NEWSLETTER 02/2014

Dear readers,

Our early summer newsletter informs you about new legal developments which support you in your daily work.

In commercial and company law the law of compliance plays a role to which ever more attention is being paid.

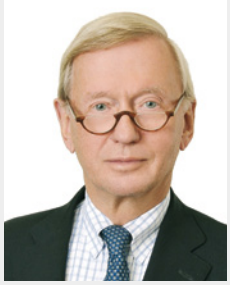
The most current topic is represented by the effects of the new version of the Energy Saving Ordinance (EnEV) on real estate contracts and applicable with effect from May 1, 2014.

The private as well as the public real estate law again contributes numerous topics: liability questions in the case of deviations from building permit and construction planning; construction worker debt-securing mortgage; and the recurring written form problems concerning rental agreements, for example, when adjusting advance payments of operating costs and when announcing index-related rent increases.

Other topics are taken from public planning law, insurance law, labour law and (European) procedural law.

I wish you some stimulating reading.

Yours
Dr. Johannes Grooterhorst



Dr. Detlef Brümmer

Current News

I. With effect from May 1, 2014: The new Energy Saving Ordinance (EnEV) – considerable effects on real estate contracts – contrary to the legislative objective

By way of the law of July 4, 2013 (Federal Law Gazette (BGBl) I 2197) the legislator established a new legal basis for the "saving of energy in buildings "(Energy Saving Act) (EnEG)). The second ordinance for amending the Energy Saving Ordinance of November 18, 2013 (Federal Law Gazette (BGBl) I, p. 3951) is based on this. Pursuant to the (mere) amendment ordinance comprising 40 pages it will come into force on May 1, 2014 or on May 1, 2015 (new version of the regulatory offences regulation in § 27 Sec. 2 of the ordinance) respectively. The amendment ordinance itself covers 108 pages according to the printed matter 113/13 of the Federal Council of February 8, 2013. For that reason the Federal Council (Bundesrat) deemed it necessary in its decision by consensus to provide the information that the complexity of the legislative activities threatened to turn the objective of energy saving into its opposite.

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II. Important amendment for the real estate industry – Duty of information for public advertisements

§ 16 a Energy Saving Ordinance (EnEV) –compulsory statements when made public

One of the central parts of the new ordinance is § 16 a Energy Saving Ordinance (EnEV). Sellers, landlords, lessors and leasing providers have to provide mandatory statements when displaying advertisements in "commercial media" (in case an energy performance certificate (Energieausweis) is available that has to be available). This applies in an individually differentiated manner to buildings (irrespective of the type), flats and miscellaneously independent utilization units.

Scope of information

Amongst other things the following information has to include

- the value of energy need of the building or its final energy consumption as specified in the energy performance certificate,
- the principal source of energy for the heating system of the building as specified in the energy performance certificate,
- in case of residential buildings the year of construction as specified in the energy performance certificate and
- in case of residential buildings the energy efficiency rating as specified in the energy performance certificate,
- in case of non-residential buildings as compulsory statement the energy requirement or the final energy consumption both for heating as well as for electricity, but each specified individually

Energy performance certificates

Interim regulations apply to those energy performance certificates issued prior to October 1, 2007 as well as to those energy performance certificates (Energieausweis) issued subsequent to September 30, 2007 and prior to May 1, 2014 (§29 Sec. 1 or Sec. 2 new version respectively).

A presentation of the manifold legal, economic and technical regulations is dispensed with in this overview: The consequences under contract law are of particular importance for the real estate industry and its drafting of contracts.

III. Effects on real estate contracts (Contract Law)

Legislators and regulators have made their life easy – as it is so often the case: Today it is part of legislation marketing to use (to invent) euphemistic and belittling headlines or those that conceal the political objective. At first the legislator and the regulator intend to gain acceptance as quietly as possible among members of parliament (who do not always understand the details to the full) and finally among citizens.

For that reason the following is stated in the explanation regarding the draft version to be submitted to the Federal Council of February 8, 2013 (printed matter 113/13) in the middle of a statement concerning the new § 16 a (mandatory information in real estate advertisements) covering several pages:

No consequences under civil law?

"Effects under civil law in rental and purchasing contracts are not intended to be substantiated by § 16 a".

This formulation of the ordinance is supported by the regulation in § 5 a EnEG which was already made part of the revised Energy Saving Act (EnEG) in 2013, and the last sentence of which is as follows:

"Only information?"

"The certificates pursuant to the Energy Saving Act (EnEG) and the information resulting from the energy performance certicates (Energieausweis), which have to be stated in real estate advertisements in commercial media due to a regulation pursuant to Sent. 2 No. 6, only serve the purpose of providing information."

Unfortunately, the real estate industry is not content with this rather political objective of the legislator and regulator. It has to consider and it has to prepare itself for the fact that the new duty of information pursuant to § 16 a Energy Saving Ordinance (EnEV) may have legal effects concerning purchasing and rental contracts. The basis of those contracts is the German Civil Code (BGB). An ordinance could, of course, by no means amend statute law – which is higher in rank. The regulator possibly intended to say "only for information purposes" – following the revised law – that the regulation "shall" actually not amend the law (comp. wording of the passage in the text).

Compulsory statements as quality agreements pursuant to § 434 German Civil Code (BGB)

A decisive and principle regulation for real estate purchasing contracts is § 434 German Civil Code (BGB). Pursuant to the basic rule of § 434 Sec. 1 Sent. 1 German Civl Code (BGB) it depends on the "agreed quality". The existence of it renders the purchased item free from defects. In the event a quality has not been agreed, it depends on the customary quality or the one to be expected (§ 434 Sec. 1 Sent. 2 No. 2 Germann Cvil Code (BGB))) or on the presupposed use according to the contract (§ 434 Sec. 1 Sent. 2 No. 1 German Civil Code (BGB)). Sedes materieae for the new duty of information and its consequences when breaching it is § 434 Sec. 1 Sent. 3. According to that, quality also comprises those properties "the purchaser can expect following the public statements of the seller… in particular in the context of advertising or when denominating specific properties of the item". The version of § 16 a Energy Saving Ordinance (EnEV) applicable as of May 1, 2014 states what the purchaser can expext: The aforementioned detailed presentation of the energy data as specified in the energy performance certificate (comp. above II.).

In spite of the political declaration about the "mere informational effect" of the energy performance certificate and of the statements to be made in the public statement, the seller has to expect that this public information requested of him are assessed as quality information for which he has to be made liable in the event of incorrect information as is the case with other quality defects.

Another consideration would have been possible if the legislator had already expressed in the Energy Saving Act that such information would not be considered as information on quality, that they are not deemed as information on quality in the meaning of § 434 German Civil Code (BGB).

Since this has not happened the real estate industry has to face the risk that civil courts will judge the information specified in the energy performance certificate (Energieausweis) as basis for liability (quality information) in spite of the wording of the law and the ordinance.

Practical considerations: Negative quality agreement – ensuring an individual agreement.

Buyer and Seller are interested in not jeopardizing the negotiated contract structure through liability risks. For that reason, they are both well-advised to protect their price-performance ratio as well as the contractual apportionment of risk against the new risks of a quality regulation that comes as a surprise to them by means of a careful and individually negotiated quality agreement (clause – no General Terms and Conditions!). They should no longer rely on the legislative mere information programme of the Energy Saving Ordinance (EnEV) as of May 1, 2014.

Dr. Detlef Brümmer
Of Counsel

B. Commercial and Company Law

I. Stock Corporation Law – Duties of the management board in the area of compliance

Liability of the CFO of Siemens AG

In its ruling of December 10, 2013 the Landgericht Munich I has decided that members of the management board of a public limited company are liable for the establishment, operability and efficiency of a compliance system in a large company. The case ruled on relates to Siemens AG and, personally, to the former CFO.

For the affected board members – who had mostly left the board in the meantime - the problem of a highly – negative – publicity of their case arises in this context and case reviews are partly published with their real names. The question whether the persons affected can take legal action against this, has to be pursued separately due to such cases.

Bribe payments by violating the OECD convention of December 17, 1997

The breaches of duty of the defendant CFO discussed by the Landgericht Munich dated back to the early 2000s. At that time the OECD Convention regulating the fight against corruption as of December 17, 1997 had already been in force: Cross-border bribe payments constituted a violation of law. According to the Landgericht Munich each member of the management board has to ensure that the company is organised and controlled in such a manner that no violations of law take place. Decisive for the scope in the individual case are the type, size and organisation of the company, the regulations to be observed, its geographical presence as well as suspected cases of the past. In the specific case Siemens invoked the fact that the defendant had established a deficient compliance system which he had also controlled insufficiently. The establishment of such a system for the use of corruption payments had to comply with strict standards of due care.

The Landgericht Munich blamed the defendant of the fact that particularly the review of the efficiency of the existing compliance system had been necessary because the management board would have been informed about suspected cases of corruption payments at regular intervals. That had been lacking for the following reasons:

– The defendant and the management board as a whole had not taken care of a clear regulation as to who had been in charge of the overall responsibility for compliance at full board level.

– Furthermore, one would have had to endeavour that the persons commissioned for controlling the compliance benchmarks had been provided with sufficient authority to draw consequences from violations.

– The board member in charge of compliance had to be granted clear rights to issue instructions to the business unit managers. Particularly in the absence of a line of reporting with competences to be derived thereof for disciplinary measures, the management board as well as the defendant should have intervened.

– The duty to establish a functioning compliance system as well as the monitoring of its efficiency affected the full board of management and therefore, in that specific case, the defendant.

– The defendant could not invoke the fact that the full management board had not followed his arguments. He could have brought forward counter-arguments and he should have called in the supervisory board, if necessary.

– Since slight negligence sufficed for the breach of duties of the management board, some fault was attributed to the defendant because of the objective breach of the aforementioned duties.

Practical considerations: Questions under procedural law

As far as court proceedings were concerned it was remarkable that the defendant in persona (not as member of the management board of Siemens AG!) had to take the responsibility concerning the knowledge about the Siemens organisation. It represented his own perceptions to which the defendant board member had to take a stand. Otherwise the proposal of the applicant company was deemed granted (§ 138 Sec. 4 Code of Civil Procedure (ZPO). In that case it had to be examined whether these principles could have also applied if the board member had been sued as a private person. Apart from that, the Landgericht of the defendant referred to his entitlement to information against the AG.

Assessment ex post?

The defendant had tried to exonerate himself by means of the fact that at the time of the violation the term “compliance” had not yet been established. The Landgericht did not attribute any significance to that circumstance. One has to ask whether the perspective could be consistent with the due ex-ante perspective of the court.

Or ex ante?

Actually the Landgericht Düsseldorf obviously decided in the opposite direction in the Apo-Bank ruling of April 24, 2014 (FAZ of April 26, 2014). The defendant members of the board management had weighed up the decision-making basics of the investments with due care. The massive decline in prices, which occurred later, regarding assets accredited with the highest rating until then was not to be expected, even in the event of the most diligent review.

All depends on the individual case!

Dr. Johannes Grooterhorst

II. Private limited companies law - § 40 Sec. 2 Private Limited Companies Act (GmbHG) – Effectiveness of submitting a list of shareholders at the commercial register by a foreign notary in charge of the notarisation

In its ruling of December 17, 2013 (Az.: II ZB 6/13) the Federal Supreme Court (BGH) has ruled that the submission of a list of shareholders by a foreign notary pursuant to § 40 Sec. 2 Private Limited Companies Act (GmbHG) is actually valid if the notarisation which took place abroad is an equivalent to the notarisation attested by a German notary.

Notarisation of a change of shareholders at a German private limited company (GmbH) by a notary in Basel/Swizerland

A notary located in Basel/Switzerland had notarised a change of shareholders of a German private limited company (GmbH) and had submitted the updated list of shareholders at the registry court. The registry court refused to enter the list of shareholders in the commercial register, because the submission made by a foreign notary did not comply with the requirements of § 40 Sec. 2 Private Limited Companies Act (GmbHG). While the Oberlandesgericht Munich has confirmed the refusal, the Federal Supreme Court (BGH) has annulled that decision and obliged the registry court to include the list of shareholders.

Effects of the German Act to Modernise the Law on Private Limited Companies and Combat Abuses (MoMiG)

When any changes are made to the persons of the shareholders the managing directors have to submit an updated list of shareholders pursuant to § 40 Sec. 1 Private Limited Companies Act (GmbHG). The notary in charge of the notarisation of a fair change hat to submit this list at the registry court according to § 40 Sec. 2 Private Limited Companies Act (GmbHG). Prior to the coming into effect of the German Act to Modernise the Law on Private Limited Companies and Combat Abuses (MoMiG) it was approved that even foreign notaries were able to notarising and submitting the list of shareholders if their activity was comparable to that of a German notary. Subsequent to the law reform various – and in part contradictory – court rulings resulted in a substantial uncertainty as to whether a notarisation effected abroad could still be made with legal effect.

Equivalence of the notarisation

The Federal Supreme Court (BGH) has confirmed the old legal position by way of its current ruling: A notarisation abroad is valid if it is deemed an equivalent to a notarisation attested by a German notary. This is indeed the case with the notary registered in Basel/Switzerland. Whether this applies to notaries in all cantons in Switzerland, and to which other foreign notaries, has not yet been finally decided.

Practical considerations

The ruling of the Federal Supreme Court (BGH) has ensured legal certainty: In the event of foreign notarisations it has, to be ensured that this notarisation is deemed an equivalent to the notarisation of a German notary. As a matter of fact, in case of an ineffective notarisation or submission of a shareholder list the new shareholder is - pursuant to § 16 Sec. 1 Private Limited Companies Act (GmbHG) – not deemed a shareholder regarding the company and he is, therefore, also not able to exercise any shareholder rights.

Jörg Looman

Jörg Looman
Rechtsanwalt

C. Real Estate Law

Ralf-Thomas Wittmann
Partner

I. Private Building Law – Liability of the architect -: No joint and several liability without a causal contribution – Implementation planning deviating from approval planning

In its ruling of September 30, 2013 (7 U 32/13) the OLG Cologne has found that an incorrect approval planning does not have a relevant impact on the implementation planning.

The client commissioned architect A with the approval planning for, amongst other things, an underground car park, a further architect B with the implementation planning and a general contractor C with the turnkey construction.

Incorrect approval planning

In the context of independent proceedings for the taking of evidence initiated by the client it became clear that according to the expert the approval planning was incorrect, because the tractrix curve as well as the ramp of the underground car park did not comply with the Car Park Ordinance of North-Rhine Westphalia (GarVO-NW). The approval planning intended a length of 11,31 m.

Deviating implementation planning and implementation

The implementation planning of B, however, intended a continuous ramp passing around a curve with a length of 11,11 m. The actual implementation of the access built by C was carried out according to the implementation planning.

The client was of the opinion that architect A, architect B and the general contractor C are to be made jointly and severally liable.

The OLG Cologne has developed different opinion: For the Oberlandesgericht it was irrelevant whether the approval planning was incorrect and whether it violated the Car Park Ordinance of North-Rhine Westphalia (GarVO-NW). Actually according to the experts, there is a lack of a necessary causality between the approval planning on the one side and the damage that occurred in the form of the flawed implementation of the underground car park access on the other side. The approval planning did not have an impact on the subsequent implementation planning and on the defective implementation of the access that resulted hereof.

The court held that a mere comparison between the approval planning and the implementation planning demonstrated that there were substantial differences between both plannings and that the implementation planning in particular constituted a new planning concept. That alone triggered the damage in the form of a defective implementation.

Practical considerations

The case of the OLG Cologne shows that the division of approval planning on the one side and implementation planning on the other side between various architects gives rise, at least from the perspective of the building owner, to risks and unpredictabilities regarding the liability of the parties involved in the development if the implementation planning deviates from the approval planning.

In this case the building owner can only indemnify himself among the planners against the architect who established the implementation planning.

Ralf-Thomas Wittmann

II. Private Building Law – Construction contract (Bauhandwerkervertrag) / Guarantee mortgage (Bauhandwerkersicherungshypothek): § 648 a German Civil Code (BGB) – client and property owner not identical

Difference between client and property owner (transferor of title to property for the purpose of security)

The Landgericht Berlin (ruling of July 17, 2013 – 28 O 275/13) has ruled that the registration of a priority notice for securing a construction worker guarantee mortgage (Bauhandwerkersicherungshypothek) pursuant to § 648 a German Civil Code (BGB) may also be possible if the client and the property owner are legally not identical.

Pursuant to § 648 Sec. 1 Sent. 1 German Civil Code (BGB) the contractor of a construction or of a single part of a construction is entitled to demand the granting of a construction worker guarantee mortgage on the building plot of the orderer. In order to secure the right of registration of the construction worker guarantee mortgage the contractor can file an application for a temporary injunction aimed at the registration of a priority notice pursuant to § 885 Sec. 1 Sent. 1 German Civil Code (BGB), § 935 Code of Civil Procedure (ZPO).

It is not uncommon that contractors face the problem that the client and thus the contracting partner of a contract for works and the property owner are not legally identical.

In that case a private limited company (GmbH) was the client, the registered owner of the plot of land, was a natural person who – at the time of commissioning – had been managing director as well as majority shareholder of the company owning the property at that time.

Economic advantage of the property owner due to construction work

Nonetheless, the Landgericht has issued the desired temporary injunction. It was decisive for the Landgericht that the construction work had ultimately not been carried out for the client, but the economic value of the construction work proved advantageous to the property owner.

Practical considerations

It was already in 1987 that the Federal Supreme Court (BGH) has ruled that the property owner had to accept to be treated like an orderer depending on the individual case and in good faith pursuant to § 242 German Civil Code (BGB) if and when the contractor sought to satisfy claims from the plot of land regarding cost for work he was entitled to (Federal Supreme Court, ruling of October 22, 1987 – VII ZR 12/87).

However it is insufficient that the property owner economically dominates the orderer. This would dilute the lacking legal identity between the legal entity on and its shareholders.

The situation, however, is different, as in the Berlin case, if it is the registered owner who economically benefits from the construction work. It is a comparable case if the owner uses a tenant without assets as client as a pretext (OLG Düsseldorf, ruling of February 25, 1993 – 5 U 162/92).

Ralf-Thomas Wittmann

D. Commercial Landlord and Tenant Law

I. Landlord rights of the property buyer prior to transfer of ownership

Purchase agreement regarding a property with a rented flat

In its ruling of March 19, 2014 (VII ZR 203/13) the Federal Supreme Court (BGH) has arrived at the conclusion that the landlord is entitled to authorize the purchaser already prior to the transfer of ownership to assert the rights of the landlord in his own name. It is not necessary to disclose the authorization regarding the effectiveness of the legal transaction made on the basis of the authorization.

Contractual rights of the property purchaser prior to the transfer of ownership

The ruling is based on the following facts: The landlord (seller) and the purchaser concluded a notarial purchase agreement for a property to which the rented flat formed part. The purchase agreement entitled the purchaser to issue towards the tenants, immediately and until the complete transfer of ownership in the land register, all statements under landlord and tenant law and to conduct respective legal proceedings in his/her own name. Prior to the transfer of ownership in the land register the purchaser addressed the request of a rent increase to the tenant, which the tenant accepted without requiring any authorization. Subsequently the tenant demanded his rent back because the purchaser (and later acquirer) had only pretended to be in the position of a landlord. The action remained unsuccessful.

Difference between authorization (Ermächtigung) (§ 185 German Civil Code (BGB)) and power of attorney (Vollmacht) (§ 166 Sec. 2 German Civil Code (BGB))

Since the clause in the notarial purchase agreement had granted the purchaser the right for taking action in his/her own name, the Federal Supreme Court (BGH) has assumed an authorization (Ermächtigung) (§ 185 German Civil Code (BGB)) and not a power of attorney (Vollmacht). The holder of rights can principally authorize a third party to assert dependent rights to alter a legal relationship in his/her own name. The purchasers automatic move into the position of the landlord and the transfer of ownership pursuant to § 566 German Civil Code (BGB) did not exclude the prior authorization of the acquirer to assert claims in his/her own name.

No duty to disclose

It was not necessary for the effectiveness of statements made by the authorized person to disclose the authorization. If claims were made against the tenant from a person other than the original landlord, he was entitled to first of all be provided with the evidence of authorization if he doubted that a power of attorney or an authorization existed or a transfer of rights pursuant to § 566 German Civil Code (BGB) had taken place. Thus the tenant was sufficiently protected.

Practical considerations

The ruling of the Federal Supreme Court (BGH) has been delivered for a rental contract of a flat. It identically applies to cases of commercial tenancies which exist more often: If a third party that is not the original landlord exercises rights to alter a legal relationship (for example, termination), without providing evidence of authorization the tenant is entitled to immediately reject the statement. If the tenant rejects the statement immediately, the third party is entitled to repeat the statement together with the respective evidence (an original document of the authorization is necessary – a possibly certified copy – does not suffice!); however only this second statement "counts" for instance with reference to the compliance of specific deadlines to be met.

Leonie Munz

Leonie Munz
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Dr. Moritz Ulrich
Rechtsanwalt

II. Content of fulfilment obligations of the landlord – No entitlement of the tenant to the modernisation of a heating system – working in accordance with the contract –

In its ruling of December 18, 2013 – XII ZR 80/12 the Federal Supreme Court (BGH) has made it clear that in case of a commercial tenancy ("at least in that present case") there is no entitlement of the tenant to the modernisation of an existing - uneconomical but flawless - heating system which corresponds to the contractual agreements.

Comprehensively refurbished commercial real estate with an unmodified distance heating system – contractually agreed and actually reaching heating output

The plaintiff requested from the defendant outstanding rent. The parties had signed a rental agreement for commercial premises regarding an older building, which had been comprehensively refurbished by the plaintiff prior to being taken over. The existing district heating system, which could only be regulated centrally, as well as the existing ventilation system remained unchanged. The parties made the building specification of the landlord content of the rental agreement. As far as the heating system was concerned, it had been regulated that the supply air should be centrally heated during the heating period up to an outside temperature of approx. 18 degrees Celsius and should be made available in the rental area. Furthermore the landlord was supposed to provide a separate connection for the supply of the communal areas and of the offices in order to reach a room temperature in those rooms of up to 21 degrees Celsius. The systems complied with those requirements. The defendant reduced the rent by arguing that the heating and ventilation system was oversized with respect to the low public traffic on the premises and could not be adjusted according to demand: they could not be operated economically.

No entitlement to modernisation without agreement

The Federal Supreme Court (BGH) has stated: The rental object was not defective within the meaning of § 536 German Civil Code (BGB). Allthough the rental contract did not refer to an express agreement concerning the technical equipment of the rental object it contained, however, the kind of information which could be taken into account for interpreting the target condition to be identified.

Decisiveness of technical standard at construction time: no entitlement to claims from § 535 Sec. 1 Sent. 2 German Civil Code (BGB) or § 536 Sec. 3 Sent. 1 German Civil Code (BGB)

The inefficiency of operating the heating and ventilation system did not result in a defect of the rental object. It corresponded to the decisive technical standard at the time the building had been built and it operated free from defects. If the non-economical operation of the heating system existing upon completion of contract resulted in a defect, as represented in parts of the literature, the landlord would be required to technically change the system to (§ 535 Sec. 1 Sent. 2 German Civil Code (BGB)). However, the law did not provide such a duty of modernisation. The efficiency principle anchored in the residential landlord and tenant law in § 556 Sec.3 Sent. 1 German Civil Code (BGB) did not lead to any other result either.

Practical considerations

Decisive for assessing the technical standard of a rental object are the norms applicable at the time when the building was built. However, even in case of older buildings the technical standards applicable upon completion of the rental agreement can be decisive for assessing the defectiveness if – other than in the present case – the landlord carried out structural alterations on the rental object which were comparable to a new building or to a substantial modification of the building (Federal Supreme Court (BGH), ruling of June 5, 2013 – VIII ZR 287/12).

From the perspective of the landlord particular attention should be paid to the information provided thus interpreting the target condition which forms part of the rental agreement in order to be able to successfully counter demands for reduction occurring at a later stage.

Dr. Moritz Ulrich

III. Written Form Requirement – valid unilateral adjustment of advance payments of operating costs by the General Terms and Conditions

On February 5, 2014 (XII ZR 65/13) the Federal Supreme Court (BGH) has ruled that the contracting parties can - with respect to the rent for commercial premises – effectively agree in General Terms and Conditions the landlord's right, by means of a unilateral statement to adjust the amount of the operating costs advance payment subsequent to the operating cost statement. Exercising this right of adjustment is not subject to the written form requirement as set forth in § 550 Sent. 1 German Civil Code (BGB).

Unilateral adjustment, as per contract, of the advance payments of operating costs by the General Terms and Conditions

The parties had agreed to an amount of € 2,061.90 as monthly net advance payment for the incidental rental costs incurring. As far as the amount of the advance payments of service charges was concerned § 5 Clause 1 of the rental agreement specified: "Potential credits or subsequent claims resulting from an advance payment of incidental costs have to be mutually balanced with immediate effect. In these cases as well as in case of an increase or a reduction of the incidental costs the landlord is entitled to newly determine the advance payment to be made on a monthly basis." Since the incidental costs statement of 2005 resulted in a subsequent claim of a net amount of approximately € 5,200.00 the landlord informed the tenant in writing that an adjustment of the advance payments of incidental costs became necessary and that the advance payments of incidental costs had to be increased to a monthly amount of 3,391.47 as of August 2007. Subsequently the tenant paid that amount. In March 2009 the tenant terminated the rental agreement by invoking a violation of the written form, amongst other things, because the increase of advance payments of operating costs did not observe the written form of § 550 German Civil Code (BGB).

No violation of the written form clause

No interference with the protective purpose of § 550 German Civil Code (BGB)

The Federal Supreme Court (BGH) has negated the possibility of termination. The increase of the advance payments of operating costs did not lead to a violation of the written form requirement. The regulation provided for in § 5 of the rental agreement granted the lessor the right to newly determine the amount of the advance payments in the event of subsequent claims. This agreement corresponded in its meaning with § 560 Sec. 4 German Civil Code (BGB), a paragraph only applicable to residential tenancies. Whereas the landlord is entitled to adjust advance payments by a unilaterial statement in text form (§ 126 b German Civil Code) without requiring the approval of the other party. In line with this, § 5 of the rental agreement provided that the landlord's right to demand an adjustment of the advance payment by way of a unilateral statement. The contracting parties actually acted accordingly: The landlord informed the tenant about the higher amount of the advance payment to be paid as of August 2007 and the tenant followed that request without requiring further statements. There were no opposing legal grounds if the contracting parties agreed in case of the rent for commercial premises in the General Terms and Conditions that the landlord was entitled to adjust the amount of the advance payments of operating costs by a unilateral statement subsequent to the operating costs statement. That was not opposed by the protective purpose of § 550 German Civil Code (BGB). That paragraph intended to provide clarity for future property acquirers regarding the conditions of a long-term rental agreement. However there were also

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Partner

situations in which a comprehensive "provision of information" was not possible. This applied, for example, to renewals of rental agreements due to exercising the option right. In that case the acquirer would be sufficiently warned due to the renewal option agreed in the rental contract. Regarding the potential exercise of the option right he would have to gather information from the seller (lessor) or the tenant. The same applied to § 5 of the rental agreement. In that paragraph the need for protection of a property acquirer was taken into account the clause clearly indicated the possibility of a change in the amount of advance payments specified in the contract document.

Practical considerations

The provision of § 560 Sec. 4 German Civil Code does not apply to commercial landlord and tenant law. In order to enable landlords to adjust advance payments of incidental costs, the landlord should expressly provide an adjustment clause in the rental agreement. Such a clause is, according to the Federal Supreme Court (BGH) also possible in a standard form.

Dr. Rainer Burbulla

IV. Written Form – valid unilateral notification of a rent increase due to a change of the consumer price index

In the aforementioned ruling (X II ZR 65/13) the Federal Supreme Court (BGH) has additionally decided that a rent increase based on the index clause regarding rental agreements did not have to observe the written form of § 550 German Civil Code (BGB). That was also not changed by the addendum to the index clause according to which a written notification of the tenant in case of an increase were provided if a purely declaratory character was attributed to it according to the decisive interpretation made by the judges of fact.

Index clause with automatic adjustment

In the rental agreement for commercial premises existing between the parties the amount of the net rent was fixed until December 31, 2008. From January 2009 the agreed index clause in § 7 No. 1 applied. Accordingly, "the agreed rent is subject to change on each January 1 to the same extent as the consumer price index for Germany as a whole had changed either upward or downward and as identified by the German Federal Statistics Office. The adjustment of the respectively changed rent occurred automatically on January 1 of each year by a written notification provided by the landlord. The date of notification did not have any influence on the coming into force of the rent increase." The landlord asserted a rent increase due to an index change and requested the tenant to additionally pay the increased rent. The tenant terminated the rental agreement amongst other things because the rent increase made did not observe the written form of § 550 German Civil Code.

Declaratory effect of the adjustment notification – no need for a supplement

In the opinion of the Federal Supreme Court (BGH) the termination was ineffective. The indexation clause agreed in the rental agreement was effective. According to that clause the adjustment of the rent occurred automatically at the beginning of each year as of 2009. The respective contractual agreement was already part of the original rental agreement and, therefore, complied with the written form requirement of § 550 Sent. 1 German Civil Code (BGB). If the clause provided a written notification of the landlord, that notification would be of a purely declaratory nature and would not result in the fact that the contracting parties had to contractually conclude an index-related rent increase, for example, in an addendum to the rental agreement.

Practical considerations

The Federal Supreme Court (BGH) has expressly confirmed the validity of existing and commonly accepted contractual practice according to which rent increases due to a change of the index principally take place "outside" the rental agreement by way of a separate letter regarding the rent increase.

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E. Public Law

Planning Law – Legal admissibility of a grocery full-range store in a factually mixed area

Dr. Steffen Schleiden
Rechtsanwalt

In its judgement of December 2, 2013 the Oberverwaltungsgericht North-Rhine Westphalia has also declared large-scale grocery full-range stores legally admissible in a factually mixed area.

Large-scale grocery retail business with a sales area of 1.000 m² – no binding land use plan (Bebauungsplan) – central supply area inter-municipally agreed upon

Validity under planning law of large-scale retail trade businesses – 800 m²? 1.200 m²?

The issue was about granting a preliminary notice under planning law for the construction and operation of a grocery retail business with a sales area of 1.000 m². The surrounding environment corresponded to a mixed area. According to the retail trade concept this location was within a central supply area which had been inter-municipally agreed upon. A retail trade expert opinion arrived at the conclusion that significantly less than 10% of loss of purchasing power was to be expected from this project.

Retail trade businesses are principally legally permitted in a factually mixed area pursuant to § 6 Sec. 2 No. 3 in connection with § 34 Federal Land Utilization Ordinance (BauNVO). However, according to § 11 Sec. 3 Sent. 1 No. 2 Federal Land Utilization Ordinance (BauNVO) large-scale retail businesses which not only have an insignificant effect with respect to type, location and extent on the realization of the obejctives of regional development planning and regional planning or on the urban development and order, except in core areas, are only permitted in areas which are special areas for them. Pursuant to the legal presumption of § 11 Sec. 3 Sent. 2 Federal Land Utilization Ordinance (BauNVO) such effects are to be assumed for a floor area of more than 1.200 m². However this regulation can be refuted according to § 11 Sec. 3 Sent. 4 Federal Land Utilization Ordinance (BauNVO) if criteria consisted that impacts in case of more than 1.200 m² floor area do not exist. According to court rulings the limit concerning a large-scale area is regularly assumed to be a sales area of 800 m² and more.

Atypical facts – Undersupply

The Oberverwaltungsgericht North-Rhine Westphalia arrived at the conclusion that the project was considered legally permitted, or that the presumption regulation of § 11 Sec. 3 Sent. 3 Federal Land Utilization Ordinance (BauNVO) did not apply since atypical facts existed. Actually the project was located within a central supply area in which an undersupply of a product range relevant for local supply existed which the plaintiff offered with his/her grocery discount store.

No effects on central supply areas

Furthermore it was a project in which no impacts on the central supply areas within the meaning of § 11 Sec. 3 Sent. 2 Federal Land Utilization Ordinance (BauNVO) needed to be feared. As a matter of fact, according to the existing expert opinion a re-distribution of turnover of significantly less than 10% was to be expected.

Practical considerations

This decision is of major practical importance. It shows that in individual cases even sales areas for centre-relevant product ranges and those relevant to the local supply with more than 800 m² can be permitted outside of core and special areas. As far as this is concerned, it very much depends, however, on the design of the individual case. A crucial factor in this context in particular may well be the fact whether an analysis of the individual case proved that no relevant losses of purchasing power to this project and, therefore, no damaging effects on central supply areas are to be expected by this project.

It remains to be seen how court rulings develop with respect to the legal admissibility of a large-scale retail trade business with a sales area of more than 800 m² outside special areas.

Dr. Steffen Schleiden

F. Insurance Law

I. Public Liability – No. 1.1 General Terms and Conditions of Liability Insurance (AHB) – Loss of Use as financial losses

The OLG Karlsruhe has stated in its ruling of October 31, 2013 (6 U 84/12), that a loss of use was not to be deemed as material damage within the meaning of No. 1.1 of the General Terms and Conditions of Liability Insurance (AHB).

Defective laying of tiles – loss of use due to the removal and re-installing of machinery

The policyholder operating a tile specialist shop layed tiles in the bottling plant of a wine press house. After some time the tiles became loose. It was indisputable that those tiles had been layed in a defective manner and, in order to remedy the defect, that the entire flooring had to be renewed. However, this could only be carried out by removing the wine press house's machinery in the bottling plant and by re-installing them at a later stage. Against this background of re-installing and removing machinery the wine press house suffered some considerable loss of use.

Subsequently, the policyholder sued his/her public liability insurer for granting insurance cover concerning the costs resulting from the loss of use.

Differentiation of material damager from damage resulting from loss of use (financial losses)

The OLG Karlsruhe has dismissed the case. The subject matter of the insurance cover was persons and material damage pursuant to No. 1.1 General Terms and Conditions of Liability Insurace (AHB). Material damage was damage to objects being owned by a third party (in this case: the wine press house) and which were not at the same time subject matter of the contractual works. According to the opinion of the OLG Karlsruhe such a material damage was, in fact, not the case with respect to the costs incurred for the loss of use of the wine press house. It was rather an issue of mere financial losses within the meaning of the terminology of the terms and conditions of the insurance. Financial losses, however, were only covered by the insurance pursuant to clause 1.1 General Terms and Conditions of Liability Insurance if they resulted from an otherwise related damage to persons or to material. Such an indirect financial loss, however, did not exist as a subject matter of present proceedings.

Practical considerations

The OLG Karlsruhe has approved the appeal against the judgement with reference to the judgement of another OLG: With reference to that judgement the policyholder had argued that the limitation of risks in the event of so-called damage of performance was to be interpreted as a surprising clause within the meaning of § 305 c Sec. 1 German Civil Code (BGB) (Law on General Terms and Conditions) and therefore, ineffective. An appeal has not been lodged.

Ralf-Thomas Wittmann

G. Labour Law

I. Compensation subject to the contract of employment - Reimbursement of detective costs in the event of a termination upon suspicion

In its judgement of September 26, 2013 (8 AZR 1026/12) the Federal Labour Court (BAG) has deemed the costs for a detective of an employer refundable – only – in case of a legally valid termination upon suspicion.

Suspicion subsequent to the first observation made by the detective

Due to the frequent absences from work of the employee the employer commissioned a detective agency. The first observation produced a considerable number of indicators for the fact that the employee was actually not unfit for work. As a result of that the employee was requested to be examined by the medical service of the health insurance, which the employee refused several times. In the month following the employer commissioned the detective agency again to observe the employee. This resulted in the reinforcement of the existing suspicion. In consequence the employer declared a termination upon suspicion and requested to be reimbursed by the employee for both observations. The Arbeitsgericht as well as the Landesarbeitsgericht had admitted the claim only with reference to the second observation. Following the appeal of the employee the Federal Labour Court (BAG) has annulled the ruling and referred the legal dispute back to the Landesarbeitsgericht.

Reinforcement of suspicion subsequent to a new (second) observation – termination upon suspicion and compensation

Prerequisite of a termination upon suspicion

The Federal Labour Court (BAG) reconfirmed in its reasons for the decision the validity of so-called terminations upon suspicion: The suspicion that the employee could have committed an offence or a serious violation of duty might constitute an important reason for an extraordinary termination. This suspicion had to be justified objectively by facts being of such a nature that that they prompted a reasonably and judiciously assessing employer to declare termination. The suspicion concerning a breach of contractually agreed principal and secondary obligations was decisive for this as well as the loss of trust thus connected to it.

Reimbursement of detective costs not only in the event of the suspicion being confirmed, but in case of a valid termination upon suspicion

Until today court rulings have only decided that detective costs have to be reimbursed upon a confirmation of suspicion. In the present case it was not possible to finally clarify whether the employee was actually unfit for work; however, quite substantial indicators supported that assumption. For that reason the Federal Labour Court (BAG) extended its ruling concerning the reimbursement of detective costs to those cases in which a termination upon suspicion had been declared with due effect. The duty of reimbursing the detective costs can now also be taken into consideration if the facts established result in such a serious suspicion of a breach of contractual obligations that due to that a termination upon suspicion based on those facts has to be deemed justified. A further prerequisite for the duty of reimbursement is that a reasonably and economically thinking employer, given the circumstances of the individual case, deemed the costs for the elimination of this irritation not only appropriate but, moreover, also necessary.

The Federal Labour Court (BAG) has, therefore, taken the costs for the second observation as based on sufficiently substantiated elements of suspicion because the first observation established those substantiated assumptions.

In order to further establish the facts of the case the Federal Labour Court (BAG) has referred the decision of the Landesarbeitsgericht again.

Practical Considerations

The Federal Labour Court (BAG) has confirmed and extended its established court rulings with that decision. It is a prerequisite for a duty to reimburse detective costs that an already existing suspicion is confirmed by means of the observation. However, it is insufficient for the reimbursement of costs that moments of suspicion only come into being by way of the observation.

Jörg Looman

II. German Federal Holiday Act (BUrlG) – Entitlement to holiday in case of unpaid special leave

In its ruling of May 6, 2014 (9 AZR 678/12) the Federal Labour Court (BAG) has added a further chapter to the ever popular topic under labour law "entitlement to holiday".

The plaintiff was employed at the defendant as a nurse. In the period between January 1, 2011 and the termination of her employment contract on September 30, 2011 the plaintiff had some unpaid special leave and did not work for the defendant during that time. After the termination of employment the plaintiff requested a compension of 15 days of holiday resulting from the calendar year 2011. Whilst the Arbeitsgericht had dismissed the action, the Landesarbeitsgericht as well as the Federal Labour Court (BAG) have admitted the claim.

Entitlement to holiday for an existing employment even without actual work performed

The Federal Labour Court (BAG) stated in its ruling that according to §4 German Federal Holiday Act (BUrlG) only the existence of an employment contract was relevant to the entitlement to holiday to arise. Whether the employee actually rendered any work was insignificant according to statutory regulations. The statutory entitlement to holiday did not constitute a consideration of the employer for a performance of work rendered or still to be rendered, but a statutory obligation of the employer resulting from the employment contract to exempt the employee for the duration of his/her holidays from the duty to work. The agreement regulating some unpaid special leave left the legal validity of the employment contract unaffected and did, therefore, not counter the claim arising from § 1 German Federal Holiday Act (BUrlG).

No analogous application of special-law regulations to the German Federal Holiday Act (BUrlG)

In fact, some special-law regulations partly provided the possibility of shortening the holidays as, for example, for parental leave or military service. However, an analogous application to other facts and circumstances could not be taken into consideration due to the exceptional nature of the special-law regulations.

For that reason the employer had the duty to satisfy the entitlement to holiday of the employee with pecuniary means.

Practical considerations

This ruling will not exactly encourage the willingness of employers to grant unpaid special leave. Since the Federal Labour Court (BAG) has made it clear that the entitlement to holiday is pursuant to § 13 German Federal Holiday Act (BUrlG) indispensable, a contractual waiver of the employee to holidays being granted may be considered ineffective. The employer should, therefore, pay attention when granting unpaid special leave that the employment contract will not be terminated directly subsequent to that special leave.

Jörg Looman

H. Conducting Legal Proceedings and Mediation

Place of Jurisdiction – EU-Law – Brussels I Regulation – Product liability (Austria /Germany)

The European Court of Justice (EuGH) has ruled in its judgement of January 16, 2014 (C-45/13) that the place of the event causing the damage within the meaning of Art. 5 No. 3 Brussels I Regulation constituted the place where the respective (defective) product was made. The place of the event causing the damage was not the place where the product was handed over to the end user or to the reseller.

Purchase of a bicycle by a German in Austria
Accident resulting from defects in Germany
Malicious action at product liability place of production

The purchaser of a bicycle had an accident. The bicycle was produced in Germany. The purchaser/plaintiff bought it at an Austrian distributor in Austria. The bicycle tour, which resulted in the accident, took place in Germany.

The instances called upon in Austria have deemed themselves internationally not competent. The Oberste Gerichtshof in Austria has submitted the question to the European Court of Justice (EuGH) for a preliminary ruling. Decisive for the dispute was the norm of Art. 5 No. 3 of the so-called Brussels I Regulation: in the case of an unlawful act the plaintiff is entitled to take legal action before the court of that place where the damaging event occurred. The European Court of Justice (EuGH), therefore, had to rule on the question as to which was the place of the event causing the damage in the case of product liability. In its judgement the European Court of Justice (EuGH) has ruled, that with respect to product liability it were the place where the product had been produced. It were irrelevant at which place the product had been passed on to the end user or to the reseller.

Practical considerations
Significance of the preliminary ruling

According to that ruling, it was not the Austrian court (registered office of the seller) but the German court (registered office of the German producer of the bicycle) that was competent. According to Art. 267 of the Treaty on the Functioning of the European Union (AEUV) the European Court of Justice (EuGH) rules upon the submission or invocation of a member state by means of a so-called preliminary ruling, amongst other things, on the interpretation of the legal acts of the Union's institutions (here: Brussels I Regulation). The rulings of the European Court of Justice (EuGH) are of a binding nature for the courts of the member states. Preliminary ruling proceedings before the European Court of Justice (EuGH) are intended to ensure the uniformity of the rulings of the courts of the member states with respect to the so-called primary and secondary law of the European Union. Since according to the Oberste Gerichtshof Austria it was not possible to take a clear answer from Art. 5 No. 3 of the Brussels I Regulation, it saw itself compelled to invoke the European Court of Justice (EuGH) when inititating preliminary ruling proceedings.

Ralf-Thomas Wittmann

Events

April 10, 2014

Seminar Science meets Practice -
Current Developments in Product Liability Insurance
- Liability Law and Insurance Law -
Grooterhorst & Partner Rechtsanwälte mbB –
insuralex (GLOBAL INSURANCE LAWYERS GROUP)
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 Ralf-Thomas Wittmann, Partner,
Grooterhorst & Partner Rechtsanwälte mbB

May 15 and 16, 2014

German Shopping Center Forum 2014
in Düsseldorf, Hyatt Regency-Hotel
Revitalising Shopping Centers
Speaker: Rechtsanwalt Dr. Johannes Grooterhorst
Grooterhorst & Partner Rechtsanwälte mbB
Current News about Commercial Landlord and Tenant Law
Speaker: Rechtsanwalt Dr. Rainer Burbulla, Partner
Grooterhorst & Partner Rechtsanwälte mbB

May 28, 2014

„Current Commercial Landlord and Tenant Law – Expressed in a Nutshell“
in Düsseldorf, Fachbuchhandlung Sack, Klosterstraße 22
Speaker: Rechtsanwalt Dr. Rainer Burbulla, Partner
Grooterhorst & Partner Rechtsanwälte mbB

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

Publications
New Releases

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

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

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