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NEWSLETTER 03/2013

Dear readers,

An EU directive and regulation on alternative and out-of-court dispute resolution gives rise to an overview of legal and contractual regulations on dispute resolution in civil engineering. With effect from July 22, 2013, capital investments of all sorts have their own code of law, the so-called Investment Code ("Kapitalanlagegesetzbuch, KAGB"): the variety of possibilities perceived by the legislator as uncontrolled growth, especially with respect to closed-end funds, has shrunk. Court rulings have tried to clarify legal issues concerning stock corporation law, the law on takeovers, and concerning employment contracts for managaging directors. Some interesting labour law cases as well as insurance contract rulings have to be discussed. As usual, public building law and commercial landlord and tenant law form a focal point of our attention.

Yours
Grooterhorst & Partner Rechtsanwälte

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A. Current News

I. Mechanisms of alternative dispute resolution in the building sector

New EU law: Out-of-court (alternative) dispute resolution (ADR) for consumers

Out-of-court (alternative) dispute resolution is in great demand. Politicians and the legislator aim at strengthening citizens, especially the consumer, with "out-of-court (alternative) dispute resolution" (EU jargon: ADR): they deem the judicial legal proceedings unsatisfactory. In June 2013, the tireless EU legislative machinery passed a regulation on the online settlement of consumer disputes (EU Official Journal L 165, p. 1). On the same day, Parliament and Council took decision No. 529/2013 EU on the alternative resolution of consumer disputes (Official Journal L 165, p. 63). Both refer to the "provision of services" and can, therefore, also involve the relationship between companies and consumers in case of works in the building sector.

Models for companies and entrepreneurs

As far as disputes between companies and entrepreneurs are concerned, these new EU regulations do not apply. Corporate legal conflicts are the focus of disputes between parties involved in a building project. In this case, too, various models of alternative dispute resolution have evolved in practice.

If differences between the parties involved occur in the course of a building project, legal proceedings are often necessary to resolve the dispute. During this period the building site is literally at a standstill in many cases.

Due to the complexity of the cases state court proceedings take several years in most cases, especially if expert opinions have to be rendered. This situation is extremely unsatisfactory for all parties involved. The longer proceedings last, the more the risk of insolvency increases, too, so that even a successful court decision can be of no economic value at the end.

The law and contractual practice offer companies four possibilities of out-of-court (alternative) dispute resolution:

Arbitration Proceedings (Code of Civil Procedure (ZPO))

1. The parties may adopt "classic" arbitration proceedings pursuant to the Code of Civil Procedure (ZPO, §§ 1025 et seq.). In this procedure the parties appoint a specific (number) of arbitrators. In principle, the arbitrators do not need to have any specific qualifications. It stands to reason that they are qualified in terms of the law and/or civil engineering and that they should possess comprehensive experience in handling building projects.

The arbitrators pass comprehensive judgement on the legal dispute both in fact and law. Arbitral awards can be enforced following the rules laid down in the Code of Civil Procedure.

The advantage of arbitration proceedings is that they can be faster than state proceedings. Furthermore, they take place in camera so that there is no fear of a negative impact on the public image.

However, arbitration proceedings can only make binding judgements on past facts. Normally a future-oriented conflict resolution is not possible, which could be of considerable significance in the case of ongoing building projects.

2. Mediation offers future-oriented conflict resolution.

Mediation (Law on Mediation (MediG))

In 2012, the Law on Mediation of July 21, 2012 regulated mediation by law: Supported by a professional third party (mediator) the conflicting parties are trying to find a solution to the conflict by mutual agreement. The mediator does not have any binding decision-making power but only acts in a mediating role.

The advantage of mediation is mainly that the parties solve the conflict themselves and that a third party (arbitrator) does not impose the solution. Consequently, there is often no clear winner or loser so that trustful cooperation continues to be possible which has, in particular, substantial significance in case of ongoing building projects.

Nevertheless, mediation only works if all participants constructively contribute to a solution. If one party refuses to cooperate, mediation is not the appropriate method of conflict resolution.

3. Adjudication proceedings, which have been mainly developed in England in recent years, manifest a further option. Until today, German law has not regulated these proceedings. The parties have to create the basis by means of an agreement.

Adjudication Proceedings (contractual solution)

In adjudication proceedings an independent third party rules on the dispute with a provisional binding effect within a very short period time (generally a few weeks). This is especially helpful if the building project is ongoing and a short-term decision necessary. The parties define the basics and objectives of decision-making in their agreement. Issues can range from a pure discretionary decision to the requirement that the claim has to be based on a high degree of probability.

The adjudicator can be integrated from the very beginning of the building project and can, at regular intervals, discuss the construction process with all parties involved. If any disputes occur, the adjudicator is already familiar with the building project and the decision-making time can be reduced again.

The parties can decide as to whether the adjudication ruling should be reviewed by a state court or by an arbitration court subsequent to the termination of the building project. Experience in England has shown that in most cases the parties have accepted an adjudication ruling and that no subsequent judicial review has become necessary.

The strong position of the adjudicator, who - subject to the design of the code of procedure - only rules at his own equitable discretion, makes the choice of the adjudicator significant for all parties involved.

4. The management of building conflicts

Management of building conflicts (Contractual solution)

The management of building conflicts is based on the understanding that not each and every mechanism of dispute resolution is equally suited for each and every conflict, so that a prior definition of a specific mechanism of dispute resolution does not always prove to be the perfect solution.

In the management of building conflicts the parties initially do not arrange a specific procedure of dispute resolution. Instead, they agree on the occurrence of a conflict – if necessary by consulting a neutral third party – to select the appropriate mechanism of dispute resolution. If a mutually agreed solution for selecting the mechanism of dispute resolution is not possible, it is recommendable that the parties define beforehand the applicable mechanism of dispute resolution. Otherwise state proceedings are the only option possible.

Practical Considerations

The law and contractual practice provide four alternative concepts of dispute resolution. The parties involved in major and complex building projects should, therefore, give some thought already upon the commencement of the building project as to how they can solve frequently unavoidable conflicts.

As far as adjudication proceedings are concerned, it should also be additionally stressed that currently it is being considered whether to make these proceedings part of the German Building Contract Law in the form of mandatory dispute settlement proceedings. The Federal Ministry of Justice has expressend constitutional reservations. Until now, expert opinions have not shared them. Individual legal solutions are permissible in any case. When preparing major building projects it is, therefore, recommendable to negotiate and to agree a solution under private law, for instance on the basis of rules of procedure forms available on the market.

Dr. Johannes Grooterhorst

II. The new Investment Code (Kapitalanlagegesetzbuch, KAGB) – a comprehensive regulation for all colletive investments – the end of all specific laws (even of those newly introduced until 2012) – a contribution to fighting the financial crisis with paragraphs

1. New comprehensive regulation

New law with effect from July 22, 2013

On July 22, 2013 the new Investment Code dating back to July 4, 2013 (BGBl. I, p. 1981) (Federal Legislation Publication) (Kapitalanlagegesetzbuch, KAGB) came into force. In 355 paragraphs the legislator tries to regulate all investments. The Investment Law (InvG) dating from 2004 and comprehensively amended in 2012, which particularly regulated open-end real estate funds, was repealed. The law on the amendment of the law on intermediaries of financial investements and on investments of December 6, 2011, which only came into effect in 2012 and which covers all investments that are not considered securities (BGB1) I, p. 2481), is virtually obsolete and only of importance for old cases.

Previously unfamiliar and unknown legal terms in Germany

In the form of legally implementing the EU directive 2011/61/EU concerning “alternative investment fund managers (AIFM Implementation Act – AIFM UmsG) of July 4, 2013 the legislator intends to create a uniform regulation not only for so-called alternative but also for all types of collective investments. This attempt requires a form and volume of conceptualization that is characterized by a high degree of abstract definitions. The legislator has intended to facilitate this task by adopting the EU language that stems from English financial terms and from French ideas concerning legal organisations in the German language, which in fact annoys German lawyers for reasons of blindness to tradition, neglect of the language and of a Europe-focussed attitude: “It enriches” the German legal landscape with the invention of

unknown, non-defined and, therefore, by all means problematic, legal institutions also from a constitutional Point of view.

Financial institutions and companies on the financial markets have to review and organize their positions and activities anew.

This is what the law regulates: collective capital investments. Over the last decades the term "capital investment law" has evolved in Germany covering all related factual and legal issues. In other laws the legislator also applies the term "investments" (comp. VermAnlG of December 2, 2011, which is now almost irrelevant). German legal terminology also knew the "Denglish" term "Investment Fonds" (comp. the now repealed Investment Law (InvG) which had been most recently completely amended in 2011/2012).

The legal field of collective investment law comprised organised investments "round the stock exchange" as well as a variety of products on the so-called "free" or " non-organised" capital markets which for their part resorted to the seemingly unlimited multitude of contractual concepts under civil law or, in particular, under partnership law.

The financial crisis, whose orginators were large-scale institutions that are now held accountable for it, triggered a collective mania of legal regulations in the constantly centralistic and collectivist-minded European legislation – as well as in the European nations following it (Erich Kästner: "Allein ging jedem alles schief. Da packet sie die Wut. Sie gründeten ein Kollektiv und dachten, nun sei es gut ...").

The new comprehensive law for all – collective – capital investments and productive investments = AIF

Traditional German terminology is now replaced by a uniform type of European conceptualization transferred into German (§ 1 Investment Code (KaGB) includes almost 4 pages – approximately 8 columns – of definitions of terms!).

2. The central terms – Legal institutions

Investment assets as organism for collective investments

The generic term is the so-called "Investment Assets" (§1 Sec. 1 Investment Code (KaGB)). This refers to an "Organism for collective Investments" which collects capital for a multitude of investors in order to invest it for the benefit of the investors on the basis of a defined investment strategy, and which is not an entity carrying out business outside the financial industrie.

Explanations of the Federal Financial Supervisory Authority (BaFin)

The Federal Financial Supervisory Authority (BaFin), appointed for reasons of supervision, had to state in its first letter of explanation of June 14, 2013 that neither the AIFM Directive (European Law) nor the Investment Code ((KaGB) the new German law) specified the term "organism". Instead, the letter referred to a further letter from administrative authorities, the "Final Report of ESMA" [European Securities and Markets Authority, Final report, "Guidelines on key concepts of the AIFMD" of May 21, 2013 (ESMA 2013/600)]. According to that it had to be an "vehicle" in which external capital collected by the investors would be "pooled".

In the German legal environment all these terms have so far not existed. The term "financial instrument" used in former directives stems from the Anglo-Saxon financial market. It is – de facto – only tailored to coporations. The term "organism" (already used in the 2012 version of the Investment Law (InvG)) obviously stems from the French legal field: "organisme" describes

a legal entity, also a competent authority etc. In German "organisms" only exist in biology. They are entirely unknown to the legal field. The English EU directive version uses the expression "collective investment undertaking". Literature covering aspects of (now partially obsolete!) German Banking Law provides the term "collective investment models".

Organisms for collective investments in securities (OGAW – gemeinsame Anlagen in Wertpapiere)

The law continues to differentiate between organisms for collective investments in securities [so-called OGAW – EU jargon, § 1 Sec 2 Investment Code (KaGB)] and Alternative Investment Fonds (AIF), which refer to investments that are rather close to the traditional German investment funds. The 2012 version of the Investment Law (InvG) still spoke of "directive-compliant trust assets" (richtlinienkonforme Sondervermögen).

Organisms for alternative investment funds (AIF), open-end AIF

All further non-OGAWs are organisms for "Alternative Investment Funds" (AIF), namely as so-called open-end investment assets pursuant to § 1 Sec. 4 No. 1 (OGAW) or Nr. 2 (AIF) Investment Code (KAGB) whose investors or shareholders once a year have the right to return their share or shares from the AIF against payment.

Closed-end AIF

The non-open AIF are called closed-end AIF [§ 1 Sec. 5 Investment Code (KAGB)].

"Closed-end AIF are all those AIF that are no open-end AIF (!)" (§ 1 Sec. 5 Capital Investment Law (KAGB)). This group covers all "collective investments" which have been traded as closed-end "funds" (geschlossene Fonds) so far – in very different legal forms.

Exceptions

Exceptions from the all-inclusive competence of the Investment Code (KAGB) are - according to § 2 Investment Code (KAGB) – holding companies of a particular type, institutions relating to the company pension scheme, certain banks and social insurance institutions. The Federal Financial Supervisory Authority (BaFin) has clarified issues of doubt in the already mentioned circular [listed real estate companies, real estate investment trusts (REITS), cooperatives, leasing companies, medium-sized associated companies, etc.].

Management by means of capital management companies (KVG), § 1 Sec. 14 to § 1 Sec. 18, individual regulations as from § 17 Investment Code (KAGB)

The law particularly introduces Capital Management Companies (Kapitalverwaltungsgesellschaften, KVG), §§ 17 et seq. Capital Investement Code (KAGB), as new institutions. Their business operations are designed to manage the various forms of investment assets (Investmentvermögen) (the new generic term for all collective investments) [comp. above § 1 Investment Code (KAGB)]. There are external capital management companies [§ 17 Sec. 2 No.1 Investment Code (KABG)] or internal capital management companies [§ 17 Sec. 2 No. 2 Investment Code (KAGB)]: For these capital management companies strict regulations apply concerning the legal form, capital and supervision. In future they lead to the uninterrupted control of all companies operating in the field of collective investments. Exempted from this is only a grandfathening for those companies which are capital management companies in a material sense but which concentrate on the management of the already existing portfolio and which do no make any new business transactions.

Depositaries (Verwahrstelle) – new: also for closed-end AIF

An important innovation for closed-end funds (AIF – Alternative Investment Funds) is the so-called depositaries ("Verwahrstellen", Investment Code (KAGB) et seq.). As far as the previous so-called investment funds are concerned, there have always been the depositary banks. Closed-end funds used – in a variety of ways - their own or third-party "trustees" with a competence and responsibility defined in individual contracts. For all of these it now applies that the capital management companies (which were in former times also referred to as man-

agement companies or similarly designated companies) have to guarantee that "for each of the AIF managed by them a depositary … has to be commissioned" [§ 80 Investment Code (KAGB)]. §§ 80 to 90 Investment Code (KAGB) regulate in detail issues of the AIF depositaries, i.e. commissioning, deposit with a third party, control function, businesses subject to approval and collision of interests, duties of information, the regulations for public AIF and the liability as well as the assertion of claims. For closed-end AIF it is possible by way of derogation from the basic rule of § 80 Sec. 1 Investment Code (KAGB) to also appoint a different institution or trustee respectively [§ 80 Sec. 3 Investment Code (KAGB)]. Trustees have to be subject to a statutorily recognised and obligatory professional registration or to legal and management regulations or to professional regulations [§ 80 Sec. 3 Sent. 2 Investment Code (KAGB)].

Trustee

3. The central rules and regulations for investment assets

The new Investment Code (KAGB) not only regulates the terms, companies and objects of its control as well as the entities acting on this market, but also includes detailed rules concerning the permissible investment assets themselves (capital investments, collective investements).

So far strict regulations have only existed for the open-end (investment) funds, equity funds, pension funds and real estate funds. Apart from that a virtually unlimited freedom to design contracts and "use" of all possible civil legal institutions and contractual constructs prevailed to conceptualize, to design and to "sell" collective investments, although a duty to publish prospectuses and a prospectus ordinance tied to a sale (sales, placing) has applied since 2011/2012. The control of the Federal Financial Supervisory Authority (BaFin) focussed on the transparency of the public placement, not on the product. These are all things of the past. The permissible collective investments, their design, their institutions and the companies thus associated are structurally (legal forms) and materially (permissible economic design) comprehensively regulated. Their control lies with the Federal Financial Supervisory Authority.

Comprehensive regulation of the entire organized and "free" capital market

Examples: In case of the popular closed-end funds (geschlossene Fonds) [in future "closed-end domestic investment assets", § 139 Investment Code (KAGB)] there are in future only investment corporations with a fixed capital [§§ 140 – 148 Investment Code (KAGB)] or investment limited partnerships [§§ 149 – 161 Investment Code (KAGB)]. Having stakes in real estate partnerships under civil law (BGB-Gesellschaften) practised for many reasons at certain times and in specific regions of Germany (Berlin) will be inadmissible in future.

Even the collective investments themselves are materially regulated: Risk spreading is required (at least 3 investments) (!). Financing with loan capital must not exceed 60% of the value.

Risk regulations as regards content concerning investments (AIF)
Practical Considerations

This overview has to restrict itself to provide first informational hints regarding the law, its new terms and new regulations.

All participants acting on the capital markets are affected. Real estate developers have to newly "look at" their financing partners. Leasing companies searching for capital on the capital market have to "reclassify" themselves. Medium-sized equitiy models have to be reviewed.

The entrepreneur as private investor himself has to "re-examine" carefully his existing and potential partners.

Dr. Detlef Brümmer

B. Commercial and Company Law

I. Stock Corporation Law – Retroactive effect of contesting supervisory board elections

Nullity ex tunc

In its judgement of February 19, 2013 (II ZR 56/12) the Federal Supreme Court (BGH) ruled that the annulment or the ascertainment of annulment of a resolution of an election also applies retroactively so that the elected member of the supervisory board ("Aufsichtsrat") has to be considered as unelected.

Contesting election in spite of resignation from office

In the case underlying the ruling of the Federal Supreme Court (BGH) several members of the supervisory board of the defendant coporation ("Aktiengesellschaft") were elected in August 2008. Due to the takeover by a new owner the members of the supervisory boards successively resigned from their offices in the following months. The claiming shareholder contested the election of the members of the supervisory board on formal grounds.

The action remained largely unsuccessful before the Landgericht (LG) and the Oberlandesgericht (OLG). The Oberlandesgericht (OLG) stated that the action for annulment lacked the requirement for legal protection ("Rechtsschutzbedürfnis") because the members of the supervisory board had resigned in the meantime so that the action had no effect anymore.

The Federal Supreme Court (BGH) annulled the judgement of the Oberlandesgericht (OLG) and referred the legal matter back to the Oberlandesgericht (OLG).

Significance ex tunc nullity for the effectiveness of supervisory board resolutions

The Federal Supreme Court (BGH) explained that the necessary requirement for legal protection continued to exist. As a matter of fact, the annulment or the ascertainment of annulment principally had a retroactive effect. In the case given the members of the supervisory board had to be deemed not appointed right from the beginning. Therefore, in the event that their voting decision had been relevant to the decision-making process in case of an interim board resolution, then those resolutions would have been ineffective.

The Federal Supreme Court (BGH) justified its contrary ruling by stating that § 250 Sec. 1 in connection with § 241 No. 5 Coporation Act (AktG) regulated that the annulment of the voting decision retroacts to the date on which the resolution was adopted.

The Supreme Court referred the legal issue back to the Oberlandesgericht (OLG) so that the latter reviewed whether resolutions of the supervisory board were made between the election of a board member and the resignation of the board membership positions which depended particularly on the votes of these specific members of the board. As far as the question is concerned whether there are board resolutions for which the votes of the affected board members were decisive due to a close voting result, the secondary burden of producing evidence ("sekundäre Beweislast") as well as the burden of proof rest on the public limited company.

Worthiness of protection of third party (resolution) addressees

In its ruling the Federal Supreme Court (BGH) also explained that the rescinded transaction of a board resolution made might contradict the legitimate interests of a third party. Whether a legitimate interest of a third party was given, had to be decided in the individual case. If board resolutions were implemented in respect an outside third party, then this third party would have been worthy of protection if it had not known and did not have to know the nullity of the board resolution. Even the appointment of a board member shall have no retroactive effect.

This judgement has) decided on a question considered extremely controversial in literature. A not insignificant percentage of the literature is of the opinion that elected supervisory board members have to be deemed effectively elected until the judicial finding of the annulment or ascertainment of annulment of the election. The ruling made by the Supreme Court might trigger some considerable uncertainty concerning the effectiveness of board resolutions. Actually, the review as to whether a reverse transaction due to an annulled board resolution contradicts the legitimate interests of the parties involved has to be comprehensively acknowledged with respect to the particular circumstances of each individual case respectively. Thus it remains to be seen which further case groups of the legitimate interests of third parties future rulings will attend to.

Practical Considerations
New review efforts for supervisory board resolutions

Jörg Looman

II. Company Law – Private limited company law – Commencement of the period of notice in case of termination without notice of a managing director's employment contract

In its ruling of April 9, 2013 - II ZR 273/11 – the Federal Supreme Court (BGH) once again clarified the requirements concerning the knowledge of the decisive facts with respect to the termination without notice of a managing director's employment contract.

Consultancy contract with local politician

The plaintiff was managing director at the defendant private limited company ("GmbH"). The sole shareholder of the defendant was S.D. mbH, whose sole shareholder was Stadtsparkasse D. The plaintiff had also been managing director of S.D. mbH until July 15, 2003. In this function the plaintiff concluded a consultancy contract with the local politician M at the end of 2000 according to which he had been entitled to an annual consultancy fee of 200,000 DM. At the beginning of 2004 M. asked for the rescission of that contract. In a letter dated February 12, 2004 and signed by both managing directors A and B of S.D. mbH the company had agreed to that. In 2009, presumptions substantiated that the consultancy contract with M. had been a sham contract. As a result, the plaintiff was recalled as managing director of the defendant and his employment contract was terminated without notice for cause.

Missing time limit: Positive knowledge of the managing director of the sole partner

After the court of appeal had declared the notice of termination of the plaintiff by the defendant ineffective, the appeal of the defendant was successful. In fact, the notice of termination had not been ineffective because it was made late. An extraordinary termination may only take place within 2 weeks subsequent to becoming cognizant of the facts decisive for the termination [§ 626 Sec. 2 German Civil Code (BGB)]. Consequently, the Federal Supreme Court (BGH) stated that this knowledge had to be available to the committee of the company appointed to decide upon the termination without notice. This is, as a rule, is the general meeting of shareholders. In the event that a company only has one shareholder – as is the case here - then his/her knowledge is relevant or the knowledge of the organ representatives of the sole shareholder, i.e. in this case the knowledge of the managing directors A and B acting on behalf of the sole shareholder.

Gross negligence versus knowledge - "Having to know" insufficient

In this context the Federal Supreme Court (BGH) emphasized that the letter of termination of the managing directors of February 12, 2004 did not indicate any such positive knowledge about a sham transaction. The Federal Supreme Court (BGH) correctly underlined once again that having to know ("Kennenmüssen") or a gross negligent lack of knowledge ("grob fahrlässige Unkenntnis") were insufficient to trigger the deadline of § 626 Sec. 2 German Civil Code (BGB).

Practical Considerations

The two-week deadline is intended to urge the company to some short-term action if all facts are known. However, it is not intended to block the action of the company and justified notices of termination for cause. The prerequisite of knowledge, therefore, has to be taken in a literal sense. Only if all facts are already known in their essence and if additional investigations become necessary, do they have to be carried out fast [according to the Federal Supreme Court (BGH)]. It might be difficult to assess the limits in the individual case.

In practice it is recommended to investigate every initial suspicion no matter how little it is and to clarify the facts quickly. In doing so, disputes arising from the date of knowledge can at least be reduced.

Johanna Westermeyer

III. Company Law – M & A: No claim of the remaining shareholders in case of omitting a mandatory offer pursuant to § 35 Sec. 2 Securities Takeover Act (WpÜG)

Duty of the acquirer of control – no rights of the remaining shareholders

In its judgement of June 11, 2013 (II ZR 80/12) the Federal Supreme Court (BGH) ruled that the remaining shareholders of a public limited company were not entitled to any consideration if the acquirer of control contrary to § 35 Sec. 2 Securities Takeover Act (WpÜG) did not submit a mandatory offer.

In the facts underlying the ruling of the defendant shareholder had acquired more than 30% of the shares issued. Pursuant to § 35 Sec. 1 Securities Takeover Act (WpÜG) "acquirer of control" undertakes in this case to publish the acquisition of control via the target company. According to § 35 Sec. 2 Securities Takeover Act (WpÜG) the acquirer furthermore undertakes to publish a mandatory offer addressed to the remaining shareholders within four weeks subsequent to the acquisition of control. The defendant omitted such a mandatory offer. Therefore, the plaintiff incrementally asserted respective claims for damages against the defendant shareholder against the transfer of the shares.

The action remained unsuccessful in all instances.

Takeover duties only in the public interest – sufficient legal protection by limiting the rights of the acquirer of control

The Federal Supreme Court (BGH) explained in its ruling that § 35 Sec. 2 Securities Takeover Act (WpÜG) does not establish any claims for damages if the acquirer of control contrary to his/her duty does not publish an offer. § 35 Sec. 2 Securities Takeover Act (WpÜG) does not provide a claim for damages. Furthermore, § 35 Sec. 2 Securities Takeover Act (WpÜG) does not grant any individual claims of a third party, but only is to serve the public purpose of structured frame conditions in the event of company takeovers. Moreover, the Federal Supreme Court explained that the submission of a mandatory offer is also sufficiently guaranteed without claims for damages. The acquirer of control commits an offence if he omits a mandatory

offer. He is – pursuant to § 59 Securities Takeover Act (WpÜG) – not able to exercise his rights resulting from the shares for the period for which he has not published the mandatory offer.

§ 35 No. 2 Securities Takeover Act (WpÜG) is no protection act

Additionally, the Federal Supreme Court (BGH) ruled that no claim for damages pursuant to § 823 Sec. 2 German Civil Code (BGB) in connection with § 35 Sec. 2 Securities Takeover Act (WpÜG) existed. Actually, § 35 Sec. 2 Securities Takeover Act (WpÜG) did not represent a protection act as laid out in § 823 Sec. 2 German Civil Code (BGB). Even in this case it had to be taken into consideration that § 35 Sec. 2 Securities Takeover Act (WpÜG) mainly served the purpose of protecting public interests and not specifically private ones.

Practical Considerations

With this ruling the Federal Supreme Court (BGH) decided on a dispute that had been quite controversially discussed in the literature. Even if the acquirer of control is not liable to pay damages, the acquirer of control should take the duties of § 35 Securities Takeover Act (WpÜG) serious enough. In fact, besides the summary offence § 35 Securites Takeover Act (WpÜG) provides for severe legal consequences for omitting a mandatory offer. In case a resolution of the general meeting was based on the votes of the acquirer of control affected by exclusion pursuant to § 59 Securities Takeover Act (WpÜG), the remaining shareholders would be entitled to contest this resolution.

Jörg Looman

C. Real Estate Law

I. Private Building Law/German Standard Building Contract Terms (VOB/B) – The contractor's prevailing right concerning the way of eliminating defects

In a recently published ruling the Federal Supreme Court (BGH) has dealt with the scope of the contractor's rights arising from defects in the event of defective work recognizable already prior to accepting ("Abnahme") the work.

Replacement of defective windows by substitute performance on the part of the contractor

In the specific case the principal commissioned the contractor by including the German Standard Building Contract Terms (VOB/B) with the delivery and assembly of window and door elements that had been tendered by functional contractual specifications ("funktionale Leistungsbeschreibung") concerning joineries. An expert called in by both parties detected that the windows for reasons of construction were not draught-proof and had to be replaced. As a result, the principal requested the contractor by setting a deadline and threatening to withdraw the contract to replace the windows. The contractor did not follow this request. Consequently, the principal replaced the windows as part of a substitute performance und took legal action against the contractor seeking reimbursement of the costs arising from the substitute performance. The Landgericht (LG) and Oberlandesgericht (OLG) were both of the opinion that it would have been sufficient – according to an expert opinion already ion obtained in the first instance - to replace the rabbet seals. The costs incurred for replacing the windows as initiated by the contractor were inappropriate.

The principal appealed against the ruling of the Oberlandesgericht (OLG). He had only partial success with his legal remedy.

Reimbursability of appropriate third-party costs of rework – contractor's risk of misjudgement

The Federal Supreme Court [BGH;) (judgement of March 7, 2013 – VII ZR 119/10] stated that the principal was entitled to request the reimbursement of the third-party costs of rework which he could have deemed appropriate as a reasonable, economically-minded building owner at the time of commissioning the third party; however, it had to be an acceptable mean ("vertretbare Maßnahme") for eliminating the defects. If he had obtained professional expert advice, he could have regularly requested the third-party costs of rework resulting from that expert advice. The risk of a misjudgement associated with an accompanying assessment had to be borne by the contractor. The latter even would have to reimburse the costs if the measures taken to carry out the elimination of the defects turned out to be unnecessary at a later stage.

Conflict between claim for rework (substitute performance) of the principal and the contractor's right concerning the method of eliminating defects

However, the Federal Supreme Court (BGH) was unable to provide a ruling. In fact, the court of appeal failed to make sufficient findings as to whether the prerequisites for a substitute performance existed. The Federal Supreme Court assigned the court of appeal to clarify whether the prerequisites of substitute performance could possibly not arise because the contractor did not owe the replacement of the windows which, however, the principal, in contrast, demanded to be done.

In fact, the principal is entitled to demand prior to the acceptance of works that already existing defects have to be eliminated and that the work has to be completed in compliance with the terms and conditions of contract. Nonetheless, he/she is not entitled – even subsequent to acceptance – to request a specific method of defect elimination or a performance subject to the terms and conditions of contract if the contract can be fulfilled in some way or other. The principal can only request a newly constructed version if the performance as per contract is not possible by any other means. It is the matter of the entrepreneur how he fulfils the contract provided that the details concerning the performance of contract have not been specified. With this special order to clarify the facts the Federal Supreme Court (BGH) has referred the legal dispute back to the Oberlandesgericht (OLG).

Practical Considerations

With this decision the Federal Supreme Court (BGH) declared its ruling (liability for defects after acceptance) made with respect to § 13 Sec. 5 German Standard Building Contract Terms (VOB/B) also applicable to the liability for defects prior to acceptance (§ 4 Sec. 7 VOB/B).

Ralf-Thomas Wittmann

II. Private Building Law/German Standard Building Contract Terms (VOB/B) – Applicability to scaffolding erection - and – provision contract with elements of a rental contract

In a recently published ruling the Federal Supreme Court (BGH) has dealt with the scope of applicability of the German Building Contract Terms (VOB/B) (judgement of April 11, 2013 – VII ZR 201/12).

VOB/B Contract

The defendant principal commissioned the plaintiff with scaffolding works and the provision of some scaffolding for the conversion of a school. The order was based on the offer of the contractor in which the transfer for use of the scaffolding to third parties was offered beyond the basic time period of use with unit prices per week for the tendered scaffolding components.

The contract assumed the applicability of VOB/B. Under the category "completion of the work to be executed" the contract provided the following regulation:

Old School Building /Connecting Building Commencement: September, 16, 2009 Completion: June/2010
School Extension Commencement: 04/2010 Completion: 07/2010
as well as individual deadlines corresponding to the detailed construction schedule."

The construction schedule included the dismantling of the scaffolding at the school extension in the period from 16 to 19 July 2010. In fact, the scaffolding had been provided longer than required by the contract. As a result, the contractor submitted a subsequent offer and announced to dismantle the scaffolding by the final date if the subsequent offer was not accepted. The principal did not accept the supplementary contract. As consequence, the contractor dismantled the scaffolding shortly after the final date. Furthermore, he prepared the final invoice. The contractor refused to pay and offset the bill against the costs of the substitute performance of erecting an alternative scaffolding. The contractor sued for the remuneration he deemed open.

No permissible subsequent offer in the event of the duty of the contractor of a further provision pursuant to § 2 para 3 VOB/B - which is subject to remuneration

The Federal Supreme Court (BGH) dismissed the case. According to the Federal Supreme Court (BGH) the contractor owed the provision for some scaffolding for the period necessary to complete the construction works. The end date for the construction works specified in the contract was not intended to limit the period of provision of the scaffolding. In each unit price contract an increase in quantities is immanent. If the contractually agreed end date for the construction work is exceeded, the rates of the unit price items will increase for the provision. As from the 110% limit the contracting parties are entitled to request a price adjustment pursuant to § 2 para 3 VOB/B. Consequently, on this basis the scaffolding company would have been entitled to claim potentional additional costs for further providing the scaffolding. At the same time the contractor would not have been entitled to dismantle the scaffolding. After all that it is immaterial whether the contract concluded by the parties intended to regulate the erection of a scaffolding and its provision had to be classified as a contract for works, a rental contract or as a mixed contract thus including both elements of a contract for works or of a rental contract. Actually, the question for how long the provision of the scaffolding is owed and which remuneration or rent respectively has to be paid in the event that a contractually provided period would be exceeded, has to be answered independently from the legal classification of the contract. Even the rental contract allowed an agreement according to which the provision is owed for the period necessary and the renter could demand adjustment of the rent by considering the additional and reduced costs, if the contractually stipulated period of time for the provision is exceeded by 10%.

Application by analogy of the VOB/B even for a rental agreement for a scaffoldingauch

Practical Considerations

The mere fact that a contract features characteristics of a rental contract or a purchase contract does not rule out the applicability of VOB/B. Relevant for a decision is whether VOB/B was made an effective part of the contract. It is actually of major importance whether a breach of the requirement of transparency ("Transparenzgebot") or the prohibition of unexpected terms ("Verbot überraschender Klauseln") possibly exists. For the Federal Supreme Court (BGH) it was neither intransparent nor surprising that § 2 No. 3 VOB/B found application to the remuneration for the part of the scaffolding contract classified as rental contract.

Ralf-Thomas Wittmann

D. Commercial Landlord and Tenant Law

I. Written Form Requirement: Effectiveness of a double written form clause in a standard-form contract

The problem: statutory written form – double written form clause

In commercial landlord and tenant law the practical significance of an agreement about an arbitrary written form ("gewillkürte Schriftform") by means of so-called written form clauses rather little for the original contract itself since the statutory written form [§ 550 German Civil Code (BGB)] already has to be generally observed for the latter. However, when subsequent amendments of the original contract become necessary written form clauses are of major importance. Therefore, written form clauses are wide-spread in practice. Written form clauses in a standard-form contract, particularly so-called double written form clauses are regularly the subject matter of legal disputes. Whilst a so-called simple written form clause (for example, "Amendments of the contract are only effective if they have been agreed in writing") is principally deemed effective, the permissibility of a so-called double written form clause is highly controversial. A double written form clause means that the amendment of the "simple" written form clause itself requires the written form (for example, "If the written form is to be annulled, the agreement about the annulment of the written form is only permissible in written form"). The double written form clause thus aims at a complete annulment of the legal preference of an (oral) indivual agreement [§ 305 b German Civil Code (BGB)].

In its judgement of March 18, 2013 (2 U 179/12) the OLG Frankfurt ruled that a so-called double written form clause in a commercial lease contract between entrepreneurs was also effective in a standard-form contract manner (in the form of General Terms and Conditions).

Oral amendment of the service charge regulation

In the case underlying the ruling the landlady rented out to the tenant office and storage space, proportional business space as well parking lots. The commercial lease contract includes a double written form clause. According to that, subsequent amendments of and supplements to the contract indispensably and, therefore, irrevocably require the written form. Besides the rent the tenant also owes advance payments of service charges. During the period of contract the parties orally agreed to increase the advance payments of service charges by 64%.

Notice of termination because of breach of the written form requirement

At first, the tenant repeatedly made the increased payments. Then, however, the tenant terminated the lease contract invoking a breach of the written form requirement. She deemed the written form of the lease contract not observed – among other things - because of the oral agreement about the increase of the advance payment of service charges. The landlady objected to the notice of termination.

Effectiveness of the written form clause

According to the OLG Frankfurt the notice of termination of the tenant was ineffective. A breach of the written form requirement [§550 German Civil Code (BGB)] did not exist.

Due to the agreed (double) written form clause the parties were only able to make subsequent amendments of and supplements to the lease contract in writing; the orally made agreement between the parties concerning the increase of advance payments of service charges was, therefore, ineffective [§ 126 Sec. 1 German Civil Code (BGB)].

According to the OLG Frankfurt the (double) written form clause was effective. It did not disadvantage the contracting parties inappropriately [§ 307 Sec. 1,2 Clause 1 German Civil Code (BGB)]. On the one hand, the (double) written form clause ruled out, that the parties of the lease contract could orally amend the agreed written form clause in the context of their contractual freedom including the clause which excluded an oral amendment of the written form clause, and in particular to annul it on their part. In doing so, the contracting parties ruled out at the same time to be able to subsequently make an oral agreement which, as an individual covenant pursuant to the statutory regulation of § 305 b German Civil Code (BGB) had priority over General Terms and Conditions. This, however, would not be inconsistent with the essential basic principle of the statutory regulation from which it deviated [§ 305 b German Civil Code (BGB)]. As far as the exclusion of an oral amendment of the double written form clause was concerned, there was a recognizable need on the part of both contracting parties. The compliance with the written form was quintessential for both contracting parties. Security as to whether a lease contract observed the written form could only be provided for both contracting parties in such a manner that it actually and irrevocably provides the compliance with the written form for any kind of side or supplementary agreement.

Relationship between double written form clauses and clauses remedying written form deficiencies

The double written form clause was also not ineffective because the parties had agreed a clause remedying written form deficiencies in the lease contract at the same time. The latter is only relevant in cases where in spite of the double written form clause an oral agreement would be effective. The question whether such an oral agreement was possible at all in the light of a double written form clause, was left unanswered by the OLG Frankfurt. As a matter of fact, the effectiveness of a double clause remedying written form deficiencies would remain unaffected hereof.

Practical Consideration Preferring individual contracts

The permissibility of a double written form clause in form of General Terms and Conditions is still deemed controversial. According to the OLG Rostock (ruling of May 19, 2009 – 3 U 19/09) a double written form clause in a standard-form contract is ineffective because of breaching the requirement of transparency (§ 307 Sec. 1 Sent. 2 BGB) since it suggests that it cannot be waived by an agreement not observing the written form. It is the view of the Federal Supreme Court (BGH) (judgement of September 21, 2005 – XII ZR 312/02) that a double written form clause is effective if it was negotiated on the basis of an individual contract. If the double written form clause is of particular importance to the contracting parties, they should choose the safe option of an individual contract.

Dr. Rainer Burbulla

II. Cosmetic repairs ("Schönheitsreparaturen") and final renovation: Permissibility of an individual contractual clause combination

In its judgement of April 12, 2013 (10 U 832/12) the OLG Koblenz has ruled that clause combinations according to which ongoing cosmetic repairs and a final renovation are passed on to the tenant are permissible with respect to an individual contract. A landlord is even entitled to a claim for compensation (in monetary terms) in the case of unimplemented renovation works if he does not carry out an intended conversion of the rental object and if he sells the rental object.

Rental contract for a medical therapy centre

In the facts underlying the ruling the tenant rented commercial space from the landlord for operating a medical therapy centre. Due to the lease contract the tenant undertook to implement ongoing cosmetic repairs, maintenance and repair work of the rental object, and it provided an obligation of final renovation on the part of the tenant at the end of the tenancy. The landlord informed the tenant that he intended to comprehensively convert the rental object subsequent to the end of the tenancy for reasons of a new tenancy and to request a monetary compensation instead of the renovation work owed by the tenant. The tenant cleared the rental space at the end of the tenancy without having carried out cosmetic repairs, maintenance work or repair work. Furthermore, he refused to pay any monetary compensation. The landlord unsuccessfully tried to find a new tenant. Finally he sold the rental object without having converted it and in the existing condition. By taking legal action he asserted monetary compensation against the tenant for reasons of non-performed renovation work.

Permissible clause combination in commercial lease contracts relating to the rights of individuals

According to the OLG Koblenz, the landlord was entitled to receive a monetary compensation ("Ausgleichsanspruch"). The clause combination of the obligation of cosmetic repairs and the obligation of a final renovation was effective, since it had been agreed between the parties on the basis of an individual contract. Consequently, there was no reason not consolidate the obligation to carry out cosmetic repairs and maintenance measures and the obligation to implement a final renovation.

No infringement of bones mores

The clause combination was not contra bones mores [§ 138 German Civil Code (BGB)]. Such an infringement could not be deducted from the fact that clause combinations of that sort in the form of General Terms and Conditions were regarded ineffective.

Monetary claims even subsequent to the sale of the rental object without conversion

The landlady was also entitled to the monetary compensation claim asserted. This claim resulted from the supplementary interpretation of the contract ("ergänzende Vertragsauslegung"). The claim arose with the information given by the landlord to the tenant about intended conversion work. It did not cease to exist because the landlord sold the rental object without actually having converted it. In fact, the implementation of cosmetic repairs and maintenance work would have led to an increase in value of the property, which would not have lapsed because of a subsequent sale of the object.

Practical Consideration
No clause combination in contracts in the form of General Terms and Conditions

According to the court rulings of the Federal Supreme Court (BGH) the combination of an obligation to implement ongoing cosmetic repair work combined with an obligation of final renovation in the form of General Terms and Conditions is ineffective, because it puts the tenant in an inappropriately disadvantageous position if ongoing repair work plus the obligation of a final renovation were passed on to him/her (comp. Federal Supreme Court (BGH), judgement of October 8, 2008 – XII ZR 84/06; continuation of Federal Supreme Court (BGH), judgement of April 6, 2005 – XII ZR 308/02). However, the contracting parties would be free to effectively arrange such a clause combination by means of an individual contract, as correctly stated by the OLG Koblenz.

Dr. Rainer Burbulla

E. Public Law

I. Planning Law – Specifying retail trade – Planning competence of the municipality versus Federal Law [Federal Building Code (BauGB)]

In two current rulings (judgement of March 27, 2013, 4 CN 6.11 und 4 CN 7.11) the Federal Administrative Court (BVerwG) had to deal with the increasingly stricter rulings of the 10th Senate of the OVG Münster with respect to controlling settlements of the retail trade in legally binding land-use plans.

Criticism of the strict court rulings of the OVG Münster when controlling settlements in legally binding land-use plans

As stated by the Federal Administrative Court (BVerwG) the OVG Münster had overstretched the requirements of a necessary urban-planning justification in the context of urban land-use planning ("Bauleitplanung") in a manner contrary to federal law level in several ways, and it had, therefore, negated in an unacceptable way the effectiveness of an exclusion of the retail trade in the context of the respective legal proceedings concerning the disputed matter:

Strengthening of municipal supply centres as an acceptable objective of urban planning

Strengthening municipal supply centres ("gemeindliche Versorungszentren") is principally an acceptable objective of urban planning that can justify ruling out centre-relevant retail trade. The OVG is wrong if it does not allow a reference to the centre concept of the respective municipality as sufficient urban-planning justificiation of planning in this sense because the principles listed in there were not completely implemented. The municipality is not denied the right to use the specifications of its planning concepts as helpful arguments, even if not implementing them with the same intensity in the context of their specific planning. The Federal Administrative Court (BVerwG) holds that the regulation chosen can only be objected to if it is unsuitable to promote the objective of strengthening centres or if it counteracts that objective.

Implementation of the centre protection alien to the system versus planning control of the development

If the OVG Münster deems – according to the constant court rulings of the respective 10th Senate – the justification of ruling out the retail trade with the objective of protecting centres only given, if the provider of the plan renders information as to why any kind of retail trade of the said type – if settled in the area of the plan – would damage grown retail trade structures in the protected centres independent of the kind and scope of the respective range of goods offered, this does indeed overstretch the standard under federal law, as expressly stated by the Federal Administrative Court (BVwerG). It depends on whether the stated exclusion of the retail trade is suitable to promote the urban-planning objective envisaged by the planner, which has to be principally assumed if in a centre concept the product ranges are determined which are decisive for the functioning of the respective centres and even centre-forming and if these product ranges are excluded in a legally binding land-use plan for an area outside the centres. However, a requirement of the OVG that goes any further is alien to the system, according to the Federal Administrative Court (BVerwG): For even if the objective is to strengthen supply centres, it is not intended to selectively ward off specific dangers, but control the development by planning and to influence the development in the long-run which is already effected in another place by excluding product ranges constitutive for the centres.

Permissible annex trade

The standard set under federal law has not been met either if the OVG Münster deems the specifications regulating the annex trade ineffective because they do not include any relative or absolute limit to areas of retail trade activities. The fact that the principles of the respective centre concept can only be implemented within a limited scope due to the permissibility of the annex trade, does not oppose the urban-planning justification of this regulation in view of the above.

Since the issue lacks the determination of actual fact the Federal Administrative Court (BVerwG) was unable in both cases to give a ruling on the matter itself, so that the two proceedings were referred back to the OVG Münster. The Federal Administrative Court (BVerWG) imposed in this context specific parameters on the lower court by which means the findings to be made up for in fact and in law have to be legally assessed.

Practical Considerations No overstretching of a need for justification for urban planning

The Federal Administrative Court (BVerwG) put the ruling of the OVG Münster clearly in its place. The planning municipalities felt partially unable to provide the (allegedly) necessary need for justification for some urban planning in view of the requirements imposed by the OVG Münster. Once again we can see that it can be well worth the effort not to let legal issues rest but – in case of doubt – to seek clarification by a supreme court.

Isabel Strecker

II. Planning Law – EU Law – Limitations on the locations of retail trade businesses

City development and consumer protection

As the Federal Administrative Court (BVerwG) stated in its current ruling of May 30, 2013, limitating locations of retail trade businesses effected under planning law was principally permissible for reasons of city development and consumer protection and did not oppose European Union law.

Permissible protection of the urban environment by controlling settlements

As stated by the Federal Administrative Court (BVerwG) in the ruling quoted, the question of a plaintiff whether a complete exclusion of retail trade businesses in a commercial estate was compatible with the freedom of establishment pursuant to Art. 49 a Treaty on the Functioning of the European Union (AEUV) and the Directive on Services respectively, did not justify the approval of an appeal (“Zulassung der Berufung”). This question can be answered in the affirmative without necessitating the implementation of appeal proceedings. The Federal Administrative Court (BVerwG) stated that from the point of view of European Union law planning measures serving the purpose of protecting the urban environment represent compelling reasons of public interest which can justify limitations. In Artc. 4 No. 8 of the Directive on Services and according to the recitals “the protection of the urban environment” including “town and urban planning”, too, is expressly listed as an example for “mandatory reasons of the public interest” which may justify a limitation. The control of settlement is, therefore, justified under European Union law if the objective of the measure is an effective use and concentrations of the public infrastructure as well as the avoidance of an unnecessary use of areas and resources caused by housing sprawl as well as its traffic associated, a fact that actually originates from the ruling of the European Court of Justice of March 24, 2011 (comp. Newsletter 4/2011, p. 3 and 4). This ruling, in fact, was made in the light of measures controlling settlements subject to land-use planning; however, for the justification of controlling locations of the retail trade it is irrelevant at which level under planning controlling takes place.

With this ruling the Federal Administrative Court (BVerwG) connects to its former judgement of December 16, 2010 (4C 8.10): Purely economically motivated measures are not permissible, the Federal Administrative Court (BVerwG) clarified once again. Regional as well as urban-motivated control of retail trade settlements can, however, be justified due to compelling reasons of public interest.

Practical considerations Permissible regional and urban control of the retail trade

Isabel Strecker

III. Public Building Law – Building permission law- Federal Land Utilization Ordinance ("Baunutzungsverordnung", BauNVO): Inadmissibility of fulfilling immission standard values by means of passive noise protection – imperative of considering neighbourhood rights

In its judgement of Novelmber 29, 2012 the Federal Administrative Court (BVerwG) ruled that the compliance with the immission standard values of the German Technical Guidelines for Noise Reduction (TA Lärm) could not be achieved by measures of passive noise protection.

High rating value – Building permit with change of use for neigbouring premises

The plaintiff operated on his premises a timber-processing company. For the neighbouring plot of land a building permit with a change of use (a factory building) into a multi-family home was granted. Both premises fell within the scope of validity of a legally binding land-use plan which identified a general residential area. The company of the plaintiff caused a rating (noise) value of up to 70 db(A) at the nearest side of the adjoining premises. The building permit included the condition to build in sound insulating windows with airing installations. They were intended to achieve sound insulation of at least 41 dB(A). The OVG North-Rhine Westphalia in Münster dismissed the action against granting the building permit. The Federal Administrative Court (BVerwG) annulled the judgement und referred the legal matter back to the OVG.

Imperative of consideration with respect to the neighbourhood rights pursuant to § 15 Sec. 1 Federal Land Utilization Ordinance (BauNVO)

According to the Federal Administrative Court (BVerwG) there is a so-called "conflict situation" between the two conflict-prone uses due to their spatial proximity. For that reason an immission standard value of 60 dB(A) has to be specified. The imperative of consideration with respect to neighbourhood rights pursuant to § 15 Sec. 1 Sent. 2 2. Alternative Federal Land Utilization Ordinnance (BauNVO) established a duty of the building owner to effect some "architectural self-help". However, this architectural self-help did not – contrary to the ruling of the OVG NRW – imply any passive sound protection with closed windows.

Interpretation of the German Technical Guidelines for Noise Reduction (TA Lärm) – no protection for existing structures in the event of disturbances

The German Technial Guidelines for Noise Reduction (TA Lärm) objectively define the immission standard values. According to that, it is, in fact, not the interior noise level concerning the residential use that is decisive, but the immission place located outside the affected building. The German Technical Guidelines for Noise Reduction present a minimum level of living comfort for residential use: windows have to be opened in spite of existing sources of noise and natural airing must be guaranteed. This standard of protection included in the German Technical Guidelines for Noise Reduction is also not subject to negotation as far as the affected parties are concerned. Decisive are the immission values of the (latently disturbing) commercial company which cannot invoke protection for existing structures of his company.

Practical Considerations Weighing the "latent" disturbances of a company against the architectural self-help of the neigbhour

Due to the ruling of the Federal Administrative Court (BVerwG) a new need for differentiation arises between existing (possibly disturbing) commercial companies and the development of existing commercial companies in the neighbourhood of residential estates: both neighbours are called upon. The company has to review its sound protection. Project developers and planning authorities have to review in more detail in how far compliance with the required immission standard values can be guaranteed by measures of architectural self-help. In doing so, the Federal Administrative Court (BVerwG) explicitely referred to other measures of architectural self-help, such as the immission-abating arrangement of living rooms and bedrooms or a changed positioning of the residential building as being permissible.

Jörg Looman

F. Insurance Law

I. Insurance Contract Law – D&O Insurance: Duty of notification due to an increase in risk

Recently, the Federal Supreme Court (BGH) had to rule on the following facts:

Action for coverage because of legal costs

The H. Molkerei AG (policy holder) concluded a D&O insurance contract with the defendant insurance company. The plaintiff was, as member of the supervisory board, the person insured. At the beginning of October J.B KG took over the majority of the shares of the policy holder and jointly and severally claimed damages against the plaintiff together with other members of the supervisory board.

The defendant denied being obliged to exempt the plaintiff from the legal fees of the lawyer commissioned to ward off claims for damages.

Question of the increase in risk due to a change of control (under company law)

The OLG Frankfurt dismissed the case stating that the defendant insurer was free from granting insurance benefits pursuant to § 28 Sec. 1 Insurance Contract Act (VVG). For the plaintiff did not inform the defendant immediately about the increase in risk ("Gefahrerhöhung") resulting from the change of control as laid down in § 27 Sec. 1 Sent. 1 Insurance Contract Act (VVG) old version.

The plaintiff successfully appealed against this ruling at the Federal Supreme Court (BGH).

Priority of the General Policy Conditions over the Insurance Contract Act (VVG)

According to the understanding of the Federal Supreme Court (BGH) it could remain open whether an increase in risk actually came into being or not due to the change of control at the policy holder. In any case, the General Policy Conditions of the defendant provided a final regulation ruling out recourse to the statutory provisions of §§ 27, 28 Insurance Contract Act (VVG) old version.

Pursuant to clause 9.2.1 of the General Policy Conditions there was, however, no obligation of the policy holder to inform the defendant about all risk-increasing circumstances subsequent to the conclusion of contract. On the contrary, such an obligation only existed according to the wording of the insurance policy upon being questioned by the insurer.

This regulation of the General Policy Conditions, which is more favourable for the policy holder compared to the statutory provisions, applied to initiated increases in risk ("veranlasste Gefahrerhöhungen"). According to the Federal Supreme Court (BGH) a policy holder endeavouring some understanding did not have to expect that in the event – as was the case here - of a non-initiated increase in risk a stricter standard could apply, namely a duty of notification without questioning by referring to statutory provisions. If a duty of notification in case of an initiated increase in risk existed only on the basis of some questioning, a stricter standard could not be possibly applied in case of a non-initiated increase in risk (Federal Supreme Court (BGH), judgement of September 12, 2012 – IV ZR 171/11).

Repercussions in case of initiated or non-initiated increases in risk

For the interpretation of General Policy Conditions (AVG) it is decisive how an "average policy holder" is expexted to make sense of these sets of clauses filling several pages with a reasonable understanding, attentive perusal and by considering the context thus to be identified. This constitutes an absolutely consolidated kind of ruling of the Federal Supreme Court (BGH).

Practical Considerations Standard of the "average policy holder"

Ralf-Thomas Wittmann

II. Insurance Contract Law – Assignment of a claim for exemption in the D&O insurance

The reform of the Insurance Contract Act of 2009 also has a significant impact on the D&O insurance.

Repercussions of the new version of the Insurance Contract Act (2009) Right of assignment of the policy holder

Prior to the reform of the Insurance Contract Act most General Policy Conditions included a prohibition of assigning the claim for exemption to the aggrieved party. Pursuant to the new § 108 Sec. 2 Insurance Contract Act (VVG) it is now no longer permissible to exclude the assignment of a claim for exemption to a third party in the General Policy Conditions.

According to the separation principle no direct claim against the insurer

According to the separation principle ("Trennungsprinzip") under insurance law the aggrieved party – in D&O proceedings generally the aggrieved company – is not entitled to a direct claim against the D&O insurer. On the contrary, the aggrieved company has to take legal action against its board member or managing director respectively for payment of the amount of damage. The board member or the managing director respectively then has, if necessary, to apply in coverage proceedings exemption from the D&O insurance.

Contractual and procedural options by way of assignment pursuant to § 108 Sec. 2 Insurance Contract Act (VVG)

According to the now existing § 108 Sec. 2 Insurance Contract Act (VVG) a board member or a managing director respectively is able to assign this claim for coverage against the insurance company to the aggrieved party. In this case the company can directly assert the claim against the insurer and can also sue for direct payment to the company by means of legal proceedings.

The advantage of such an assignment lies particularly in the fact that the board member or the managing director is no longer party of the proceedings. This is of special advantage if the board member or the managing director continues to be active for the company so that the relationship between the company and the board member is not burdened any further by assigning the claim for exemption.

In the event of an assignment the court comprehensively reviews in legal proceedings the facts of the liability case as well as the coverage protection.

The board member may – in the event of assignment – be appointed as witness both by the company and by the insurer. It goes without saying that the board member is subject to a comprehensive duty of a witness to tell the truth so that for reasons of the penalty envisaged as laid down in §§ 153 et. seq. Criminal Code (StGB) an abusive cooperation between the company and the board member at the expense of the insurer is unlikely to occur.

Questions concerning the relief of the burden of proof (§ 93 Sec. 2 Public Limited Companies Act (AktG)/§ 43 Sec. 2 Private Limited Companies Act (GmbHG)) subsequent to assignment
Practical Considerations
Diligence as to the assignment agreement

Until today, the question has not been decided by court whether in case of assignment the relief of the burden of proof subsequent to § 93 Sec. 2 Public Limited Companies Act (AktG) or § 43 Sec. 2 Private Limited Companies Act (GmbHG) will continue to exist for the company or whether the company will be subject to the duty to provide proof for the existence of all legal prerequisities of § 93 Sec. 2 Public Limited Companies Act (AktG) or § 43 Sec. 2 Private Limited Companies Act (GmbHG).

Especially for the board member it is, therefore, of particular importance that the declaration of assignment is formulated in a legally diligent manner. It should be regulated in an assignment agreement whether the company is entitled to hold the board member personally liable if the proceedings remain unsuccessful against the insurer. Actually, in that case and according to the prevailing opinion there would be no coverage protection by the insurer so that the board member would have to manage these “second proceedings” on his/her own.

Since it is now possible to assign the claim for exemption to the aggrieved party interesting possibilities for action arise, particularly if the board member continues to be active for the company and if this relationship is not impaired by often long and protracted proceedings that are considerably burdensome for the board member.

When formulating an assignment agreement, legal particularities have nonetheless to be considered so that the assignment does not prove to be a “boomerang” for all parties involved.

Jörg Looman

III. Third Party Insurance – the scope of the legal duty to implement safety precautions

Awkwardly parked lift trucks with pallets in the D.I.Y. store

According to the Kammergericht Berlin (ruling of January 22, 2013 – 7 U 202/12) customers of a D.I.Y.-store always have to reckon with lift trucks with pallets being parked in the aisles. The goods offered, according to the senate, are parked there, among other reasons, so that customers have an easy access to them. The transportation of pallets is commonly done with lift trucks, which are clearly visible for the customers at any time. Even if the lift trucks are only

awkwardly parked while still not blocking the aisles completely, a breach of the duty to implement safety precautions as well as a fall of the customer cannot be assumed because the customer could be distracted by large labelled advertising signs.

In fact, if such circumstances were permitted, any collision with objects in a D.I.Y. store could constitute the fact of a liability case.

Duty of the customer to pay attention

Whoever visits a D.I.Y. store as customer is generally looking for articles He/she wants with the help of advertising signs and will inevitably be distracted. However, this will not exempt him/her from the duty to pay attention to the obstacles that are typical in a D.I.Y. store.

Practical Considerations
Problem of "unexpected and atypical" functions

The breach of a duty to implement safety precautions especially for automatic doors can only be assumed if unexpected and atypical functions occur. The use of automatic doors is an expression of technical progress, and considering the frequency of use in everyday life also known to the general public. The Amtsgericht München stated that the user, therefore, has to pay attention to potential dangers himself/herself (judgement of May 21, 2013 – 224 C 27993/12, not legally binding).

Ralf-Thomas Wittmann

G. Labour Law

I. Employment Contract Law – Exclusion (acceleration) clause not in the event of liability for intent

In its judgement of June 20, 2013 (Az.: 8 AZR 280/12) the Federal Labour Court (BAG) ruled that an exclusion clause under employment contract law did not refer to claims based on intentional acts.

Claim for damages for pain and suffering because of "bullying" – acceleration clause

In the case ruled the plaintiff asserted claims for damages for pain and suffering against the defendant employer for reasons for bullying. The contract of employment included an acceleration clause ("Verfallklausel") in which claims resulting from the employment or are in connection with it would lapse if they were not asserted within three months since their due date. The employment terminated on May 31, 2010. The action for damages for pain and suffering was filed on September 9, 2010.

The action before the Arbeitsgericht and the Landesarbeitsgericht was dismissed as unfounded, since the claims had lapsed. This decision was annulled by the Federal Labour Court (BAG) and was referred back to the Landesarbeitsgericht for renewed judgement.

Permissible acceleration clause only in case of need for regulation – not intent (§ 276 Sec. 3 German Civil Code (BGB))

The Federal Labour Court (BAG) stated in its decision that acceleration clauses regularly had to be interpreted to the effect that they should only cover cases deemed in need of regulation by the parties. Pursuant to § 202 Sec. 1 German Civil Code (BGB) the statute of limitation, however, in case of liability on grounds of intent could not be facilitated beforehand by means of a legal transaction. According to § 276 Sec. 3 German Civil Code (BGB) a party could not be exempted from liability beforehand on grounds of intent. Liability on grounds of intent is, therefore, expressly regulated by law.

Furthermore, the Federal Labour Court (BAG) stated that in case of another interpretative result the clause for breaching the law governing the General Terms and Conditions was ineffective.

Since the Landesarbeitsgericht has not reviewed so far whether it actually was a case of bullying, the legal dispute was referred back to the Landesarbeitsgericht so that it carried out a respective review.

Practical Considerations Prompt review of prerequisites of claims

Numerous tariff agreements and employment contracts include such acceleration clauses in which frequently a three- or six-month period applies. Due to this very short period claims resulting from the employment always have to be reviewed promptly so that they can be asserted within this very short period.

Johanna Westermeyer

II. Contract Employment Law – Discretionary reduction of the performance bonus (§ 315 German Civil Code (BGB)) in case of state bank bail-out

Personal performance targets versus public intervention

In its judgement of May 15, 2013 (Az.: 10 AZR 679/12) the Federal Labour Court (BAG) ruled that the performance bonus of an employee could legitimately lapse if the employee exceeded his/her performance targets by far, but the employer, however, could only be rescued from insolvency by help from the state.

Bank bailout by public funds

In the case ruled the plaintiff was employed with the defendant bank as account manager. Besides a fixed remuneration the employment contract also provided for a performance bonus. This was composed of the achievement of targets on the part of the employee, team behaviour as well as of the success of the bank. As far as the business year 2008 was concerned, the employee “exceeded by far” his personal targets. Still, the defendant bank refused to pay a bonus in the amount of approximately 30,000.00 EURO. The bank justified its decision that it had to take out help from the state in the region of billions due to the credit crunch so that it had been entitled to reduce the bonus to zero.

The action was partially successful before the Arbeitsgericht. While the appeal of the defendant before the Landesarbeitsgericht remained unsuccessful, the Federal Labour Court (BAG) allowed an appeal of the defendant and dismissed the action as altogether unfounded.

Discretionary amount of the bonus (§ 315 Sec. 1 German Civil Code (BGB))

The Federal Labour Court (BAG) explained that the discretionary bonus amount was determined within the meaning of § 315 Sec. 1 German Civil Code (BGB). A definition of performance would comply with reasonable discretion if the essential circumstances of the case had been weighed up and the interests of both parties had been appropriately considered.

Normal fluctuation margin of the annual result insignificant

Yet the mere existence of a negative annual result in the context of "normal fluctuation margins" did not automatically entitle the employer - according to the BAG – to reduce the performance bonus to zero, since its fixing to zero could contradict reasonable discretion within the meaning of § 315 Sec. 1 German Civil Code (BGB).

Public funds not meant to "rescue" remuneration claims

If a substantiated exceptional case existed reasonable discretion within the meaning of § 135 Sec. 1 German Civil Code (BGB) could, however, justify the complete lapse of the performance bonus. The BAG assumed such an exception in the cases where the bank received help from the state in the billions. The help from the state was intended to contribute to the rescue of the banking system and not to serve the purpose of securing remuneration claims of their employees.

The BAG thus objected to the opinion of the plaintiff that the fulfilment of his/her personal performance success already justified a minimum amount of the performance bonus.

Practical Considerations

When employers and employees discuss remunerations, the fixed remuration and the bonus payments have to be clearly separated according to their respective legal basis. The Federal Labour Law (BAG) stated with some welcome degree of clarity that in exceptional situations a reduction of the performance bonus even to zero could be justified. Nonetheless, it always depends on the review of the specific individual case.

However, in order for a company to pay a bonus to its members of staff in a situation of considerable losses, a careful formulation of the criteria for paying the performance bonus is absolutely necessary.

Johanna Westermeyer

H. Conducting Legal Proceedings

Procedural law in court – Value in dispute for an action for eviction and recovery against subtenants

Decisiveness of the main rent

The KG Berlin stated in its ruling of February 18, 2013 (8 W 10/13) that for the value in dispute ("Streitwert") of an action for eviction and recovery based on property initiated by the landlord against the subtenant, it was not the sub-rent that was decisive, which the subtenant paid to the sub-landlord, but the main rent to be paid by the tenant to the landlord.

In the facts underlying the ruling the landlady took legal action against the subtenant for eviction and recovery of commercial space as well as a parking lot in an underground car park. In proceedings of the Landgericht the parties concluded a settlement. According to that, the subtenants undertook, among other things, to pay a monthly user fee of € 1,916,91 to the landlady for a period of 3 months. Consequently, the Landgericht set the value in dipute at € 8.295.99. It set the user fee for three months (3 x € 1.916,91) plus service charges typical for the location, however without including VAT. The landlady appealed against the determination resolution concerning the value in dispute.

Question of service charges

According to the KG Berlin, in case of an action for eviction and recovery based on property against the subtenant [§§ 546 Sec. 2, 985 German Civil Code (BGB)] the fee to be paid for the period of one year had to be taken into consideration for the value in dispute [§ 41 Sec. 2 German Court Fees Act (GKG)]. Basically, not the sub-rent to be paid by the subtenant to the sub-landlord would be decisive, but the main rent to be paid by the tenant to the landlord. The Landgericht had, therefore, inappropriately taken into account the user fee ("Nutzungsentgelt") agreed in the settlement, which, in fact, did not mean the rent to be paid by the tenant. Furthermore, the Landgericht had incorrectly considered the service charges customary to the local market. When determining the value in dispute the operating costs and advance payments for heating costs had to be principally disregarded. Service charges could only be added provided they constituted a part of a lump-sum agreement and were not subject to a separate settlement. However, VAT resulting from the basic rent had to be considered when fixing the value in dispute.

Practical Considerations

In case of an action for eviction and recovery also at least based on property, the annual amount of the rent to be paid has also to be taken into consideration pursuant to § 41 Sec. German Court Fees Act (GKG) if the period under dispute amounts to less than one year.

Dr. Rainer Burbulla

Events

July 2, 2013
Legal Annual Summit for the Real Estate Industry
Forum „Mediation – The Other Way towards Conflict Resolution“
in Düsseldorf
Speaker: Dr. Ursula Grooterhorst, Rechtsanwältin und Mediatorin
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
Conference on Retail Trade Development
String Bag instead of Carrier Bag – How Do Customers, Companies and Municipalities React?
in Hamburg, Handelskammer, Adolphsplatz 3
Speakers: Rechtsanwalt Dr. Johannes Grooterhorst,
Partner, Grooterhorst & Partner Rechtsanwälte
Marc-Christian Schwencke, Partner, Grooterhorst & Partner

September 26, 2013
Expert Talk: Pitfalls in Commercial Landlord and Tenant Law from the Perspective of
Experience in Practice in Düsseldorf, Klosterstraße 22, Fachbuchhandlung Sack
Speaker: Rechtsanwalt Dr. Rainer Burbulla, Partner, Grooterhorst & Partner Rechtsanwälte

October 29/30, 2013
5. German Speciality Market Real Estate Congress 2013
Next-Generation-Speciality Markets – Where are Still Potentials for New Growth?
In Focus: Large-Scale Concepts in Sought-After Inner City Locations
in Wiesbaden
Speaker: Rechtsanwalt Dr. Johannes Grooterhorst,
Partner, Grooterhorst & Partner Rechtsanwälte

November 06/07, 2013
Euroforum
Rental Contract and Public Law
Put Your Contracts for Commercial Real Estalte on a Legally Safe and Sound Footing!
in Frankfurt am Main, Marriott Hotel, Hamburger Allee 2, 60486 Frankfurt
Speakers: Rechtsanwalt Dr. Rainer Burbulla, Partner, Grooterhorst & Partner Rechtsanwälte
Rechtsanwalt Niklas Langguth, Partner, Grooterhorst & Partner Rechtsanwälte

November 25/26, 2013
Euroforum
Rental Contract and Public Law
Put Your Contracts for Commercial Real Estalte on a Legally Safe and Sound Footing!
in Düsseldorf, Van der Valk Airporthotel Düsseldorf, Am Hülserhof 57, 40472 Düsseldorf
Speakers: Rechtsanwalt Dr. Rainer Burbulla, Partner, Grooterhorst & Partner Rechtsanwälte
Rechtsanwalt Niklas Langguth, Partner, Grooterhorst & Partner Rechtsanwälte

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