20 YEARS LAW FIRM GROOTERHORST & PARTNER

NEWSLETTER 03/2014

Dear Readers,

Twenty years ago, in August 1994, I founded the law firm Grooterhorst & Partner as a legal boutique specialized in commercial law. Prior to that, I had gathered eight years of experience in a large law firm – at the end as partner. Until today it is the objective and ambition of our law firm, together with distinguished colleagues, to be a personally managed outstanding law firm in the fields of commercial and real estate law. To render top legal performance linked with personalized support constitutes our fundamental concern. The partners Dr. Johannes Grooterhorst, Ralf-Thomas Wittmann, Marc-Christian Schwencke, Dr. Rainer Burbulla and Niklas Langguth have given the law firm a strong profile on the market. All of us, partners, colleagues, and members of staff are proud to be able to realize the founding vision of this law firm on a day-to-day basis also today. This newsletter features extracts of our fields of work relating to commercial law. We would be delighted if its readers, clients and people interested continue to give us the opportunity to contribute to the solution of their tasks by means of our expertise also in the future.

As usual, I wish you some stimulating reading.

In gratitude for your staunch support

Yours

Dr. Johannes Grooterhorst

Ralf-Thomas Wittmann
Partner

Current News

I. Developments In Insurance Law 2014 – Fundamental Questions

The – legal and non-legal – public perceives "spectactular" cases in insurance law: damage relating to product liability in the medical field (to which we legally contribute), lawsuits covering millions in connection with D&O liability, in which we are also active, those lawsuits are also addressed at the Deutscher Juristentag of 2014 (comp. also Hopt, Handelsblatt of September 2, 2014, p. 13).

Entrepreneurs and companies are particularly interested in the answers provided by court rulings concerning basic questions as to insurance coverage as they are formulated in insurance contract law. The current rulings of 2014 render illustrative material on this topic: In its ruling of June 17, 2014 – 12 U 36/14 the OLG Karlsruhe addressed the issue regarding the fundamental problem of the concept of damage to be found in the General Terms and Conditions for the Liability Insurance (AHB). With respect to this issue the Federal Supreme Court (BGH) had already clarified basic questions in its ruling of March 26, 2014. Both rulings refer to a difficult definition issue concerning many insurance branches and thus going beyond the case ruled on: "What is an event of damage?"

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Basics clause 1.1 General Terms and Conditions for the Liability Insurance (AHB) – Event of damage

The insurance industry has solved the problem by means of formulations. The General Terms and Conditions for the Liability Insurance (AHB), which for their part are based on model terms and conditions provided by the General Association of the German Insurance Industry (GDV), include a seemingly clear and simple regulation.

According to clause 1.1 General Terms and Conditions for the Liability Insurance (AHB) an event of damage is an event as a consequence of which the damage was directly caused to the third party whereas the time of the cause of the damage resulting in the event of damage is irrelevant.

The most recent practical case: damage during a building project

The a. m. recent ruling of the OLG Karlsruhe (ruling of June 17, 2014 – 12 U 36/14) has demonstrated the difficulty of applying § 1.1 General Terms and Conditions for the Liabiltiy Insurance (AHB). The OLG has ruled that the event of damage was a damage resulting from some behaviour of the policy holder and that it was of such kind as to trigger the claim asserted (theory of causation). In doing so, a direct impact on a legally protected good must have taken place:

Facts – Faulty backfilling of an excavation pit– Occurrence of damage 18 months later

A building contractor (policy holder) had on behalf of the building owner backfilled an excavation pit during the term of his business liability insurance. Approximately 18 months later the building owner informed the policy holder of the fact that the walls of the cellar developed some buckling on the inside and he attributed this to the faulty backfilling by submitting an expert opinion. The policy holder duly reported the compensation claim of the building owner to the insurance company being sued. The latter refused insurance cover since damage only occurred after the insurance period had expired.

The policy holder sued the insurance company for granting insurance coverage for that case of damage. In order to settle the dispute the interpretation of the term event of damage within the meaning of § 1 No. 1 General Terms and Conditions for the Liability Insurance (AHB) was decisive.

Direct impact on the legally protected good

On the basis of its interpretation of § 1.1 General Terms and Conditions for the Liabiltiy Insurance (AHB) the OLG Karlsruhe has ruled in favour of the policy holder. The term “event of damage” did not presuppose that the damage had to become perceptible and evident. The damage had neither to be or to become recognizable. An event of damage would be an event resulting from some behaviour of the policy holder and that would be suitable to trigger the claim asserted. However, the act or the omission may not have remained internal, but should have set the cause decivisive under liability law for the damage and the consequences of the damage. Therefore, a direct impact on a legally protected good is required.

The question of follow-up liability

The behaviour complained about by the building owner is based on the fact that the policy holder had prematurely backfilled the excavation pit in violation of the rules of the technical procedure. This behaviour had not remained internal, but had had a direct impact on a legally protected good of the building owner, i.e. the ownership to the already built cellar. Insurance coverage would have existed, if the building contractor (in this case: the policy holder) had backfilled the excavation pit within the period insured and if he had directly deformed the already erected walls of the cellar. This also applied if compensation claims resulting from this

were only asserted subsequent to the expiry of the insurance (so-called case of follow-up liability).

Understanding of the average policy holder

When interpreting § 1.1 General Terms and Conditins for the Liability Insurance (AHB) focus has to be on the average policy holder. It cannot be expected from the latter, that he/she makes his/her own linguistic inquiries into the term "event" – especially when such terms are commonly known or used in colloquial discourse. A purpose-oriented effort of understanding can only be expected which is derived from the common meaning of the word and the respective context. The average policy holder is also not aware of the history of the origins of the terms and conditions of the insurance submitted to him/her. For that reason, it cannot be expected of the policy holder that he reflects on the fact which purpose was pursued with a specific rewording of the terms and conditions.

Occurrence of damage during the insurance period

As a result it was decisive for the court of appeal that the claimant by invoking an expert opinion asserted that "the cellar walls had bulged to the inside due to the backfilling work." According to the OLG this had to be understood in a manner that the claimant intended to assert the occurrence of a first damage – which had not been immediately recognizable – directly during the backfilling work, i.e. during the insured period.

The fundamental question: effectiveness of § 1.1 General Terms and Conditins for the Liability Insurance (AHB)

It was already in March this year that the Federal Supreme Court (BGH) fundamentally dealt with § 1.1 General Terms and Conditions for the Liability Insurance (AHB) (ruling of March 26, 2014 – IV ZR 422/12).

In court rulings and the literature doubts arose whether that provision would be ineffective due to intransparency pursuant to § 307 German Civil Code (BGB).

No content control because core of the specification of services by the insurer

In a leading decision the Federal Supreme Court (BGH) has ruled that § 1.1 General Terms and Conditions for the Liability Insurance (AHB) is neither subject to the judicial content control nor to the transparency control and is, therefore, effective. Actually the legislator had consciously not regulated in the German Insurance Contract Act (VVG) which process represented an insurance case in the liability insurance, but left it for clarification in contract law. The definition of the insurance case belonged, therefore, to the core of the specification of insurance itself. Since the General Terms and Conditions of the Liability Insurance (AHB) only just defined the performance owed by the insurer, a content-related control of the General Terms and Conditions for the Insurance Liability (AHB) was not allowed. A content control pursuant to § 307 Sec. 3 Sent. 1 German Civil Code (BGB) did not take place with respect to the description of service which specifies the immediate object of the principal service owed and without the existence of which an effective contract could not be assumed due to a lack of determination and determinability of the essential contractual content.

No transparency control – with respect to the guarantuee of contractual freedom

Even some transparency control is ruled out. § 1 No. 1 General Terms and Conditions for the Liability Insurance (AHB) is excluded right from the beginning from a consequence of ineffectiveness, because there would otherwise be – especially as there is no statutory definition of the insurance case in the liability insurance - no regulation regarding insurance coverage as such and regarding the classification of the insurance case. However, where there is an absence of a statutory fall-back regulation, the ineffectiveness of essential parts of the contract would effect the ineffectiveness of the entire contract. In the negative case the transparency control would have the consequence that the policy holder loses his/her entire insurance cov-

erage. A mere transparency control of the core of the contract resulting in the ineffectiveness of the entire contract, is, therefore, invalid with respect to the guarantee of the contractual freedom.

RALF-THOMAS WITTMANN

B. COMMERCIAL AND COMPANY LAW

I. LAW OF CORPORATIONS – NEW INITIATIVES UNDER COMPANY LAW FROM EUROPE

CORPORATE GOVERNANCE PACKAGE

On April 9, 2014 the European Commission has announced or introduced respectively new initiatives under company law (Corporate Governance Package (European Commission Memo 14/275)).

DR. DETLEF BRÜMMER
OF COUNSEL

- A proposal for a directive of the European Parliament and of the Council concerning companies with limited liability with a single member (Com 2014) 212 final, printed matter 16514 of the Federal Council of April 10, 2014 (information from the European Commission; Memo European Commission 14/274 of April 9, 2014): "Societas Unius Personae (SUP)");

- A recommendation of the Commission of April 9, 2014 regarding the quality of reporting concerning corporate governance ("comply or explain") – 2014/208 EU – Official Journal of the European Union of April 12, 2014 L. 109/43;

- New rules to allow greater "involvement" of the shareholders and concerning their say when determining the remuneration of the board of management (European Commission IP 14/396 of April 9, 2014 "Say on Pay").

EU LAW VERSUS GERMAN LAW

European law influences German civil law in many fields. As far as company law is concerned the Commission has been particularly active for many years: In the context of a process stretching over several years it managed to make the German legislator comprehensively regulate investments - which according to English terminology are called "financial instruments" - in the Investment Code (KAGB) of July 4, 2013 (Investment Code (KAGB), Federal Gazette I, p. 1981).

CRITICISM FROM GERMANY

In the end, the remuneration for members of the management board globally discussed as being "too high" have also triggered new/old considerations when fixing their remuneration (critics: "In former times members of the management board earned thirty times the amount compared to an employee of the group, today it is one hundred times the amount".). Some years ago the Federal Supreme Court (BGH) pointed out in the context of the so-called "Mannesmann Affaire" that members of the management board and of the supervisory board were no landlords but only administrators and for that reason they should not be allowed to receive remunerations of an arbitrary amount. The German business associations (Association of German Industry (BDI), Association of German Employers ("Arbeitgeber") (BDA), German Chamber of Commerce and Industry (DIHK)) the plans as a "massive opposing attack on the German division of responsibilities between the board of management and the supervisory board" (FAZ of August 8, 2014).

SUP – Societas unius personae

Subsequent to SE (effective) – SPE (failed) – now SUP

Company law, especially that of corporations, experiences the particular attention of Europe. A few years ago the commission failed with its attempt to also establish a European "private limited partnership (SPE – Societas Privata Europaea)" after having successfully introduced a European public limited company (SE Societas Europaea) (comp. Newsletter 1/2011, p. 3). It was Germany in particular that knew how to prevent that in view of the special problematic nature of co-determination. The new approach being taken by the Commission in its "Corporate Governance Package" of April 2014 expressly refers to that failed attempt and now launches the idea of a European one-member company which already exists in other places (such as, for example, Spain). In its official explanation regarding the "proposal for a directive of the European Parliament and of the Council concerning a company with limited liability with a single member (Federal Council Printed Matter 165/14 of April 10, 2014) the problematic nature for smaller and medium-sized companies (KMU) to invest abroad is pointed out in particular. On the other hand the small and medium-sized European companies (KMU) would play an important role. For that reason it is the paramount objective of this proposal, manifesting an alternative to an SPE, to facilitate for potential company founders and especially for small and medium-sized companies (KMU) to found a company abroad.

Draft version of the statutes

The text is accompanied by a detailed draft version of the statutes (printed matter p. 18 ff): The company which will thereupon be called SUP – Societas Unius Personae – can be formed by a natural person or a legal person (Art. 8) namely by way of a start-up or by way of a conversion (Art. 9). Its registration will be done in that member state in which it is meant to have its registered office (Art. 14, Sec. 1). There it also acquires its legal personality (Art. 14., Sec. 2). The SUP does not emit more than one share (Art. 15). This share cannot be split up. The share capital amounts to at least 1,00 EURO (Art. 16, Sec. 1). The resolution of the single member replaces the general meeting (Art. 21.). The SUP has either one or several managing directors (Art. 22.) who are subject to the right to give instructions exercised by the shareholder (Art. 23, Sec. 1). The company can be converted into another company or be dissolved pursuant to the respective national law at any time (Art. 25).

"Comply or explain"

Once again – Compliance

The recommendation of the Commission 2014/208 EU is based in its aforementioned considerations on the socially central significance of an effective Corporate Governance Frame, on the objectives of transparency, accountability and the long-term perspective of listed companies as well as on the Directive 2013/34 EU of June 26, 2013 and the obligation specified therein to include a statement concerning corporate governance in the management report. The Commission acknowledges the improvement of practical applications of the last years. Nonetheless, the Commission considers a recommendation primarily to listed companies pursuant to Art. 20 of the Directive 2013/34 but also for other companies regarding quality improvement appropriate, even if – as the Commission admits – there is no union-wide standard format for Corporate Governance.

For that reason, companies should clearly outline from which individual recommendations they have diverged (No. 7 of the recommendation) and they should – for each deviation from a recommendation –

a) explain in which manner they diverged from the recommendation;

b) explain their reasons for deviating;

c) describe by which means the decision for deviating from a recommendationhas been made within the company;

d) in case the deviation is of a temporary nature, explain when the company intends to comply with the respective recommendation;

e) if applicable, describe the measure chosen instead of the recommended procedure and explain in how far this measure contributes to reaching the actual objective of the respective recommendation or of the code, or describe in detail in how far this measure contributes to good corporate governance.

„Say on pay“

Control over the remuneration for the board of management

The Commission intends to solve the problematic nature of determining the remuneration for the board of management by “integrating shareholders in a stronger manner and by granting (them) a say when determining the remuneration (European Commission IP 14/396 of April 9, 2014). The Commission describes its starting position in the so-called Explanatory Memorandum of April 9, 2014 (52014 PCO 213) under the subheading “Insufficient Link between Pay and Performance of Directors” and refers to some incidents in which critical representations of management board remunerations occurred. The Commission is of the opinion that the shareholders did not have sufficient means to express their opinion about the remuneration of the management board. For that reason it proposes to supplement the Company Law Directive 2007/36 EC by some regulations.

For that purpose Art. 9 a, 9 b and 9 c are to be included in the directive:

Pursuant to 9 a shareholders shall vote on the remuneration concept (“Remuneration Policy”) at least every three years and shall publicize their approval (amongst other things on their website).

9 b of the proposed supplement to the directive obliges the Member States to ensure that detailed information regarding remuneration are also made available to the individual board member, to former or to new board members.

Article 9 c requires the member states to ensure that transactions will be publicized which exceed 1% of their assets and that they will submit independent expert opinions with respect to market conditions and the impact on their shareholders, including minority shareholders.

Practical consideration

The set of measures of the EU Commission – still – bears in mind the financial crisis in the world and in Europe: While centrals bank and European banks together with governments are in dispute about the correct financing in Europe, the Commission intends to use the crisis as a lever to put an end to old ideas (such as the European private limited company) or other deficiencies identified in the public or in the publicized opinion. Entrepreneurs should know “what is going on in Europe in the field of company law”. Entrepreneurs and companies should

take into consideration for their plans what they possibly have to face and how to adjust it. Whether, how and when these ideas will turn into national law, remains – as is so often the case – to be seen.

Dr. Detlef Brümmer

II. Law of Partnerships – Russian-Roulette clauses in partnership agreements – Impacts on the board member's mandate of a partner

In its ruling of December 12, 2013 (Reference number:: 12 U 49/13, NJW-RR 2014, 418) the OLG Nürnberg has ruled on two current questions relating to company and stock corporation law: So-called "Russian Roulette Clauses" (also known as Texas-Shoot-Out Clauses) are effective. Furthermore, the obligation of a board member resulting from the "Russian-Roulette Clause" to terminate all activities for the partnership and to resign from mandates in public limited companies is also valid.

Problem of the two-person partnernship with each of them holding an interest of 50%

If a partnership consists of 2 partners only and if each of them holds an interest of 50 per cent (which can particularly be the case in joint venture companies), the danger exists that these partners mutually block each other in decision-making, thus actually making the partnership unable to act and to take decisions. In order to eliminate this danger as fast as possible, contract documents under company law have been developed in the course of time. In essence the core idea is to already agree in the partnership agreement under which conditions the parties are entitled to acquire the partnership interest of the other party or to sell their own partnership interest to the other party. In order to guarantee that an appropriate purchase price applies it is mostly agreed that the partners undertake either to accept the purchase offer of the other party or to acquire the interest of the other party at exactly that price. Since the offering party does, therefore, not know in advance whether it can acquire the interest of the other partner or whether the other partner itself acquires the shares of the offering partner at that purchase price, the offering partner will, as a result, for the sake of his/her own interest try to call up an appropriate price, since there is always the risk that he/she has to sell his/her own interest at exactly that price. Due to that element of uncertainty when "fighting for interest" these contract clauses are often called "Russian-Roulette " or "Texax-Shoot-Out" clauses.

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Partner

In the case ruled on the two parties founded a joint venture in the form of a limited commercial partnership with a private limited company as general partner (GmbH & Co. KG). Both parties held 50% of the shares in the limited commercial partnership (KG) as well as in the private limited company (GmbH). The limited commercial partnership (KG) was sole shareholder of a public limited company. In the partnership agreement of the limited commercial partnership (KG) the following clause – reproduced here in extract form – was agreed which was meant to apply as long as the two parties were sole limited partners:

Reciprocal rights to offer

"Each limited partner is entitled to offer the other partner for purchasing purposes his/her limited partner's share by quoting a specific price. The offer has to be made by means of a notarial deed. A commitment period of 15 months with respect to acceptance has to be provided. If the receiver of the offer rejects acceptance or if he/she does not comment on it within 6 months subsequent to the date of its receipt, the acceptance is considered rejected. If the receiver of the offer does not accept the offer or does not accept it in time, he/she undertakes to sell the offerer his/her limited partner's share immediately at the respectively identical price and to assign it.

Duty to resign from office in dependent companies

With the payment of the purchase price for the share all further employment contracts of the limited partner departing from the group (especially as board member of…) are terminated without any further compensation, namely by derogation from possibly contrary contractual agreements. The departing limited partner undertakes to immediately resign from his offices in the…group – especially as board member of the public limited company (AG)."

For reasons of economic difficulties the limited commercial partnership (KG) sold more than half of its shares in the public limited company (AG) to foreign investors in the course of time. In 2011 the defendant submitted to the plaintiff his/her interests for purchase. The plaintiff accepted that offer within the prescribed time limit and the defendant declared his resignation from his office as board member of the public limited company (AG) by means of a notarial deed. In June 2012 the supervisory board of the public limited company (AG) reappointed the defendant to the management board of the public limited company (AG). The defendant agreed to that renewed appointment. The plaintiff, however, was of the opinion that the defendant was obliged, due to the contractual agreement, to again resign from his management board office in the public limited company (AG). The OLG Nürnberg dismissed the action.

Permissible avoidance of self-blockade

First of all, the OLG has dealt in detail with the effectiveness of such so-called "Russian-Roulette Clauses". Principally the OLG considers this clause to be effective. A reason for this is, particularly, that in case of a company with only two partners – as is the case here – holding equal interests in the partnership, there is the special danger of self-blockade or of a stalemate. In order to avoid such a stalemate, there is a legitimate interest in solving such a situation as soon as possible. According to the ruling of the Federal Supreme Court (BGH) so-called "Contract Termination Clauses" are immoral and, thus, ineffective. A "Contract Termination Clause" applies if the partners are entitled, according to the partnerhip agreement, to exclude a partner from the partnership without an objective reason. In case of such a right of termination there is for the individual partner always the – unspoken – danger of disciplining. However, the avoidance of such a stalemate represents such an objective reason.

Control of abuse related to the individual case

In spite of this fundamental validity of a Russian-Roulette Clause some control of abuse related to the individual case has to take place – according to the OLG Nürnberg. As a matter of fact, such a clause might also be abused by one of the parties in an immoral – and therefore unlawful manner. An abuse of the clause might, for example, apply if one of the parties is in financial difficulties and the other party then submits an offer that is well below the market value, because the latter knows that the co-partner will not be able to finance his/her own counteroffer. If that financial imbalance has already existed upon completion of contract, it has to be considered during the review, however, that the financially weaker party itself is required not to commit itself to such a clause, because it would then be considerably less worthy of protection. In case of this control of abuse related to an individual case a comprehensive assessment of the facts is, therefore, necessary.

Duty to resign from office and right of (re-)appointment of the supervisory board pursuant to § 84 Stock Corporation Act (AktG)

The OLG Nürnberg has negated the duty of the defendant to again resign from the management board. Such a duty is opposed by the requirement in § 84 Stock Corporation Act (AktG). § 84 Stock Corporation Act (AktG) regulates that members of the management board are appointed by the supervisory board. This right of eligibility and appointment of the supervisory board cannot be limited, so that agreements under company law which limit § 84 Stock Corporation Act (AktG) are ineffective pursuant to § 134 German Civil Code (BGB).

The existing duty of the management board member to resign from his management board position in the case ruled only establishes an obligation of the management board. The supervisory board is still free to appoint the defendant as member of the management board, because the defendant will then only be prevented from granting his consent.

In this present case the defendant had fulfilled his obligations under contract law because he had resigned from his management board position. On the other hand there were no points of reference to be found in the partnership agreement which would have prevented the defendant from agreeing to a renewed appointment as member of the management board. This was especially true as the limited commercial partnership (KG), which was by now wholly owned by the plaintiff, only had a minority share in the public limited company, so that the originally intended purpose of the provision of the Russian-Roulette Clause and the duty to resign from the management board office to avoid some stalemate did no longer exist.

Practical consideration

With this present ruling the OLG has sent a clear signal: this ruling adjudicated for the very first time – to the extent evident – about the effectiveness of Russian-Roulette Clauses. The legal view represented by the OLG Nürnberg corresponds to the prevailing opinion in the literature. Nevertheless attention has to be paid when formulating and exercising this clause that it can also withstand a control of abuse related to the individual case. The rights of the supervisory board as set forth in § 84 Stock Corporation Act (AktG) remain unaffected.

Dr. Johannes Grooterhorst

C. Real Estate Law

Private Building Law – Engineer's Contract law – On the scope of liability of an engineer – third party

Poor performance of an engineering contract concerning a weir (hydro-electric power plant)

In a case recently ruled by the OLG Naumburg (ruling of April 24, 2014 – I U 27/11) the operator of a hydro-electric power plant had commissioned in the context of an engineering contract a syndicate (ARGE) with its planning. As a consequence of the planning of the syndicate a weir was built, amongst other things, at which the water of the river flowed through turbines. A bridge building was located in immediate proximity to the weir which was owned by the federal state of Saxony-Anhalt. The federal state was not involved in the building of the hydro-electric power plant. Furthermore, there were no contractual relationships between the federal state and the syndicate (ARGE).

Occurrence of damage at a third party (owner)

After putting the hydro-electric power plant into operation some damage at the bridge appeared. According to the explanation of the federal state insufficient precautionary measures had been taken with respect to the flow velocity of the water in the area of the bridge and with respect to the pushing movement impacting the river bed. The basic assumption of planning made by the syndicate (ARGE) that the plant to be built would influence the flow velocity of the water only insignificantly turned out to be incorrect. Due to that erosions occurred at one of the bridge pillars. The load-bearing capacity of the bridge was no longer guaranteed to the full.

The federal state sued the syndicate (ARGE) for damages.

The syndicate (ARGE) claimed that there was absolutely no contractual basis with the federal state and that already for that reason compensation claims were ruled out.

Contract with a protective effect in favour of a third party

The Court of appeal (OLG) has delivered a different opinion: The senate the syndicate (ARGE) was to be made liable pursuant to the basic principles of a contract with a protective effect in favour of a third party, namely that engineering contract existing between the operator of the hydro-electric power plant and the syndicate (ARGE). This engineering contract protected the federal state as owner of the bridge.

Necessity of the proximity to the contractual performance – community relationship governed by neighbouring rights

A contract with a protective effect in favour of a third party is generally assumed if the third party gets in relationship with the main contractual performance according to its designated use and if the implementation of the main contractual performance. Consequently, some proximity to the contractual performance has to exist and the reference to a third party must be recognizable for the party liable. According to the Federal Supreme Court (BGH) these principles are also applicable to architect's contracts (ruling of September 25, 2008 – VII ZR 35/07). The same applies ro a so-called neighbour's community relationship (OLG Koblenz, ruling of May 7, 1999 – 8 U 10/98, KAG, ruling of August 21, 2003 – 27 U 338/02). Exactly such a constellation has been issued of dispute here: Naturally the neighbour would come in touch with building work on the neighbouring property and was, therefore, particularly worthy of protection. Moreover, it was the task of the engineer to recognize a danger for the bridge pillars and to rule it out. The syndicate (ARGE) culpably did not meet that obligation.

Practical Consideration – Similar Cases

Contracts with a protective effect in favour of a third party can also be imagined in other constellations. For instance, an architect is made liable - if he prepares an expert opinion which is intended to be submitted to a third party as a basis for dispositions of assets particularly in a relationship to the principal of the expert opinion – towards the third party in case of the expert opinion being incorrect in content. An opposing will of the contracting parties with the objective to deceive a third party is in breach of trust and irrelevant (OLG Dresden, ruling of July 12,2011 – 14 U 942/10).

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Partner

A contract with a protective effect in favour of a bank granting a loan also has to be assumed if the building contractor signs a progress report for the building owner that is especially intended "for the purpose of being granted a credit and its disbursement (OLG Celle, ruling of November 19, 2009 – 8 U 29/09).

Ralf-Thomas Wittmann

D. Commercial Landlord and Tenant Law

I. Concluding a rental agreement – Written form requirement of § 550 German Civil Code (BGB) – Ineffectiveness of a clause remedying written form deficiencies towards a person successively entitled to the property

In its ruling of April 30, 2014 (XII ZR 146/12) the Federal Supreme Court (BGH) has ruled that a so-called "clause remedying written form deficiencies" does not prevent a person entitled to usufruct the property, who entered into the rental agreement as new lessor, to terminate the rental contract by invoking a deficiency of the written form.

Unclear allocation of areas in the plan identifying rental areas (attachment) – clause remedying written form deficiencies

A rental agreement for commercial space existed between the original landlord and the tenant with a fixed rental period of 10 years for commercial spaces in a shopping centre to be used as restaurant and outlet for the sale of drinks. In § 2 of the rental agreement the rental

object, located in the area of a shopping mall with a market-like design was described as "premises to be used as sales/shop area on ground floor 1, level 3, 75 sqm, as set forth in the plan identifying the rental areas and attached as addendum 1". The plan identifying the rental area, which was stapled to the rental agreement, displayed an extract from the shopping mall, on which – apart from two areas denominated as "storage space" and "sales" – tables with chairs were marked in the transportation and common areas, without those being specifically allocated to a store. In § 20 the rental agreement included a clause remedying written form deficiencies, according to which the parties undertook in case of non-compliance with the written form of the rental agreement (§ 550 Sent. 1 German Civil Code (BGB)) to bring about the written form retroactively as well as in case of amendments to do everything possible to meet the terms of the written form requirement and not to terminate it for reasons of the deficient form prior to that point in time. The owner of the property (landlady) established a usufructuary right in favour of the person entitled to the usufruct. The latter declared the termination of the rental agreement by invoking an infringement of the written form and demanded that the tenant cleared the rental space.

Effective appointment of a usufructuary (§ 567 1 German Civil Code (BGB))

The Federal Supreme Court (BGH) confirmed an entitledment to the clearance and return of the rental object because the tenancy of the parties was terminated by the orderly cancellation of the person entitled to the usufruct. By appointing a usufruct the person entitled to usufruct enters the rental agreement as new landlord (§ 567 Sent. 1 German Civil Code (BGB)).

Ineffective clause remedying written form deficiencies for the protection of the purchaser (person entitled to the usufruct)

The new landlord was entitled to termination because the written form of the rental agreement had not been observed. As a matter of fact, the space rented out had not been sufficiently marked in the rental agreement. As far as the plan identifying rental areas was concerned, which was attached as addendum 1, only the areas 11sqm for "storage" and 17,37sqm for "sales" had been allocated clearly but not the remaining area of 46,63 sqm, which with respect to the specific circumstances had to be allocated to the common area. It was unclear which part of the common area had been specifically rented out to the tenant (also comp. previous instance OLG Düsseldorf – I-10 U 434/12, for further reference see Newsletter 1/2013, p. 7). The tenant was not able to invoke the clause remedying written form deficiencies in § 20 of the rental agreement. Actually there is no obligation for the person entitled to usufruct to make up for the written form. The requirement of the written form as set forth in § 550 German Civil Code (BGB) first and foremost intends to ensure that a subsequent purchaser of a property who by act of law enters on the part of the landlord into a tenancy lasting for more than one year, can take note of its terms and conditions from the written rental agreement. Even if the protection of § 550 German Civil Code (BGB) cannot be comprehensive, the purchaser shall be protected by means of the written form requirement to enter into a rental agreement, the economic conditions of which differ from expectations, for instance, as a result of an agreed rent reduction. Nevertheless, if that turns out to be the case due to informal agreements, he/she has, as a result of the legal concept, the possibility to disengage from the rental agreement ahead of time by means of an ordinary termination. He would be deprived of that possibility if he were obliged as a result of a clause remedying written form deficiencies to ensure the long-term existence of the tenancy.

Practical consideration

The Federal Supreme Court (BGH) has ruled about a very important question for practical applications. What this means in specific terms is that clauses remedying written form deficiencies do not have any effect with respect to that person who enters into the contract as a new landlord (i.e., for example, purchaser of a property, person entitled to usufruct, person entitled

to a leasehold property). Since this result has been directly derived from § 550 German Civil Code (BGB), it is irrelevant whether the clause is part of a standard form rental agreement or whether it has been individually agreed. The Federal Supreme Court (BGH) has not (expressly) adopted a position whether the clause remedying written from deficiencies is effective concerning the relationship between the actual contracting parties. However, it is recommendable to make clear in the clause remedying written form deficiencies that the rights of a purchaser of property remain unaffected. Then, by all means, the perspective of the Federal Supreme Court (BGH) in its ruling of April 30, 2014 is taken into account.

Dr. Rainer Burbulla

II. Concluding a rental agreement – Written form requirement, § 550 German Civil Code (BGB) – Effective representation of a public limited company

In its ruling of April 28, 204 (12 U 1419/12) the OLG Koblenz has ruled that the written form of a rental agreement with a public limited company has not been adhered to only if according to the recitals of the rental agreement doubts might arise as to whether the signing member of the management board also has acted on behalf of another board member or the impression emerges that the deed seems incomplete and that it required a further signature, in order to make the contract become effective.

Public limited company as tenant – to management board members – one signature

A rental agreement for commercial premises had been signed between the landlord and the tenant. The tenant was a public limited company represented by two members of the management board. However, the second supplement to the rental agreement was only signed by one board member on the part of the tenant. It was not obvious, that the signing board member also intended to sign on behalf of the second one. A separate statement about his/her representation and a second signature was missing. In the recitals of the rental agreement it was formulated that the tenant was represented by the management board. The landlord terminated the rental contract due to an infringement of the written form and thereby invoking, amongst other things, the missing signature of the second board member.

Federal Supreme Court (BGH) 2009: Reference to the (represented) second board member

According to the opinion of the Federal Supreme Court (BGH) the written form requirement in case of rental agreements with a public limited company necessitates that either all members of the management board sign the rental agreement or that one signature includes a reference, that the signing board member also represents those board members who have not signed it (comp. Federal Supreme Court (BGH), ruling of November 4, 2009 – XII ZR 86/07).

Doubts concerning representation only in case of indicators concerning the incompleteness of the deed

The OLG Koblenz has found the a. m. requirements missing. Nevertheless, the court has deemed the written form of the second addendum adhered to: In contrast to the cases ruled by the Federal Supreme Court (BGH) there could be no doubt whether the signing board member intended to sign only for him-/herself or for the other board members, too, since the power of representation did not become obvious from the addendum. For that reason it was not possible that one might get the impression that the deed was incomplete. It was conceivable, that there was only one board member or that only one power member had the sole power of representation. A purchaser to be protected by the observation of the written form could not assume without any further ado that all members of the board always had to sign it since a deviating regulation might have been arranged. The potential legal successor was only insufficiently protected if due to a deviation of the recitals in the rental agreement or in the

addendum from the signatures rendered the impression of incompleteness or incorrectness might occur. This was not given in the present case. The issue of the effective representation as such was the sole decisive aspect for the effectiveness of the contract and not for the adherence to the written form.

Practical consideration

The opinion of the OLG Koblenz is in tune with the ruling of the OLG Düsseldorf of January 31, 2012 (I-24 U 152/11). It, therefore, appears that a certain higher-court tendency asserts itself. Nevertheless, it has to be taken into consideration that the Federal Supreme Court (BGH) has not yet expressly dealt with the question so that, when concluding rental agreements with "majorities of persons" on one page of the rental agreement, the safe way to further on go about it is that either all members of the majority of persons sign the rental agreement or that the existing signatures express that they were added in representation of the contracting parties that did not sign it.

Dr. Rainer Burbulla

III. Stipulation of operational costs in the rental agreement – Price Clause Act (PrKlG) – Content control of the General Terms and Conditions

In its ruling of May 14, 2014 (Reference number:: VIII ZR 114/13) the Federal Supreme Court (BGH) has decided that a breach of the Price Clause Act (PrKlG) did not automatically imply an inappropriate discrimination within the meaning of § 307 Sec. 1 German Civil Code (BGH), at least not in B2B business transactions.

Natural gas supply contract with price clause (standard domestic heating oil)

In the case ruled the effectiveness of the General Terms and Conditions of a natural gas supply contract in B2B transactions was dealt with. The natural gas price included the fixed annual basic price as well as a volume-based energy rate that was linked to the development of prices for domesting heating oil. With this volume-based energy rate both the initial price as well as later price adjustments were determined. The company supplied demanded a part of its payment back from the defendant natural gas supplier because the link to the price development for domestic heating oil was contrary to the General Terms and Conditions. The suit remained unsuccessful in all instances.

Control of content (only) for future price developments, not for the "main price agreement"

The Federal Supreme Court (BGH) outlined in its ruling that the calculation of the natural gas price was subject to the content control under General Terms and Conditions law provided that it dealt with the regulation of future price developments. Only the determination of the initial price payment as so-called "main price agreement" pursuant to § 307 Sec. 3 Sent. 1 German Civil Code (BGB) was not subject to the General Terms and Conditions control.

That distinction also applied if the initial price and the future price were calculated on the basis of the same formula. Otherwise the user of the General Terms and Conditions had the power to deprive the entire price determination of the General Terms and Conditions control by means of a uniform price calculation.

Valid price adjustment clause in B2B business transactions

Unlike consumer contracts such a link to domestic heating oil is valid in B2B transactions. For reasons of his market experience an entrepreneur is much more in a position than a consumer to assess the cost risk connected to a flexible price development.

Different effects of the price clause (future-oriented) and of the content control (conclusion, i.e. past-oriented)

Furthermore, the Federal Supreme Court (BGH) commented on the question, which had not yet been dealt with by the highest court, whether a breach of § 1 Sent. 1 Price Clause Act (PrKlG) was at the same time also deemed a breach of § 307 German Civil Code (BGB). Whilst a breach of the Price Clause Act (PrKlG) pursuant to § 8 Price Clause Act (PrKlG) only applied in relation to the future, the ineffectiveness could also be asserted retroactively in case of a (simultaneous) breach of § 307 German Civil Code (BGB), so that any overpayment made could be reclaimed. The Federal Supreme Court (BGH) ruled on that question to the effect that a breach of the Price Clause Act (PrKlG) did not automatically imply a breach of § 307 Sec. 1 German Civil Code (BGB). It justified that with the legal reasoning behind the Price Clause Act (PrKlG) as well as with the legislative decision according to which breaches of the Price Clause Act (PrKlG) pursuant to § 9 Price Clause Act (PrKlG) could only be asserted in relation to the future. When assuming an automatic breach of § 307 German Civil Code (BGB) this legal consequence would be subverted.

Practical consideration

In its ruling the Federal Supreme Court (BGH) decided on several legal questions which are of particular relevance to the commercial landlord and tenant law. This especially applies to the relationship of the Price Clause Act (PrKlG) to § 307 German Civil Code (BGB): The indexation clauses frequently occurring in commercial landlord and tenant law are predominantly linked to the price development of other products. Even these indexation clauses have to be measured on the basis of the Price Clause Act (PrKlG). For that reason, it can also be assumed for the landlord and tenant law that a potential breach of the Price Clause Act (PrKlG) does not automatically imply a breach of § 307 German Civil Code (BGB). However, an ineffectiveness of the General Terms and Conditions may occur for other reasons which are not connected to the Price Clause Act (PrKlG).

Dr. Rainer Burbulla

IV. Renewal of the rental agreement – Exercising an option and rights regarding defects

With its ruling of May 21, 2014 (“ U 901/13) the OLG Koblenz has decided that rights of warranty of the tenant were excluded if a contract was renewed in consequence of exercising an option and the tenant was aware of defects when exercising the option if he/she did not expressly reserved his/her rights.

Exersing an option without reservation in case of a commercial rental agreement in spite of former notices of defects

In the facts underlying the ruling a rental agreement concerning commercial premises existed between the parties. Originally the contract had been concluded for a period of 10 years. The tenant was entitled to a right to exercise the option to renew the rental period two times by 5 years respectively under the conditions of the existing contract. The tenant had informed the landlady several times in writing about defects regarding the rental object. The defects complained about were individually in dispute between the parties. It was, however, indisputable that the tenant exercised her right regarding the option of renewal without reserving her rights as to the existing defects. The tenant reduced the rent because of the defects claimed. The landlady demanded the payment of the full rent.

Scope of regulation of § 536 b German Civil Code (BGB)

Starting point of the ruling is the regulation of § 536 b German Civil Code (BGB). According to that, the following applies: If the tenant upon signing of contract is aware of defects concerning the rental object, he/she is not entitled to any claims for defects. The same applies if the tenant accepts a defective rental object although being aware of the defect and not reserving his/her rights upon acceptance.

According to the ruling of the Federal Supreme Court (BGH) the regulation of § 536 b German Civil Code (BGB) regarding rental payment without reservation also had to be applied to defects which first occurred at a later stage (comp. Federal Supreme Court (BGH), ruling of October 18, 2006 – VIII ZR 33/04). Nonetheless the Federal Supreme Court (BGH) has ruled – though prior to the Landlord and Tenant Law Reform Act coming into force – that § 539 German Civil Code (BGB) old version also, and particularly so, had to be applied to defects which had been discovered during the rental period if it was in the power of the tenant to terminate the contract regarding a defective rental object upon the termination of the agreed period, but if instead of that he/she had made use of a granted right to exercise an option thus continuing the contract (comp. Federal Supreme Court (BGH), ruling of July 24/28, 1970 – VIII ZR 230/68). This perspective corresponded with the prevailing opinion in the application of the new law (comp. OLG Koblenz, ruling of September 19, 2012 – 2 U 1264/11).

Applying the older ruling of the Federal Supreme Court (BGH) (prior to the Landlord and Tenant Law Reform Act)

The OLG Koblenz has agreed to that opinion and, therefore, rejected rights of the tenant concerning defects. The tenant could have terminated the rental agreement by not exercising the option. However, he/she had opted for the continuation of the contract – although knowing about the defects complained about – with the consequence that he/she was no longer entitled to invoke any rights regarding defects not precisely reserved when excercising the option.

Practical consideration

If there are defects at the object, even if they are disputable in the individual case, the tenant should at any times prior to a renewal of contract, for instance, due to exercising an option or some tacit renewal, expressly reserve his/her rights. Otherwise the tenant loses his/her rights concering defects.

Dr. Rainer Burbulla

E. Public Law

Planning law – Preclusion of an application for judicial

On February 20, 2014 (Reference number: 4 CN 1/13) the Bundesverwaltungsgericht (BVerwG) has ruled that an application for judicial review against a legally binding land-use paln was invalid pursuant to § 47 Sec. 2 a Rules of the Administrative Courts (VwGO) if the applicant had not raised any objections on the occasion of a renewed public participation concerning the amended draft plan.

Dr. Steffen Schleiden
Rechtsanwalt

Considering the objections of a property owner in the context of the – first – public participation – no objections at the – second – public participation

The issue dealt with an application for judicial review against a legally binding land-use plan which overplanned a farm of the applicant and which identified an area on which the farm building was situated as “green” area. In the context of public participation the applicant raised objections against that plan. The respondent to the application revised the draft plan and reduced the green areas and additionally determined a plot area to be built on to enable the partial preservation of the farm building. On the occasion of the renewed public participation the applicant did not object to this new draft.

Invalidity of judicial review application due to preclusion of the objections (§ 47 Sec. 2 (VwGO))

In the following application for judicial review the OVG – first instance – has ruled that the application for judicial review was invalid. The applicant had not raised any objections in the context of the renewed public participation and was, therefore, precluded pursuant to § 47 Sec. 2 Rules (VwGO).

The Federal Administrative Court (BVerwG) has confirmed that decision. Pursuant to § 47 Sec. 2 a Rules of the Administrative Courts an application for judicial review against a legally binding land-use plan was invalid if the applicant raised objections which he did not raise in the context of a public display or which he claimed too late, but which he could have claimed, and if reference would had been made to the legal consequence in the context of the participation.

Application of § 47 Abs. 2 (VwGO) to renewed public partici-pation

According to the opinion of the Federal Administrative Court (BVerwG) the effect of preclusion also applied to renewed public participations which had an amended draft plan as subject matter. The application for judicial review had to be dismissed as being invalid.

Practical consideration

As far as practical applications are concerned this ruling is of far-reaching significance. It reveals how important it is to raise objections against the legally binding land-use plan in the context of public participation of land-use planning procedures. Only in doing so property owners can reserve all rights and – if necessary –put forward an application for judicial review at a later stage. Land-use planning procedures should by all means be further monitored subsequent to public participation in order to ensure that also in case of a repeated public participation objections can also be raised in order to prevent preclusion of § 47 Sec. 2 (VwGO).

Considering the monitoring of the building law

It is recommendable, especially for institutionalised building owners, which have only limited possiblities to monitor local indicators concerning public participations, to commission a so-called monitoring of the building law by means of which the developments of building law concerning the respective object are monitored by external consultants.

Dr. Steffen Schleiden

Jörg Looman
Rechtsanwalt

F. Labour Law

Contract of employment – Part-time and Fixed-term Employment Act (TzBfG) – Application to members of the works council – Validity of an unfounded fixed term of the contract of employment

In its ruling of June 25, 2014 (Reference number:: 7 AZR 847/12) the Bundesarbeitsgericht (BAG) has ruled that even contracts of employment with members of the works council could principally be of an unfounded fixed-term nature.

Fixed-term contract of employment – renewed fixed term subsequent to the election into the works council – Refusal of being taken over into permanent employment

Initially the plaintiff had been employed for a fixed term of one year with the defendant chemical company and she had been elected into the works council within that period. Subsequently the employment had been renewed for another year. After that the defendant company informed the plaintiff that she would not be taken over into permanent employment. The plaintiff has brought an action seeking clarification which stated that the employment did not end for reasons of the fixed term. The Federal Labour Court (BAG) has dismissed the action.

Taking into account § 78 Sent. 2 Works Constitution Act – No discrimination or preferential treatment due to the activitiy as member f the works council

Pursuant to § 14 Sec. 2 Sent. 1 Part-time and Fixed-term Employment Act (TzBfG) the fixed term of an employment contract is valid up to a duration of a maximum of two years, even without the existence of an objective reason. However, attention has to be paid to the fact that pursuant to § 78 Sent. 2 Works Constitution Act (Betriebsverfassungsgesetz) members of the works council are neither allowed to be discriminated against nor get preferential treatment because of their activity as members of the works council.

No discrimination in case of fixed term only

The Federal Labour Court (BAG) has ruled that the unfounded fixed term pursuant to § 14 Sec. 2 Sent. 1 Part-time and Fixed-term Employment Act (TzBfG) was also valid for members of the works council. Discrimination prohibited pursuant to § 78 Sec. 2 BetrVG only applied if the member of the works council was not taken over into permanent employment exactly because of his/her activity in the works council.

Burden of explanation and of proof

As far as such kind of discrimination is concerned, the member of the works council is obliged to produce explanation and proof. If there is evidence that indicates some discrimination because of the activity in the works council, the employer has to specifically bring about arguments concerning this in the legal proceedings and to invalidate such evidence. In the legal proceedings ruled the plaintiff only presented the argument that almost all employees had been taken over into permanent employment. However, this claim was insufficient for the Federal Labour Court (BAG) in order to serve as indicator for some discrimination.

Practical consideration

In its review as to whether some dicscrimination pursuant to § 78 Section 2 BetrVG applied the court has to arrive at an overall assessment. For that reason it is of particular significance that the employer carefully documents the reasons that led to not being taken over into permanent employment. Actually by means of such a documentation reasons for not being taken over into permanent employment can be comprehensibly demonstrated in case of future legal proceedings. If the employer is not able to invalidate evidence of some discrimination, the member of the works council is entitled that his/her employment is turned into permanent employment.

Jörg Looman

G. Conducting Legal Proceedings and Mediation

Mediation as building block of corporate social responsibility (CSR) or "there are no conflicts with us"

Mediation as a means of employee management

The task to minimize conflicts is no longer seen as a soft skill of managers, but as a tough issue of management. Within the context of globalisation there is an exponential growth of conflicts, thus representing an enormous risk that significantly influences the success of an organisation (for example, companies/authorities). A survey of the Austrian Federal Chamber of Economy (WKÖ) (2006) shows that the proportion of costs spent on conflicts within small and medium-sized companies amounts to 19% of the total costs. According to a survey on costs for conflicts at least 25% of the costs for conflicts can be reduced on an annual basis which, amongst other things, are based on staff turnover, illness of members of staff, counterproductive behaviour, customer turnover or sanctions under labour law. Only an intensive investigation into conflicts can introduce some process or cost optimization in the company.

Dr. Ursula Grooterhorst
Rechtsanwältin & mediatorin

By way of mediation conflicts can be eliminated or future conflicts can be avoided. If this instrument is applied regularly in a company, it does not only lead to a reduction of conflict costs but also to an increase in communicative standards within the company. The image of the company created to the outside world will be enhanced.

Interpersonal aspects of mediation

Mediation considers both human and interpersonal aspects of people's working life. Members of staff are no longer seen as a means to generate profit (shareholder value), but they gain centre stage as human beings with individual abilities, needs and hardships (stakeholder value). Job satisfaction resulting hereof has a positive impact on the company and its success.

So many members of staff in the company – so many private worlds in the company

In a company with many members of staff just as many private worlds of people meet which have come into being by various experiences as well as by various origins, traditions, various kinds of social rank and knowledge. Each and every human being draws conclusions based on his own world which he connects to what he/she perceives. They result from the attribution of meaning of his/her perception. Each human being constructs his/her own reality in his/her own head. If two people observe the same thing, images of a different nature are created in their heads depending on the experience they had. This implies that "understanding" something is not necessarily possible without an explanation provided by the other. Many members of staff are constantly subjected to big challenges that lead to an increase in stress conditions. In such cases there is as a rule no time to explain their behaviour, which again is necessary for some mutual understanding. Frictions are the inevitable consequence and conflicts come into being. A "realistic" world view can, therefore, not deny conflicts at places where human beings coexist and work together.

Identifying conflicts

Sometimes managers have problems with identifying conflicts in the first place. This state of affairs often leads to the claim "we do not have any conflicts here". This subjective perception of managers is in these cases possibly based on the fact that they themselves are in a conflict-free state at the time or that there are, in fact, no conflicts carried out in their immediate working environment. However, it is more common – at least above a certain number of staff members – that managers do not perceive existing conflicts occurring around them. This may be due to various causes:

Hot conflict

The manager cannot recognize a conflict because there is no "hot" conflict in his/her working environment. A "hot" conflict is accompanied by strong emotions. "The parties in dispute confess their personal use of violence (verbal or physical) and do not deny their part in it, even if they notice that they caused some harm. The energy of the conflicting parties is focused on pursuing their own objectives" (Glasl, Der heimliche Krieg, in: Konfliktdynamik 2014, 101 ff.). However, if destructive energies are not released and if emotional discharges are not recognizable, this fact does not allow the conclusion that there are no conflicts within a company.

Witholding conflicts

It may be that conflicts are not brought to the attention of a manager since he/she is not supposed to get to know about the conflict with respect to his/her hierarchical position. The dispute is carried at a lower level; the manager is meant to remain an outsider. In the long run, both cooperation and work performance will suffer some damage anyhow.

Cold conflict

The hierarchical position of a manager does not protect him/her from being involved in a conflict. If the other conflicting party cannot afford -due to its "subordinate" position - to show the conflict, it will carry out the conflict subliminally. Then it is an issue of "cold" conflict, if the parties in dispute do not openly carry out the conflict, but if the main issue is to impede the opponent in the best possible way (Glasl, ibid, p. 102). It is characteristic for cold conflicts that suppressed uncomfortable feelings are bottled up over time turning into physical problems concerning metabolism, cardiovascular diseases, a prolapsed intervertrebral disc, menstrual pain, asthma, migraine etc.. Statistics concerning noticeable staff turnovers and diseases

within an organisation, especially burn-out, are indicators of potentially hidden cold conflicts (Bauer, J., Schmerzgrenze, 2008, P. 199 ff.).

Dealing with one's own imperfections

Perceiving conflicts also goes hand in glove with the ability of a manager as to how he/she deals with his/her own imperfections. If he/she does not accept his/her own imperfections because he/she then would consider him-/herself as marked with a blemish thus blocking out reality, he/she will only recognize conflicts in his/her own working environment with a certain delay in time. As a rule, conflicts do not solve themselves, but they grow exponentially as time passes by. A a certain positive attitude that one's own imperfection and that of other human beings are just part of life, leads to the fact that conflicts can be remedied in time. Illness and the termination of staff members do not have to be the inevitable consequence of conflicts.

Open handling of conflicts resulting from corporate social responsibility

Conclusion: A systemic-constructivist stance cannot deny conflicts. Even if those are not perceived for various reasons, a realistic view of the world has to assume that conflicts come into being wherever human beings work together. Due to the working conditions it is often not possible at all to mutually explain one's own actions so that misunderstandings are pre-programmed. An entrepreneur who openly deals with his/her own imperfection and who is also open with respect to the imperfection of others can keep consequences of imperfection within limits at an early stage by using mediation as a tool of corporate governance. For that reason a contact point for emerging conflicts is required as well as the offer of the entrepreneur to his staff members to eliminate or to at least mitigate conflicts developing between people by way of mediation. Such a strategy results from showing corporate social responsibility towards members of staff as well as from the objective to increase the economic success of the company. This involves that staff members are convinced of the attractiveness of a company which also takes care of human relations at the work place. Decreasing sick leave and decreasing staff turnover first of all reduce the costs in the company. Last but not least, however, motivated members of staff increase the economic success of the company.

Dr. Ursula Grooterhorst

Events

Specialist lecture: "Current News on Commercial Landlord and Tenant – Properly Focused"
Speaker: Rechtsanwalt Dr. Rainer Burbulla, Partner
Grooterhorst & Partner Rechtsanwälte mbB

September 18, 2014
in Cologne, Am Justizzentrum 3, Specialist Book Shop Sack, at 6 pm

September 24, 2014
in Bielefeld, Friedrich-Verleger-Straße 7, Specialist Book Shop Struppe & Winckler, at 6 pm

October 21, 2014
6. German Specialty Store – Real Estate Conference 2014
in Wiesbaden, Dorint Pallas Hotel
Lecture "Legal Framework for the Development of Specialty Stores Demonstrated on the Basis of Current Case Studies"
Speaker: Rechtsanwalt Dr. Johannes Grooterhorst, Partner
Grooterhorst & Partner Rechtsanwälte mbB

October 22, 2014
IMMOEBS Work Group Rhein-Ruhr
in Düsseldorf, Königsallee 53-55, 18.00 Uhr
Specialist Lecture: "Commercial Landlord and Tenant Law – Up-to-date and Compact"
Speaker: Rechtsanwalt Dr. Rainer Burbulla, Partner
Grooterhorst & Partner Rechtsanwälte mbB

Recent Publications

Powers of Attorney in the Company
Author: Dr. Ursula Grooterhorst, Rechtsanwältin and Mediatorin
6th revised and extended edition 2014

Current News Commercial Landlord and Tenant Law – Rulings and Contractual Design
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