations

The complaint against the denial of leave to revision (Nichtzulassungsbeschwerde) filed by the adverse party against this decision has been taken back in the meantime. Against this background and by a ruling of April 3, 2013 the BVerwG determined the closing of the proceedings (4 BN 17.13). The ruling of the VGH Mannheim thus became final.

Isabel Strecker

F. Insurance Law

Residential Building Insurance/Insurance Contract Act: No breach of obligations of the insured party subsequent to final insurer's refusal to perform the insurance benefit

The Federal Supreme Court (BGH) ruled in its judgement of March 13, 2012 – IV ZR 110/11 – that the defendant insurance company, after having refused the insurance benefit, is not entitled to invoke exemption from the obligation to indemnify pursuant to § 6 Sec. 3 Insurance Contract Act (VVG) old version because the insured party committed a breach of the duty of information.

Residential Building Insurance pursuant to VGB 98

The building owner IP (insured party) had a residential building insurance with the defendant insurance company IC since January 2000 at the gliding reinstatement value according to the General Terms and Conditions of Insurance of the defendant (VGB 98), which also granted, among other things, an insurance cover against pipe water damage und burst pipe damage occurring at the pipes of the water supply.

Obligations of the insured party in the event of a vacant building

The General Terms and Conditions of Insurance provide that the insured party controls unoccupied buildings or parts of buildings often enough and that it has to shut off, to empty and keep empty all water distribution systems and installations.

Furthermore, they provide that the insured party has to heat all buildings and parts of buildings during the cold season, and that it controls them often enough and that in unheated or not sufficiently controlled buildings or parts of buildings he shuts off, empties or keeps empty all water distribution systems and installations. In the event of an insurance case the insured party has to grant any inspection relating to the cause and amount of damage about the scope of the duty to indemnify, and to provide any information and to submit the requested documents.

In the event that the insured party violates one of the mandatory obligations, the insurer is exempted from the obligation to indemnify if the violation of obligation results from intent or gross negligence.

Water leakage due to frost breakage following a longer period of vacancy

In 2005 the last tenant moved out. It was indisputable that the building was heated by the insured party, however the heating system failed during a cold period in January 2006. On the evening of January 13, 2006 a neighbour discovered that water ran into the street. Reason for the water leakage was a single-lever mixer damaged due to frost breakage of the left wash-basin located in the bathroom of the upper house.

On the occasion of an inspection date of the claim adjuster, the insured party specified that its last visit to the building was on January 9 or 10, 2006, when it did not notice the frostiness.

Refusal of the obligation to perform and termination of the insurance contract

With reference to the aforementioned obligations the insurer rejected an obligation to perform insurance benefits in its letter of February 7, 2006 and terminated the insurance contract. The insured property had been vacant, had not been sufficiently heated and the water pipes had not been emptied either.

On February 14, 2006 the insured party turned to the insurer by means of a call letter from a lawyer. In this letter the insured party submitted that its wife had been in the building under dispute on January 12, 2006 at 3 pm for the last time. At that time it had still been warm. The heating system had still worked.

Thereupon the insurer replied on February 20, 2006 a further query would be necessary in order to be able to process the damage.

On the same date the insurer sent the insured party a confirmation about the cancellation of the residential house policy and a final account about the reimbursement of the excess premium in the amount of € 64,48.

After the insurer rejected an obligation to bear the costs for the damage, the insured party brought legal action against the insurer to obtain payment of € 41,401.00 as well as to determine that the insurer was obliged to reimburse further damage and, in the event of proving the restoration or replacement of certain destroyed objects, a reinstatement amount of € 7,412.00.

Claimed exemption from the obligation to indemnify because of fraudulent conduct subsequent to the refusal to perform the insurance benefit

The insurer deemed itself exempted from the obligation to indemnify because the statement, that the wife of the plaintiff had been in the building under dispute on January 12, 2006, was wrong. The behaviour of the insured party represented a violation of an obligation, because he behaved fraudulently subsequent to a refusal to perform the insurance benefit.

The Federal Supreme Court (BGH) objected to this legal opinion in its judgement of March 13, 3013 – IV ZR 110/11. The defendant insurer could not invoke an exemption from the obligation to indemnify pursuant to § 6 Sec. 3 VVG old version because of a violation of the duty to inform.

Obligation to clarify and to inform subsequent to an insurance case only in the event of an insurer prepared to inspect and willing to negotiate

An insured party only has to satisfy his obligation to clarify and to inform subsequent to an insurance case as it deals with an insurer that is still willing to inspect and to negotiate. With the final refusal to perform insurance benefits of the insurer, provided that the insurer adheres to it, negotiations relating to compensatory payment terminate during which the insurer depends on the information provided by an honest insured party. The special need for protection of the insurer only continues to exist until the statement to reject the insurance benefit. This need for

protection is taken sufficient account of in insurance law with the sanction of the exemption from the obligation to indemnify due to a culpably committed violation of obligation.

Revival of the need for protection

The protection for the insurer can, in fact, be revived, if it unmistakably reveals to the insured party that it does not adhere to its refusal to perform insurance benefits, but to enter again into the inspection of the obligation to perform insurance benefits and that it intends for that reason to take up again negotiations concerning the adjustment of damages. Furthermore, in this case the insurer has to clearly reveal to the insured party to what extent a need for clarification still exists for it.

In this case the need for protection of the insurer was not revived. The letter of the insurer of February 2, 2006 did not clearly indicate that the insurer intended to enter again into an inspection of the specific subject matter.

On the contrary, the insurer once again confirmed its termination of the insurance contract by forwarding to the insured party a notification of cancellation plus a final account specifying the refund of the excess premium paid. The insured party was only able to understand this in a manner that the insurer adhered to the fact that the insured party had violated an obligation of the VGB 98.

For that reason the insurer could not object to the fact that the plaintiff had forfeited his insurance benefits because of completed or caused fraudulent misrepresentation about facts relevant to the cause or the amount of indemnification.

No special need for protection after refusing to cover

The conflict of the contracting parties resulting from the refusal of performing insurance benefits does not justify it any more to grant any special need for protection to the insurer.

As far as the subject matter is concerned, the Federal Supreme Court (BGH) referred the case back to the appeal court. The latter has to clarify whether the insured party can be blamed for a violation of obligation already prior to the insurance case of VGB 98 to be satisfied.

Practical Considerations

Even in the event that an expressly agreed obligation had been wilfully violated, exemption from the obligation to indemnify is only given subject to § 6 VVG old version or § 28 VVG new version.

Ralf-Thomas Wittmann

G. Conducting Legal Proceedings

I. Reimbursement of costs for private expert opinions in independent evidence proceedings in case of a justified interest of the client

With its ruling of February 7, 2013 (VII ZB 60/11) the Federal Supreme Court (BGH) has declared refundable the costs of a private expert in independent evidence proceedings in special cases.

The idea and purpose of implementing independent evidence proceedings is an anticipated hearing of evidence, mostly by means of a publicly appointed and sworn in expert supervised by a court. Independent evidence proceedings do not seek a court ruling. They terminate with the provision of a (supplementary) expert opinion and a potential discussion of the evidence topic with the expert appointed by court on the occasion of oral proceedings. Ideally it comes to an end with a court settlement.

No general duty to compensate costs in independent evidence proceedings

In contrast to lawsuits the Code of Civil Procedure (ZPO) does not provide for any duty to compensate costs of the parties participating in proceedings in the case of independent evidence proceedings. If the applicant in independent evidence proceedings "is defeated" in a manner that the court-appointed expert does not confirm the factual claims of the applicant, this does not yet result in a duty to compensate costs of the applicant towards the respondent.

However, in order not to leave the respondent without rights, § 494 a Sec. 1 Code of Civil Procedure (ZPO) offers him/her the possibility to apply at the court of the independent proceedings, that the latter sets a deadline for the applicant within which he/she has to file a suit.

Duty to compensate costs when missing the period for filing a suit (§ 494 a Sec. 2 Sent. 2 Code of Civil Procedure (ZPO))

In the event that the applicant does not comply with this court order the court declares upon a ruling and subsequent to the application of the applicant, that the applicant has to bear the costs incurred by the respondent, § 494 a Sec. 2 Sent. 1 Code of Civil Procedure (ZPO).

These costs primarily involve the costs incurred by the legal representative of the respondent.

In case of complex technical questions, however, the respondent is regularly not only dependent on a legal representative, but also asks a private expert of his choice to accompany him during independent proceedings. This regularly applies to construction matters if, for example, the question is about the causality of a defect, the assessment of contributory negligence or if the assessment of costs necessary for remedying the defect is required.

In the context of the duty to compensate costs the question is regularly dealt with as to whether the costs of a private expert are also subject to reimbursement.

Refundability of necessary costs

At first, the Federal Supreme Court (BGH) made it clear in its ruling that in the context of § 494 a Sec. 2 Sent. 1 Code of Civil Procedure (ZPO) only those costs are subject to being refunded that were necessary for an appropriate legal defence, § 91 Sec. 1 Sent. 1 Code of Civil Procedure (ZPO). In order to assess its necessity the point in time is relevant at which the measure causing the costs was initiated.

Exceptional reimbursement for a private expert opinion when being directly related to the lawsuit

In this exceptional case costs eligible to be refunded can imply those costs for getting a private expert opinion, provided they are directly related to the lawsuit.

If the court commissions an expert it is acknowledged, according to the Federal Supreme Court (BGH), that it can be additionally necessary to get a private expert opinion by a non-expert party, if this party is not able to provide proper and factual presentation without expert support.

This includes those cases in which the party is not able to review or challenge the findings of the expert and to practice the right to ask him questions. The party not in command of sufficient knowledge has, according to the Federal Supreme Court (BGH), an acceptable interest in integrating its own expert as early as possible into the hearing of evidence in order to formulate essential evidence-relevant questions, issue information, control the court-appointed expert, and especially to review the facts and their respective results to be determined in the context of a local inspection. In order to assess the necessity of the costs, the filing of the suit after terminating the taking of evidence cannot be taken into account. This would imply an invalid ex-post perspective relating to a circumstance, the occurrence or non-occurrence of which was not foreseeable when the respondent commissioned the expert.

Legitimate interest of the respondent without expert knowledge in case of specific evidence-relevant questions

With respect to the facts to be specifically assessed by the Federal Supreme Court (BGH), the Federal Supreme Court (BGH) stated that the respondent was, in fact, a globally operating company, having at its disposal a significant number of specialist engineers and conducting technical examinations of offers. However, in the first part the evidence-relevant questions of the applicant specifically referred to the statics of the building inspected by the respondent. Assessing the statics did not belong to the field of activity of the respondent. Therefore it would have been only possible to take liability into consideration, if a structural defect could have been noticed when inspecting the building, to which the second part of the evidence-related questions of the applicant referred. Since the question of recognisability only arose if a structural defect existed, the respondent would have had a vested interest in actively accompanying the evidence proceedings also with respect to the first part of the list of questions. For that it was required to subject the expert opinion submitted together with a petition to an expert evaluation, to integrate the expert into the local inspection and allow him to review the expert opinion provided by the court-appointed expert.

Practical Considerations

Even the costs arising from a private expert opinion can be refundable costs. As far as their scope is concerned, the legal regulations concerning the remuneration of experts, male and female interpreters and translators apply as well as the compensation for male and female lay judges, witnesses and third parties, German Law on Payment and Compensation by Judiciary Authorities (JVEG). The fee for the service of experts is subdivided into various fee groups, § 9 JVEG in connection with attachment 1 JVEG. A privately acting expert is not to be measured by the hourly fees for a court-appointed expert. The question is whether his hourly fees were appropriate and based on local market rates and whether the scope claimed was necessary.

Ralf-Thomas Wittmann

II. EU Procedural Law/Cross border product liability: choice-of-forum clause in the event of cross-border supply chains

On February 7, 2013 (C 543/10) the European Court of Justice has ruled that a choice-of-forum clause in the case of cross-border supply chains within Europe shall only be effective between the contracting parties of the agreement.

Art. 27 of the Regulation (EU) No. 44/2001 of the Council („EuGVVO")

In international supply contracts it serves to ensure legal certainty and it is standard practice to agree on choice-of-forum clauses in favour of a national court. As far as contractual relationships among member states of Europe are concerned, art. 27 of the regulation (EU) No. 44/2001 of the council regarding the competence of a court and the recognition of the enforcement and decision in civil and commercial matters ("EuGVVO") regulates the requirements of a choice-of-forum clause.

Manufacturing defects at refrigerating compressors – production in Italy – Italian intermediary trader – project manager in France – French building insurer

The question arose as to the court competence for product liability claims against a compressor manufacturer in the context of a supply chain within the EU. A developer and real estate manager D had a real estate complex renovated located in Courbevoie near Paris. In the course of work being done refrigerating aggregates were fitted in. These refrigerating aggregates contained compressors produced by the Italian manufacturer R. R did not sell the compressors directly to D, but via two intermediary traders, among them the Italian company C.

In the further construction process the air conditioning system did not run properly. An expert opinion concluded that the disturbances resulted from a manufacturing defect of the compressors. The French insurance company A as building insurance covered the damage of D. Due to the applicable provisions of the French insurance law the claims of D against the damaging party were passed on to A. Therefore, A, for reasons of transferred rights, claimed compensation from the Italian manufacturer, amongst others, before French courts. R contested the competence of the French court and was of the opinion that the choice-of-forum clause also applied to A, which R concluded with C and which defined the competence of Italian courts.

Subrogation in favour of the insurance – customer-/manufacturer lawsuit in France

The question about competence was fought right up to the French court of cassation ("Cour de Cassation"). The court of cassation found it necessary to bring the matter before the European Court of Justice. Background to this is the regulation of art. 267 of the Treaty on the Functioning of the European Union (AEUV). According to this, a national court has the possbility if within the context of legal proceedings before a court of a member state of the European Union a question of interpretation arises concerning the so-called primary or secondary law of the European Union, to bring the question before the European Court of Justice (EuGH) to give a ruling thereon (a so-called preliminary ruling).

Prelimary ruling by the European Court of Justice

In this specific case the Cour de Cassation asked the EuGH in the context of preliminary ruling proceedings to answer the question whether within a supply chain within the European Union a later purchaser had to accept to be confronted with a choice-of-forum clause included in the contract between the manufacturer and the first purchaser (trader).

No effectiveness of a choice-of-forum clause towards a third party not involved

The EuGH has noted that in principle the choice-of-forum clause has only an effect on the relationship between those parties that signed the contract. Prerequisite for the fact that the choice-of-forum clause is also binding on a third party is, as a consequence, that this third party actally gave its approval.

There was no contractual relationship between the real estate developer and the manufacturer. Therefore, according to the EuGH it cannot be assumed that the parties of the lawsuit had agreed on the court defined in the original contract between the manufacturer and the first trader as competent court within the meaning of art. 23 EuGVVO.

No reference to national law

In doing so, The EuGH stated more precisely that a reference to national law for judging whether the later purchaser (developer D) could be confronted with the choice-of-forum clause, was not permissible. Otherwise deviating solutions would arise in the various member states. These, however, opposed the objective of the EuGVVO to create a harmonisation of regulations about the competence of courts. Furthermore, such a reference to national law would trigger uncertainties. This, in fact, would contradict the objective of ensuring the foreseeability in the area of court competence.

Practical Considerations

The new version of the EuGVVO will come into force on January 10, 2015. Among other things, this will provide reforms with respect to the question of choice-of-forum clauses (comp. Newsletter 01/2013, p. 3).

Ralf-Thomas Wittmann

Events

May 16, 2013
Basics of Landlord and Tenant Law for Retail Real Estate,
Intensive Studies Retail Real Estate, IREBS
in Eltville
Speaker: Rechtsanwalt Dr. Rainer Burbulla
Partner, Grooterhorst & Partner Rechtsanwälte

May 22, 2013
Current Rulings in Commercial Landlord and Tenant Law und Impacts of the Landlord and Tenant Law Reform Act, Düsseldorfer AnwaltService
in Düsseldorf
Speaker: Rechtsanwalt Dr. Rainer Burbulla
Partner, Grooterhorst & Partner Rechtsanwälte

May 23, 2013
Trade Dialogue Lower Saxony: Without Risks or Side-Effects?
Current News from Jurisdiction
in Lüneburg
Speaker: Rechtsanwalt Dr. Johannes Grooterhorst
Partner, Grooterhorst & Partner Rechtsanwälte

July 2, 2013
Annual Legal Summit for the Real Estate Industry
Forum „Mediation – The Alternative Way of Conflict Resolution“
in Düsseldorf
Speaker: Dr. Ursula Grooterhorst, Rechtsanwältin and Mediator
Grooterhorst & Partner Rechtsanwälte

August 27/28, 2013
IIR – Legal Knowledge Real Estate
Commercial Landlord and Tenant Law
in Bad Nauheim
Speaker: Rechtsanwalt Dr. Rainer Burbulla
Partner, Grooterhorst & Partner Rechtsanwälte

August 29, 2013
Seminar on behalf of the evolution of retail
Web versus Pag – How do the clients, the companier and the municipalher react?
Host: GMA Gesellschaft für Markt- und Absatzforschung mbH,
Grooterhorst & Partner Rechtsanwälte
Speaker: Dr. Johannes Grooterhorst, Rechtsanwalt / Partner,
Marc Christian Schwencke, Rechtsanwalt / Partner
Grooterhorst & Partner Rechtsanwälte

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