GROOTERHORST
& PARTNER
RECHTSANWÄLTE

NEWSLETTER 04/2013

Dear readers,

There are no summer holidays in the legal world: The legislator remains active. Now the federal state of North Rhine-Westphalia intends to let a decision be made on the criminal law for companies and associations in a new initiative of the Federal Council (Bundesrat). The Federal Supreme Court (BGH) and instance courts dealt with issues of liability. The commercial landlord and tenant law reflects the variety of commercial lease agreements in Germany. Important new rulings of the OVG Münster regulate competition and conflict of neighbouring municipalities when establishing retail businesses. EU norms and directives increasingly influence rulings under public building law. We cover new rulings under insurance law and the development of jurisdiction when enforcing under procedural law the new law on mediation. We wish you some stimulating reading.

Yours
Grooterhorst & Partner
Rechtsanwälte

Content

A. Current News

Corporate "Schuld und Sühne" – draft version of a Criminal Code for Associations (VerbStrG) of the state of North Rhine-Westphalia in the Federal Council (Bundesrat)

Federal Council (Bundesrat) Initiative initiated by North Rhine-Westphalia

In the meeting of the Federal Council (Bundesrat) taking place on November 14, 2013 a draft version of the state of North Rhine-Westphalia was submitted relating to a – new – criminal law for associations. The order-based, regulation-focussed and income-oriented (state) legislator presented the draft version with the usual legislative headline marketing as its own Criminal Code for Associations.

Existing company sanctions against financial service providers and cartels

Sanctions against companies are no invention of this code of law. In the US American reality of law and life fines running into billions are to be imposed on banks and other sinners of the financial crisis during these weeks and months. The German Federal Financial Supervisory Authority (BaFin) concluded 240 proceedings in 2012 – many of them against companies – with a fine amounting to a total of 3.6 million EUR (annual report BaFin 2012, p. 207). In Germany and in Europe corporate cartel sinners pay high fines worth three-digit millions: German antitrust law regulates fines against companies/associations in § 81 Par. 4 Sent. 2 Antitrust Law (GWB): The maximum fine of 10% of the relevant turnover specified in this legal regulation obviously serves as model for the "punitive" approach of North Rhine-Westphalia. It is called a draft version of an act for the introduction of criminal liability of companies and other associations.

EU and OECD recommendations

In its introduction the draft bill refers to initiatives, regulations and recommendations of the European Union (EU) as well as of the Organisation for Economic Cooperation and Development (OECD).

Criminal offences of associations: inappropriate selection or supervision of managing persons

As far as the subject of the regulation is concerned it is stated: "The bill develops from the specifications of the European Union law two independent material criminal offences of associations in which the liability of the association can be put down in the first case to an inappropriate selection of the managing person, in the second case to a failure to appropriately supervise." (italics not in the original).

In spite of its sophisticated designation as Criminal Code the relatively short act with its 22 paragraphs is substantiated in detail on approximately 65 pages.

Associations

In its first part the draft version regulates the criminal offences of associations: associations are legal entities, associations not having a legal capacity and partnerships under private and public law having legal capacity (§ 1 Sec. 1). In § 2 "wilful or negligent association-related contraventions" are specified as criminal offences of associations. The content of such contraventions is not defined further.

Association sanctions

Association sanctions are either penalties for associations (§ 4 Sec. 1 – fines for associations, warnings against associations, public notification) or disciplinary measures for associations (§ 4 Sec. 2 – exclusion from subsidies, exclusion from public calls for tender, dissolution of the association)

In the regulation on fines for associations (§ 6 Sec. 4) the maximum amount of a fine appears that consists of a total of 10% of the average total turnover of the company, which in fact is already known from antitrust law.

Procedural law

The second part of the law includes procedural regulations as, for example, the principle of legality, court competence, exclusion regulations, representation and service of process, main trial and enforcement.

Practical considerations

Actually it is a Federal Council (Bundesrat) initiative initiated by the state of North Rhine-Westphalia. When and in which way the Federal Council will decide on this issue cannot be predicted. The current coalition negotiations with respect to the envisaged grand coalition will certainly also include formal and content-related initiatives coming from individual federal state governments. If need be, time will come for companies and its associations and their experts on issues under business law, criminal law and criminal trial law to give extensive consideration to this matter and to other problems (for example, the question as to the sufficient description of the criminal offence). Already now entrepreneurs should acknowledge certain trends and should try to prepare themselves for them – especially in their compliance constitution.

Dr. Detlef Brümmer

B. Commercial and Company Law

I. Professional Service Contract – Malpractice of a tax consultant as to insolvency rules

In two recently passed rulings the Federal Supreme Court (BGH) has again clarified the scope of the consultancy duties of a tax consultant:

Indicating excessive indebtedness in case of ongoing tax consultancy

In the first ruling (Federal Supreme Court (BGH), judgement of March 7, 2013, IX ZR 64/12) the defendant tax consultant had been commissioned with the ongoing payroll accounting as well as with exercising the general fiscal interests of a private limited company (GmbH) for several years. In the context of that consultancy the tax consultant refrained from potentially indicating the over-indebtedness of the private limited company. Subsequent to the insolvency of the private limited company, the insolvency administrator made claims against the tax consultant on the grounds that the tax consultant would have been obliged to provide information about the indebtedness and its possible consequences.

No evidence for a shortfall pursuant to commercial law for the over-indebtedness under insolvency law

The claim of the insolvency administrator remained unsuccessful in all instances. The Federal Supreme Court (BGH) stated in its decision that the tax consultant was not obliged in the context of the general tax consultancy of a company to point out the duty of the managing director in the event of a shortfall of the commercial balance sheet to carry out a more accurate review of the over-indebtedness. The over-indebtedness under insolvency law was not evident from the commercial balance sheet. The tax consultant was only obliged to attend to those aspects relating to tax law that had to be taken care of for dutifully completing his mandate.

The Federal Supreme Court (BGH) dealt with a similar issue in its ruling of June 6, 2013 (XI ZR 204/12). In that case, too, the tax consultant had been commissioned to prepare the annual accounts. In the context of preparing those annual accounts the tax consultant provided the information that there was, in fact, a deficit not covered by equity capital, however that "over-indebtedness was of a purely accounting nature". As a result, the managing director omitted to file for insolvency proceedings. After the private limited company became insolvent some time later, the insolvency administrator made claims for damages against the tax consultant. Finally the Federal Supreme Court (BGH) sustained that claim:

Liability of the tax consultant in the event of not required but incorrect information

In fact, the tax consultant did not have to provide consultancy under insolvency law in the context of preparing the annual accounts (comp. the previous ruling). However, as soon as the tax consultant answers an issue subject to insolvency law, it has to be correct, otherwise the tax consultant is to be made liable.

Practical considerations "Cobbler, stick to your trade"

These two rulings reveal in an exemplary manner that the managing director does not automatically book an "all-round carefree package" if he solely commissions a tax consultant with preparing the annual accounts. At the same time, the tax consultant is strongly advised to refrain from making casual and unverified recommendations and hints that are beyond his mandate.

Jörg Looman

II. Partnership Law – contract with a protective effect for a third party – liability of the managing director of a general partner in the form of a private limited company (Komplementär-GmbH) to a limited commercial partnership – significance of the consent of all partners

In its judgement of June 18, 2013 (II ZR 86/11) the Federal Supreme Court (BGH) ruled that the managing director of a general partner in the form of a private limited company (Komplementär-GmbH), the sole or essential function of which is managing the businesses of the limited commercial partnership, is also directly liable to the limited commercial partnership.

The defendant was the managing director of a private limited company, the sole task of which was to manage a limited partnership. The managing director did not receive any remuneration from the limited commercial partnership. A contract of employment did not exist.

In the context of his activity as managing director the defendant concluded several consultancy and utilization contracts. Subsequent to the insolvency of the limited partnership, the insolvency administrator made claims for damages against the managing director on the ground that the conclusion of those contracts was contrary to his duties.

The claim was mainly successful at the Landgericht and at the Oberlandesgericht. The Federal Supreme Court (BGH) annulled those decisions and referred the legal dispute back to the Oberlandesgericht.

The Federal Supreme Court stated: Resulting from the organ position as managing director of the private limited company a special relationship with the limited partnership developed, if it was the sole and essential task of the private limited company to manage the business of the limited partnership. The managing director of the private limited company was also liable to

the limited partnership according to the principles of the so-called "contract with a protective effect in favour of a third party", if he acted contrary to his duties. For this liability the organ position as managing director of the private limited company was sufficient. It was not necessary to conclude a contract of employment.

The Federal Supreme Court (BGH) did not decide on the subject matter: According to its understanding the Oberlandesgericht unjustly left the submission of the defendant out of consideration that he had acted in agreement with all partners of the limited partnership. Acting in agreement with all partners has – just as a binding instruction imposed by the partners – the effect of being released from liability. For that reason, the Federal Supreme Court (BGH) referred the legal dispute back to the Oberlandesgericht.

Practical considerations

A consent of all partners can only be assumed, if they had been comprehensively and correctly informed about the facts beforehand. This constitutes a matter of fact.

Jörg Looman

III. Partnership Law: Different liability of the civil-law partnership (Gesellschaft bürgerlichen Rechts (GbR)) and the individual partner for contractual cease-and-desist obligations of the civil-law partnership

Copyright declarations to cease-and-desist of the civil-law partnership (GbR)

In its judgement of June 20, 2013 (I ZR 201/11) the Federal Supreme Court (BGH) ruled that a partner of a civil-law partnership (GbR) in the event of violating a contractually founded cease-and-desist obligation of the company was only liable for the interest and not personally for omission.

Making claims against the partnership and its partner

At first the defendant was a partner of a civil-law partnership (GbR), which submitted to the plaintiff a cease-and-desist declaration enforced by penalty. In the meantime the defendant joined another company in the same business sector. When publishing a catalogue some copyright violation occurred which was also object of the aforementioned cease-and-desist declaration.

As a result, the plaintiff took legal action against both the company at which the defendant was employed and against the defendant himself.

Ruling in the second procedural process

At first, the Landgericht Munich I had conferred by way of a part and final judgement the injunctive relief with the restriction to the specific form of violation and had limited the asserted claim for information to the submission of commercial recipients and had awarded the costs for the warning. After the unsuccessful appeal, the revision was successful and the case was referred back to the court of appeal. The OLG Munich dismissed the claim against the company and it confirmed the ordering of the defendant (partner of the civil-law partnership) with respect to omission and the provision of information. The revision led to dismissing the case.

Different content of the cease-and-desist obligation of the partner – no independent cease-and-desist obligation

The Federal Supreme Court (BGH) assumed that the partner of a civil-law partnership was principally liable to the same extent as the partnership. However, the cease-and-desist obligation of a partner had inevitably a different content than that of the partnership. Principally, the partner could not directly be made liable for an obligation under penalty of the partnership, which was intended to omit an action. In fact, he was liable for the interests of the creditor, in case the company violated the order of omission. A partner of a civil-law partnership (GbR) did not have a separate cease-and-desist obligation.

No extension in good faith and trust (§ 242 German Civil Code (BGB))

Even the principle of good faith and trust pursuant to § 242 German Civil Code (BGB) did not allow for an extension of the cease-and-desist obligation to the defendant personally. In spite of knowing the legal form of the civil-law partnership, the plaintiff limited the cease-and-desist obligation to the partnership and had not included the partners in that cease-and-desist obligation. Bearing these circumstances in mind, it was not contrary to faith if the defendant invoked the fact that he - beyond his activity for the civil-law partnership - was not affected by any personal contractual cease-and-desist obligation.

Practical considerations

When formulating cease-and-desist declarations special regard has to be given as to who can be committed to omission and who not. A valid cease-and-desist declaration has to cover the difference between the civil-law partnership and its partners.

Dr. Steffen Schleiden

C. Real Estate Law

I. Private Building Law – Building Contract Law: No claim from remedying defects in case of "illicit work"

Contract for works "without invoice"

It always comes as a surprise which facts are sued upon by parties. The Federal Supreme Court (BGH), indeed, has ruled a case on August 1, 2013 (VII ZR 6/13) in which the parties to a contract for works concerning pavement work agreed that the defendant contractor would receive his "remuneration" (1,800.00 EUR) in cash and without an invoice issued.

The work revealed some defects. As a result, the principal sued the contractor for refunding replacement costs in the amount of approximately 6,070.00 EUR.

Breach of the Illegal Employment Act as breach of a statutory prohibition (§ 134 German Civil Code (BGB))

The Federal Supreme Court (BGH) dismissed the case. § 1 Sec. 2 No.2 Illegal Employment Act (SchwarzArbG) includes the prohibition of concluding a contract for work with regulations that serve the purpose that one contracting party as a taxable party does not fulfil its tax duties resulting from the works owed pursuant to the contract. § 1 Sec. 2 No. 2 Illegal Employment Act (SchwarzArbG) constitutes a prohibition act as set forth in § 134 German Civil Code (BGB). The contract for work was deemed nul and void pursuant to § 134 German Civil Code (BGB).

No recourse to good faith

This led to the fact that the principal was not entitled to any claims for defects. It did not violate good faith to deny him claims for defects. The prohibition of the Illegal Employment Act (SchwarzArbG) cannot be overcome by principles of good faith, even if the contractor acted contradictorily by demanding remuneration for work and then, at a later stage, invoking the nullity of the contract in case of defects.

Practical considerations

The judgement can point beyond the case ruled: According to rulings so far, the entrepreneur – in spite of a breach of the law on combatting illegal employment with the consequence of the nullity of the contract for work – has had a claim on account of unjust enrichment possibly reduced by a risk discount against the principal, if and insofar as he had rendered works: The purpose of the law had not required that the purchaser of illegal employment had been entitled to keep the work of the rendering "illicit workers" for free on the strength of the effectiveness of the actually illegal contract (see OLG Hamburg, ruling of December, 23, 2010 – 5 U 248/08).

It remains to be seen whether this jurisdiction will continue to survive in the light of the judgement of the Federal Supreme Court (BGH) of August 1, 2013.

Ralf-Thomas Wittmann

II. Private Building Law – Timey suspension of the statute of limitations by ongoing negotiations

The Kammergericht (judgement of August 6, 2013 – 7 U 210/11) had to deal with the issue whether claims for defects of the principal could be held against the plea of the statute of limitations, or whether the statute of limitations was suspended by negotiations.

Interpretation of § 203 German Civil Code (BGB)

If negotiations are still going on between the debtor and the creditor concerning the claim or circumstances substantiating the claim, the statute of limitations is suspended until either one party or the other party refuses to continue negotiations. The statute of limitations will come into effect at the earliest three months after the said suspension (§ 203 German Civil Code (BGB)).

The term "Negotiation"

The Kammergericht stated: It was sufficient for negotiations if the creditor raised a claim stated with reason, and if subsequently an exchange of opinion took place about the claim or its actual grounds, unless the debtor immediately and apparently refused any negotiation (Federal Supreme Court (BGH), judgement of July 14, 2009 – XI ZR 18/08). According to the Kammergericht the notice of defects as such did not represent any kind of negotiation. However, if the contracting partners in the light of the notice of defects in a time period not subject to a statute of limitation agreed an appointment to inspect the building project with the intention to jointly determine defects covered by warranty and thus slightly prolonging the limitation period, this could already be seen as a review and negotiations about the main share of the blame. The term negotiations as set forth in § 203 German Civil Code (BGB) is fairly open to interpretation. Suspension ended in case of claims for defects, if the entrepreneur communicated the test result, declared the defect to have been eliminated or refused to continue to remedy the defect.

Practical considerations

Courts often have to deal with the question when negotiations can be assumed. If parties in the context of a judicial conciliation hearing reach a revocation settlement relating to a claim, which was not object of the legal dispute, then its statute of limitation is suspended until the declaration of revocation (Federal Supreme Court (BGH), judgement of September 4, 2008 – VIII ZR 93/04).

Further exemplary cases for negotiations are:

- the declaration of the debtor to contribute to the clarification of the facts underlying the claims, if the creditor explains it in more detail,
- the declaration of the debtor that he intends to substantiate to the creditor in a meeting his position that the claim has become time-barred,
- the notification of the insurer that he will return to the matter on its own initiative subsequent to the termination of the criminal proceedings.

RALF-THOMAS WITTMANN

D. Commercial Landlord and Tenant Law

I. Written Form – Sufficient determination of the commencement of the tenancy period from the "drawing board" – fictitious handing over

In its judgement of July 24, 2013 (XII ZR 104/12) the Federal Supreme Court (BGH) has ruled that a determination of the commencement of tenancy in a lease agreement satisfied the written form (§ 550 German Civil Code (BGB) if the criteria to which the contracting parties attached the commencement of contract enabled its distinct determination (here: fictitious handing over).

Long-term lease agreement with the start of the tenancy period subsequent to handing over/taking over of the rented space

In the facts underlying the ruling the landlord rented out business premises to the tenant in a commercial property. It was planned that it would be comprehensively refurbished prior to the tenant moving in. The lease agreement covered a period of 10 years. For the commencement of the tenancy the parties agreed in § 4 of the lease agreement the following: "Tenancy starts with the handing over/taking over of the rental property. In the event that the handing over/taking over is delayed due to requests for changes of the tenant or by not timely submitting plans and documents necessary for the tenant's fit-out or by not timely providing safety, tenancy commences on the day the object would have been handed over without these requests for changes or with the timely submission of the plans and documents or of the letter of credit respectively. If the tenant defaults with taking over the rental object, the tenancy commences with the occurrence of the default of acceptance." The business premises were passed on to the tenant on October 16, 2007. In 2010, the tenant terminated the lease contract by invoking a breach of the written form, among other things, because the commencement of the tenancy and, therefore, the period of tenancy could not be identified.

Requirement of the written form (§ 550 German Civil Code (BGB)) and non-contractual events (handing over)

In order to observe the written form (§ 550 German Civil Code (BGB)) it is principally necessary that the essential terms and conditions of contract – especially the rental property, the rent as well as the period and parties to the tenancy – are specified in the (rental) contractual document (comp. most recently Federal Supreme Court (BGH), judgement of February 24, 2010 – XII ZR 120/06). Already in 2005 the Federal Supreme Court (BGH) had answered the (controversial) issue in the affirmative that it sufficed for the determination of the commencement of tenancy that the tenancy commenced with the "handing over of the rental premises" (comp. Federal Supreme Court (BGH), judgement of November 2, 2005 – XII ZR 212/03).

Determination/determinability of the contractual commencement of tenancy

The Federal Supreme Court (BGH) took up its recent rulings and rejected a violation of the written form. The regulation as set forth in § 4 Item 1 Sent. 1 of the lease agreement according to which tenancy should start with the "handing over/taking over of the rental property"

satisfied the written form. Due to this clause the commencement of tenancy - subsequent to the handing over made – was clearly established. The other regulations concerning the "fictitious handing over" specified in § 4, Sent. 2 and 3 did not oppose the sufficient determinability of the commencement of tenancy. By exactly specifying the prerequisites according to which the tenancy should already start prior to the actual handing over, the commencement of contract was also determinable for a purchaser of the premises and, therefore, the protective purpose of the written form (§ 550 German Civil Code (BGB)) was fulfilled. Due to the provisions in the lease agreement a potential purchaser of the premises would know that the commencement of tenancy and, therefore, also the end of the rental period either depended on the actual handing over of the rental property or depended on whether a delay of the actual handing over was caused by circumstances clearly specified in the agreement. Therefore he would also know that the tenancy did not already terminate 10 years subsequent to the conclusion of contract, but only at a later stage about which he would have to establish certainty for himself in another way and which he could also do on a regular basis. This would be sufficient for fulfilling the requirement of the written form.

Practical considerations: Hypothetical causal processes sufficient for the commencement of tenancy

The ruling of the Federal Supreme Court (BGH) follows the recently and increasingly observed generous line of court rulings highlighting the written form. It is remarkable that the Federal Supreme Court (BGH) allows in its ruling even hypothetical causal processes for the commencement of tenancy to be sufficient, and, therefore, linked to the written form.

Dr. Rainer Burbulla

II. Billing of operating costs – subsequent correction – no declaratory acknowledgement of debt in case of unconditional reimbursement of a credit balance

"Forgotten" real-estate tax at billing of operating costs

In its judgement of July 10, 2013 – XII ZR 62/12 – the Federal Supreme Court (BGH) has ruled that even in case of a tenancy for commercial premises the unconditional reimbursement made by the landlord resulting from a credit balance in consequence of the billing of operating costs did not justify making the assumption of a declaratory acknowledgement of debt which opposed a subsequent correction of the operating costs billing.

In the facts underlying the ruling the landlord of a retail shop calculated the operating costs for the year 2009 in September 2010. According to the billing the tenant was entitled to a credit balance in the amount of 53.75 EUR, which the landlord paid out to the tenant immediately. After the tenant had raised objections to the operating costs billing, the landlord prepared a new one. The latter concluded with an additional payment of 375.76 EUR to be made by the tenant. It involved the payment of the real-estate tax, which the landlord had forgotten to include beforehand. The tenant refused to make the additional payment because the balance previously calculated and paid out by the landlord constituted a declaratory acknowledgement of debt.

Legal situation prior to the Landlord and Tenant Law Reform Act 2001 – Forwarding the operating costs bill and settling of the balance as acknowledgement of debt

Until the Landlord and Tenant Law Reform Act came into force on June 19, 2001 (German Civil Code (BGB), p. 1149) court rulings as well as the literature had primarily been of the opinion that by forwarding the bill of the operating costs and by settling an additionally resulting unconditional claim on the part of the tenant, a declaratory acknowledgement of debt had come into being between the contracting parties of the lease agreement, which had made the calculated balance binding thus ruling out future additional claims both by the

tenant and by the landlord. The same was to apply if the landlord unconditionally paid out to the tenant a credit balance arising from the billing.

Since 2011: No acknowledgement of debt in the case of a residential lease agreement

In 2011 the Federal Supreme Court (BGH) ruled for residential rents that a declaratory acknowledgement of debt could neither be derived from the unconditional payment of an additional claim made by the tenant resulting from the operating costs billing nor from the unconditional balance of a calculated credit balance made by the landlord in favour of the tenant (comp. Federal Supreme Court (BGH), judgement of January 12, 2011 – VIII ZR 269/09). As far as the rent for commercial premises was concerned, this issue remained contentious.

Extension of the rulings for residential lease agreements to lease agreements for commercial premises

With its ruling the Federal Supreme Court (BGH) also concluded concerning rents for commercial properties that a declaratory acknowledgement of debt, which opposed a correction of billing of operating costs at a later stage, is constituted neither by the unconditional payment made by the tenant of an additional claim resulting from the operating costs nor by the unconditional reimbursement of a credit balance made by the landlord and resulting from the billing of operating costs.

Accounting of operating costs is no declaration of will, but a declaration of knowledge - no protection of confidence

The Federal Supreme Court (BGH) supports its ruling by stating that the requirement of two concurring declarations of will is missing, which is also applicable to a declaratory acknowledgement of debt. By refunding the tenant a credit balance calculated without reservation, the landlord does not make, from the decisive point of view of the tenant (§§ 133, 157 German Civil Code (BGB)), a declaration of will directed towards the conclusion of a declaratory acknowledgement of debt. The billing of operating costs rather constituted a plain declaration of knowledge without any intention to create legal relations. There is no other assessment also for reasons of protection of confidence. So the landlord could not rely on the fact that the tenant accepted the operating cost balance as binding merely because of the circumstance that the tenant unconditionally accepted the reimbursement of an operating cost balance in his favour.

Practical considerations: The end of the "theory of confirming debt" - alternatives

The Federal Supreme Court (BGH) decided on a very significant issue and firmly rejected the so-called "theory of confirming debt". On the other hand, the Federal Supreme Court (BGH) emphasized that the parties to a lease agreement could in the individual case make in fact a declaratory acknowledgement of debt with respect to a balance resulting from the billing of operating costs and thus regarding the balance as binding on both sides. The Federal Supreme Court (BGH) provided as examples for this the settlement of the balance subsequent to a previous dispute arising from the billing of operating costs or an agreement about instalments or deferral respectively.

Dr. Rainer Burbulla

E. Public Law

I. Planning Law – Landmark court decisions of the OVG Münster in the city law judicial review procedure – Requirements concerning the forecast of the surface area productivity of retail trade projects ("Pulheim")

Issue of city law judicial review of claims of neighbouring cities

The OVG Münster (7th Senate) clarified in two highly respected judicial review judgements of October 2, 2013 (7 D 18/13.NE and 7 D 19/13.NE) the requirements concerning the turno-

ver forecast for retail trade projects and the "worst case" scenario applicable in that case. The specific case dealt with the applications for judicial review of the cities Bergheim and Leverkusen against the establishment of a Segmüller furniture store in Pulheim. The expert opinion regarding the retail trade which formed the basis of the legally binding land-use plan of the city of Pulheim assumed a surface area productivity of 2,070 €/m² (this obviously corresponded with the surface area productivity of comparably large and efficiently operating furniture stores in the Greater Cologne area). A counter-opinion submitted by the applicant, however, established on the basis of publicly accessible information about the company Segmüller (sales area of the individual furniture stores, overall turnover of the company) a surface area productivity of Segmüller in the furniture sector of at least 3,300 €/m².

Realistic consideration of the "worst case" in the context of the inter-municipal coordination requirement (§ 2 Sec. 2 German Building Code (BauGB))

The OVG Münster made it clear that the planning municipality had to carry out a "realistic consideration of the "worst case", i.e. the most disadvantageous case from the perspective of neighbouring municipalities and on realistic grounds, in the context of the inter-municipal coordination requirement (§ 2 Sec. 2 German Building Code (BauGB)). In the present case the offered legally binding land-use plan was aimed at the realisation of a specific project, the basic information of which had been predefined in the notarial purchase agreement (an obligation to prepare a project-related land-use plan did not exist in these cases, according to the court's opinion). For that reason the city of Pulheim had to determine the impacts ("worst case") of that specific project and had to make it the basis of the consideration. The impact assessment forming the basis of the legally binding land-use plan of the city of Pulheim did not meet those requirements, since it was not comprehensibly justified in its consideration why the Segmüller furniture store in Pulheim should generate considerably less turnover per square meter than comparable furniture stores of the company in Southern Germany.

In case of forecasts no recourse to status quo – range of development opportunities – worst case view

The reference to different competitive environments did not suffice for argumentation, since those environments were subject to change. Above all, a strong competitor could lead to "clearing the competitive density". For that reason existing forecast uncertainties did not justify to base the focus on the status quo; in fact, in such cases a bandwidth of development opportunities had to be assumed which cover the given uncertainty in the sense of a realistic worst case view. However, the OVG obviously assumed that there was no other competitive situation in Pulheim as it was the case at other Segmüller locations.

Legally binding land-use plan incorrect concerning consideration

Due to the aforementioned reasons the legally binding land-use plan under attack was incorrect in consideration. In order to meet the requirements stipulated in the coordination requirement, the drafter of the resolution had to have expert statements at the time of adopting the resolution which had objectively worked on the sources of information available at the decisive point in time by considering the circumstances crucial for them and which comprehensively explain those forecast results. The impact assessment would not meet those requirements even if the underlying surface area productivity of 2.070 €/m² turned out to be correct as a result.

Formal deficiencies in the announcement of the public display customary to the area (§ 3 Sec. 2 Sen. 2 German Civil Code (BauGB)); environmental topic

Furthermore, the legally binding land-use plan suffered from formal deficiencies: In the announcement of the public display (§ 3 Sec. 2 Sen. 2 German Building Code (BauGB), the specifications concerning the types of available environmental information were not made in a sufficient manner. In the announcement text the city only referred to the review regarding species and to an expert opinion on noise. However, the environmental report to the legally binding land-use plan additionally addressed numerous other environmental topics, which

were not sufficiently characterized in the announcement. This ruling followed the decision of the Federal Administrative Court (BVerwG) of July 18, 2013 discussed in this newsletter under aspect E.IV..

Due safeguarding of information for parties affected by the plan

Moreover, the textual stipulations for denominating the product ranges admissible in the furniture store made reference to the list of Pulheim and to the classification of the economic sectors of the Federal Statistical Office without ensuring that the parties affected by the plan became reliably acquainted with those documents and by reasonable means. In order to do so it would have been sufficient to refer in the plan to an administration office that keeps the list of Pulheim as well as the classification of the economic sectors ready for inspection.

Practical considerations

The OVG Münster defined with its decisions essential criteria of consideration in the case of legally binding land-use plans for retail trade projects and clarified additional formal requirements: Legal practice, developers of retail trade projects, entrepreneurs, municipalities and consultants have, in fact, to be prepared for that, at least in the state of North Rhine-Westphalia.

Marc Schwencke

II. EU Law – Planning law and the EU guideline of the freedom of establishment when planning retail businesses

The Federal Administrative Court (BVerwG) has dealt in its decision of May 30, 2013 – 4 B 3.13 – with the question whether a complete exclusion of retail businesses in a commercial estate by arrangements of a non-qualified legally binding land-use plan was compatible with the freedom of establishment or the services guideline, i.e. with EU law.

Principal legitimacy of the complete exclusion of retail businesses by means of a legally binding land-use plan in the case of legitimate objectives of urban planning

The preliminary question had already been answered by supreme courts whereby a complete exclusion of retail businesses would be principally possible and permissible by arrangements specified in a legally binding land-use plan. Keeping a commercial estate clear for producing and service-oriented commercial businesses as well as securing supply close to the consumer in the adjacent residential areas are – according to the courts – legitimate objectives of urban planning, which may justify an exclusion of retail trade depending on the planning situation. Such an exclusion of the retail trade serves the purpose of controlling urban development and land use and, therefore, of protecting the urban environment.

Protection of the urban environment – no inadmissibility purely of an economically motivated measure

From the perspective of EU law on the other hand planning measures serving the protection of the urban environment constitute urgent reasons of general interest, which may justify restrictions as set forth in the prohibition of restrictions.

In the present case the exclusion of the retail trade aimed at controlling urban development and land use, thus protecting the urban environment. On the other hand there was a not inadmissible, purely economically motivated measure. Furthermore, in the context of the proportionality to be examined it had also been taken into consideration, that the plaintiff was merely prohibited to open a retail business only in a relatively small part of the area. Against this background, the court of appeal (OVG) legitimately had arrived at the conclusion – according to the opinion of the Federal Administrative Court (BVerwG) - that the requirements of EU law had been observed.

With this decision the Federal Administrative Court (BVerwG) deemed the exclusion of retail businesses permitted under German law also effective under EU law and under certain conditions. Of course, it remains to be seen whether the courts of the EU themselves will accept the "German" interpretation of EU law.

Practical considerations

Johanna Westermeyer

III. EU Law/Guideline of the Freedom of Movement of People – European Court of Justice (EuGH): Restriction on the acquisition of land from the public hand to "locals" (Belgium/Flanders)

In its judgement of May 8, 2013 (Rs. C-197/11 + C-203/11) the European Court of Justice (EuGH) has dealt with the effectiveness of a Belgian regulation concerning the restriction of acquiring land to persons with sufficient ties to the municipality. Furthermore, the court has discussed the legitimacy of social requirements concerning land acquisition.

Acquisition of land by a company – regional restrictions on acquisition

The matter dealt with a company acquiring land in the Flanders region. Pursuant to a decree of the Flemish government real estate in specific municipalities could only be transferred to persons who, according to the belief of the regional evaluation committee, had "sufficient ties" to those municipalities.

Social sanctions for people parcelling land ("developers") and for property building

Furthermore, regional provisions provided that in specific cases "social sanctions" could be imposed according to which the creation of social housing or the payment of some social contribution could be demanded for a part of their building project.

Breach of directive when conveyancing property

The European Court of Justice (EuGH) ruled that the restriction of conveyancing property to people violated the fundamental freedom of the freedom of movement of people pursuant to articles 21, 45, 49, 56, 63 Treaty European Union Treaty (AEUV) as well as directive 2004/38/EG. In fact, this regulation restricted the freedom of movement of people considerably and thus turned out to be obviously disproportionate.

Legitimacy of social sanctions

However, imposing so-called sanctions would be compatible with fundamental freedoms if this measure was necessary and appropriate in the individual case to ensure the objective of sufficient accommodation for low-income persons or other disadvantaged groups of the supra-local population.

Practical considerations

As far as legal practice is concerned this decision can have far-reaching importance beyond the specific Flemish regulation. In Germany, too, many municipalities believe that land acquisition could only be made to local people. Locals, for example, are defined as persons who have been registered with their main place of residence in the target municipality for at least 3 years within the last ten years prior to concluding a purchase contract. With respect to the ruling of the European Court of Justice (EuGH) it is doubtful whether such models are still compatible with European law and in particular with the fundamental right of the freedom of movement. This, in fact, cannot be assessed in a general manner. If need be, it has to be clarified in the individual case whether it is still a case of acceptable or no longer acceptable restrictions of the fundamental right of the freedom of movement. In any case, it will be far more difficult for municipalities in Germany to restrict the acquisition of land to local people.

Dr. Steffen Schleiden

IV. Planning Law – Requirement regarding the public announcement of available statements

Draft version of a legally binding land-use plan with general reference to environmental statements

The Federal Administrative Court (BVerwG) (judgement of July 18, 2013 – 4 CN 3.12) ruled that the announcement of displaying a draft version of an urban land-use plan also had to include informational keywords as to which environmental concerns were dealt with in the available statements.

Violation of § 3 Sec. 2 Sent. 2 German Building Code (BauGB)

The followings facts underlie the ruling: In the announcement of the public display of a draft version of the legally binding land-use plan the planning municipality referred to the fact that "the stated grounds together with an environmental report as well as the essential, already available environmental statements" would be publicly displayed at particular times. Additionally, the following types of environmental information were available: "Examinations concerning protected species in connection with the legally binding land-use plan".

According to the court this announcement text represented a considerable violation of § 3 Sec. 2 Sent. 2 German Building Code (BauGB) due to which the legally binding land-use plan was declared ineffective.

Objectives and scope of the announcement – groups of topics

The displayed announcement lacked sufficient reference to the "types of environmental information available". The announcement was intended to enable the public to assess in terms of content whether the planning affects further environmental concerns not covered by the available statements, which should be listened to by means of its own statements. A general reference to the environmental report or a mere listing of the statements did, therefore, not suffice. § 3 Sec. 2 Sent. 2 German Building Code (BauGB) did not expect a listing of all statements or an account of their respective content. However it was deemed necessary to summarize the existing (environmental) documents in groups of topics and to provide them with a short characterization based on keywords.

Overview in the form of keywords

The court has required a complete overview to be published based on keywords about that environmental information playing a role in the respective planning.

Practical considerations

The requirements of the Federal Administrative Court (BVerwG) deviate considerably from a widespread practice in municipalities. The new decision questions the effectiveness of many legally binding land-use plans unless their mistakes have already become insignificant in the meantime.

Furthermore, the decision leaves it open how precise the reference to the "types of available environmental information" has to be in the individual case. Planning municipalities are confronted with a considerable degree of legal uncertainty. In order not to jeopardize the effectiveness of the legally binding land-use plan, the reference to relevant environmental information should be formulated as precisely as possible, even if this could lead to long announcement texts.

Leonie Munz

V. Building Law: Building licence – Requirements regarding the consistency of the building permit

Two new rulings of the regional courts of appeal (OVG) Rhineland-Palatinate (judgement of May 2, 2013 - 1 A 11021/12) and North Rhine Westphalia (judgement of May 15, 2013 – 2 A 3009/11) have set limits to the wish of investors and building owners to obtain concise building permits combined with a maximum of flexibility for subsequent building projects.

Change of use of a house for fire brigade equipment into a boat hire

According to the facts underlying the ruling of the OVG Rhineland-Palatinate a neighbour objected to the change of use of a former house for fire brigade equipment into a boat hire, which was granted to the building owner. The planning application included a company description listing a daily operating time from 6 am to 10 pm as well as the equipment used in the company (high-pressure cleaners, water hoovers, vacuum cleaners). Specific information concerning the time of use and the place of use of the equipment was not determined in the project planning. The court stated that the permit was against the law and that it violated the rights of the neighbour: The permit violated the requirement of thoughtfulness since the permitted use did not become obvious from the building permit. It was apparent that depending on the place, time and type of the work carried out various kinds of stress could occur for the neighbourhood. In the event that the building owner made use of that permit, a violation of neighbouring rights could not be ruled out.

Change of use for unoccupied halls in warehouses for a logistics company

The ruling of the OVG North Rhine-Westphalia, judgement of May 15, 2013 (2 A 3009/11) was based on the following facts: A neighbour objected to a permit concerning a change of use granted to the building owner with respect to vacant halls to be converted into warehouses for a logistics company. Authorization existed to process 30 trucks per day. Furthermore, it was specified that in the event of so-called “special actions” a truck volume of up to 100 trucks per day was to be reckoned with. The court stated that the building permit was against the law and violated the rights of the neighbour: The building permit was not specified enough, since it did not regulate the processing of the potentially generated truck traffic. The scope of regulation of the building permit granted had the potential to cause unreasonable traffic and development conditions. It was not ruled out that the total of 30 trucks that were permissible would drive to the logistics centre within a short period of time.

Practical considerations

Both rulings of the OVGs make it clear that especially in the case of a noise-intensive use a building permit has to specifically regulate the type, scope, the point in time and duration of the approved use. Therefore it is sensible for the building owner to make this specification already when filing an application for a preliminary notice or a planning application. In the event that the building owner has not already specified the planned use or if the authority defaults in specifying regulations concerning the way of permitted use when granting the building permit, the building permit is unlawful.

Eva Appelmann

F. Insurance Law

I. Liability Law – Prerequisites for anticipated legal proceedings concerning coverage

In a recently publicized decision (judgement of July 25, 2013 – 2 U 23/13) the OLG Naumburg has discussed the question in which circumstances the aggrieved party could directly institute legal proceedings against the third-party liability insurer of the liable party.

In its extensively and comprehensively reasoned decision the court has once again summarized the principles going beyond the case ruled which apply to the procedural processes between the insurance company, the liable party and the aggrieved party.

The ruling states:

Principle: liability proceedings prior to coverage proceedings (§§ 100, 115 Insurance Contract Act (VVG))

The legal regulations concerning third-party liability insurance and court rulings principally assume that the aggrieved party itself first of all asserts claims against the liable party (comp. §§ 100, 115 Insurance Contract Act (VVG)) and – in case of legal action – lets the claim be determined with regard to reason and amount. This constitutes so-called liability proceedings. Only after these proceedings the aggrieved party generally takes legal action against the third-party liability insurance of the liable party for reasons of assigned rights or for rights ignored due to attachment or transfer orders. This is known as so-called coverage proceedings. The findings resulting from the previous liability proceedings have a binding effect in subsequent coverage proceedings provided that the fulfilment of the same preconditions existed (Federal Supreme Court (BGH), judgement of September 30, 1992 – IV ZR 314/91; judgement of February 18, 2004 – IV ZR 126/02).

Requirements imposed on coverage proceedings

On this basis the court compiled the requirements regarding anticipated coverage proceedings: Coverage proceedings regularly manifest a declaratory action. An interest in a declaratory judgement as precondition for a declaratory action is confirmed by court rulings where with respect to the inactivity of the insurance holder (i.e. of the liable party) there is a danger, that the liability creditor (i.e. the aggrieved party) loses the coverage claim as object of satisfaction. This is assumed when the insurance holder has become insolvent and neither the insurance holder nor the insolvency administrator institute legal proceedings against an unjustified refusal of coverage thus leading to a loss of right due to the statute of limitations (comp. also Federal Supreme Court (BGH), judgement of March 3, 2000 – IV ZR 233/99; OLG Celle, judgement of July 5, 2012 – 8 U 28/12): According to the opinion of the Federal Supreme Court (BGH) the aggrieved party may have an interest in a declaratory judgement even if the insurer upon his request as to whether insurance coverage existed either provides no answer or no clear answer or refuses to provide information altogether (comp. also Federal Supreme Court (BGH), judgement of July 22, 2009 – IV ZR 265/06).

Necessary interest in a declaratory judgement

The particular problematic nature of the interest in a declaratory judgement resulted, according to the OLG Naumburg, from the fact that – in the insurer's view – the insurer was incapable of committing an offence, which therefore led to the exclusion of liability pursuant to § 827 German Civil Code (BGB). In the event that the insurer is capable of committing an offence, insurance cover has to be refused because of an act of intent; in contrast to that, and in the event of an inability to commit an offence, insurance coverage could be taken into consideration in form of the so-called preventive coverage. Due to this very problematic nature the OLG

Naumburg denied an interest in a declaratory judgement of the aggrieved party relating to a declaratory action and dismissed the case.

Practical considerations

The ruling gives rise to calling attention to other cases of direct claims of aggrieved parties against the third-party insurance: Pursuant to § 115 Insurance Contract Act (VVG) such claims could exist if

- it is a case of the third-party vehicle insurance according to the so-called Compulsory Insurance Act,
- it is a compulsory insurance (i.e. an obligation to conclude a third-party insurance based on a statutory regulation) and if insolvency proceedings have been opened involving the assets of the insurer or the initiation application was rejected for lack of assets or if an interim insolvency administrator has been appointed,
- it is a compulsory insurance and the residence of the insurance holder is unknown.

Ralf-Thomas Wittmann

II. Legal Expenses Insurance – Effectiveness of risk exclusion in the event of liability subject to the "principles of prospectus liability"

In its judgement of May 8, 2013 (IV ZR 84/12) the Federal Supreme Court (BGH) has declared an exclusion of risk ineffective because of violating the requirement of transparency.

Risk exclusion for investment liability

Subject matter of the legal dispute was the following exclusion clause: "Legal protection does not exist for defending legal interests in causal connection to the purchase or sale of securities (for example, bonds, stocks, investment shares) as well as an interest in investment schemes to which the principles of prospectus liability are applicable (for example, tax loss companies, real estate funds)."

Legal action of a consumer protection association

A consumer protection association filed a suit against the insurer and sought to enjoin the insurer from using this provision, because in the association's view it was not transparent.

Regulations of interpretation for terms and conditions of insurances – requirement of transparency

The Federal Supreme Court (BGH) found in favour of the consumer protection association. At first, it repeated its established rulings according to which terms and conditions of an insurance have to be interpreted in such a manner that an average insurance holder has to understand them by giving them due regard, attentive perusal and by considering a recognizable contextual meaning. In doing so, it depends on the possibilities of understanding of an insurance holder without special knowledge in insurance law and, therefore, also on his own interests (Federal Supreme Court (BGH), judgement of June 23, 1993 – IV ZR 135/92).

No possibility of understanding for an average insurance holder

According to the opinion of the Federal Supreme Court (BGH) a legal layman is not in a position in this case to understand the "principles of prospectus liability" and to which types of investment schemes they could be applied.

With the term "prospectus" the legal layman associates – in his every-day discourse – a small, possibly illustrated piece of writing designed to inform or to advertise something. By contrast, however, he does not associate with this term "the public presentation of the financial situation of a company in the event of intentionally making use of the capital market".

Furthermore, he is not familiar with the "principles of prospectus liability". He, therefore, does not know on which actual preconditions liability according to these principles and, thus, an exclusion of the insurance coverage depended. The principles of prospectus liability do not constitute a clearly defined term in legal terminology.

The same ineffectiveness applies to such formulations as "purchase or sale of securities". As far as the term "securities" is concerned, it does not represent a clearly defined term in legal terminology. There is no legal definition available for this term. The term opens a wide field of terminology for the average insurance holder. He is not in a position to recognize when stocks are to be classified as securities and when business activities with these papers are covered by the scope of coverage of the insurance. For that reason even this clause is invalid.

Practical considerations

First of all, insurers define their duty to provide cover with the so-called primary risk delimitation by describing the risk. The so-called secondary risk delimitation then again rules out specific partial risks. This is called risk exclusion. According to prevailing opinion the insurance company bears the burden of proof simply due to a formulation as to when the restriction steps in. Risk exclusions generally have the character of General Terms and Conditions and often lead to a court's review of their effectiveness.

And, finally, it is important to bear in mind that courts cannot help insurers in that with the help of interpretation they can take a "still valid" version of the clause as a basis (prohibition of the reduction to preserve validity). This is intended to impose on the insurer the risk of its contract design (comp. Federal Supreme Court (BGH), judgement of October 11, 2011 – VI ZR 46/10).

Ralf-Thomas Wittmann

III. Property Insurance – Residential building insurance – risk exclusion "refurbishment works"

Regulations of design for General Terms and Conditions of Insurances

The Federal Supreme Court (BGH) once again defined its regulations of design for General Terms and Conditions of Insurances in its ruling of September 9, 2013 (IV ZR 259/12): "They have to be designed in such a manner that an average insurance holder has to understand them when giving due regard to them, reading them attentively and by considering the recognizable contextual meaning. In doing so, it depends on the possibilities of understanding of an insurance holder without any special knowledge in insurance law and thus on his interests… The interest of the insurance holder in terms of risk exclusion clauses generally implies that they are designed narrowly and not any further than necessary for its purpose by considering its economic purpose and the selected kind of wording. The average insurance holder does not have to expect to find gaps in the insurance cover without the clause indicating this to him in a sufficient manner.

The proceedings dealt with the admission of a revision against the judgement of the OLG Celle.

Refurbishment works at a vacant residential building

In the context of refurbishment works carried out at a vacant residential building, which commenced in August 2009, a damage caused by water occurred (tap water). The damage happened in an area in which the flooring material had not yet been laid and in which the bathrooms had not yet been refurbished.

The insurance company deemed itself free from providing benefits. § 6 No. 3 a of the General Terms and Conditions of the Residential Building Insurance 2003 (VGB 2003) provides the following:

"Regardless of contributing causes for damage, insurance coverage against tap water does not extend to damage brought about by

- tap water at insured objects [...], as long as the insured building is not yet ready for occupancy or no longer usable because of refurbishment. [italics not in the original].

Suit for rendering benefits of the insurance holder for compensation

The defendant was of the opinion that it was exempt from rendering benefits because of the risk exclusion (refurbishment works). The OLG agreed with the defendant. It dismissed the case of the insurance holder and did not permit the revision. The Federal Supreme Court (BGH) contested the decision of the OLG and referred the case back to the OLG for further hearings.

According to the Federal Supreme Court (BGH) a residential building is in normal linguistic usage ready for occupancy if it has been completed to such an extent that people can move in as intended and if it can be permanently lived in.

Understanding of refurbishment works of the average insurance holder

The systematic context of the regulations of the residential building insurance results in the fact that the average insurance holder will attribute similar importance to refurbishment works with respect to restrictions of use as to the outstanding readiness for occupancy during the new construction of a building.

The term "refurbishment works"

The insurance holder will understand the term "refurbishment works" in a manner that not each and every temporary restriction of use – as for example due to renovation works - can be considered as refurbishment within the meaning of the exclusion of rendering benefits. He will rather assume that the refurbishment has to be an extensive transformation of the insured building, which in its quality has to feature similarities to a complete rebuilding, and even has such an impact on the structure of the building that it does no longer seem usable for its original purpose.

Since the facts had not been sufficiently clarified for this legal definition, the Federal Supreme Court (BGH) referred the legal dispute back to the court of appeal with the instruction to determine the refurbishment works in more detail.

Practical considerations

The problematic nature of the readiness for occupancy also arises for buildings regarding windstorm insurance: According to court rulings a building is not yet ready for occupancy as long as the outer fabric, the roof or the door and window openings have not yet been completely closed and as long as some scaffolding is still erected. The latter, actually, impacts the direction and the force of air flow in a storm and poses a danger to the building by falling parts. Accessorizing the building with furniture is, however, not required (OLG Rostock, ruling of October 30, 2007 – 6 U 127/07).

Ralf-Thomas Wittmann

G. Labour Law

I. Contract of Employment Law – Forfeiting the right of objection in the context of the transfer of a business in spite of deficient instructions

In a recently made decision the Federal Labour Court (BAG) has ruled on the forfeiture of the right of objection in the context of the transfer of a company (judgement of October 17, 2013 - 8 AZR 974/12).

Refusal of further employment by the acquirer of the business – settlement at the Arbeitsgericht

The plaintiff had been employed at the defendant catering company for many years. With effect from January 1, 2011 the operation of the canteen, in which the plaintiff worked, was transferred to another catering company. In a letter sent out for this purpose, which, however, did not meet the requirements of § 6131 Sec. 5 German Civil Code (BGB) (duty to instruct in the context of a transfer of business) the plaintiff was made aware of the transfer of the company. The new catering company, however, refused to further employ the plaintiff, so that the plaintiff instituted legal proceedings against the acquirer of the business for determining the fact of a transfer of the business. The proceedings concluded with a court settlement in which it was agreed that there had been no transfer of business pursuant to § 613a German Civil Code (BGB). Furthermore, the acquirer of the business undertook to pay an amount of 45,000 EUR to the plaintiff.

Legal action for further employment against the seller of the business

Following these proceedings, the plaintiff requested from the seller of the business to be further employed by him. The defendant refused the further employment by referring to the transfer of business made as well as to the payment of 45,000 EUR, which the plaintiff had received from the acquirer of the business.

The action for declaring the fact of further employment and the payment of wages lost was successful at the Arbeitsgericht. The Landesarbeitsgericht and the Federal Labour Court (BAG) dismissed the case.

Forfeiture because of contradictory behaviour ("to cash in twice")

The Federal Labour Court (BAG) explained: The instruction did not meet the requirements of § 613a Sec. 5 German Civil Code (BGB) so that the one-month period for objection as set forth in § 613a Sec. 6 German Civil Code (BGB) had not commenced. The right of objection, though, was forfeited: The plaintiff disposed of his employment in the first court proceedings. As far as the payment of the 45,000 EUR was concerned, it had to be seen as severance payment. With the new legal proceedings instituted against the seller of the business the plaintiff violated the generally applicable legal principle of good faith (§ 242 BGB). He acted contradictorily. Moreover, the plaintiff was not entitled to raise objections pursuant to § 613 a Sec. 6 German Civil Code (BGB) against the seller of the business because he had arranged with the acquirer beforehand that a transfer of business had not taken place. This norm in particular presupposed a transfer of business.

Practical considerations

When transfers of business take place it is of particular importance to pay attention to the formal requirements of § 613a Sec. 5 German Civil Code (BGB). The period for objection of § 613a Sec. 6 German Civil Code (BGB) substantially depends on that. § 242 German Civil Code (BGB) refuses an employee to "hold out his hand" at all parties involved for reasons of profit maximization.

Jörg Looman

II. General Equality Act – Claim for compensation because of gender discrimination

In its judgement of October 17, 2013 (8 AZR 974/12) the Federal Labour Court (BAG) has ruled that there was no entitlement to any claim for compensation as set forth in § 15 General Equality Act (AGG) if the employer gave a notice of termination unaware of the pregnancy of the employee.

Suing for protection against dismissal because of non-cognizance of pregnancy

The plaintiff was employed at the defendant as HR administrator. Some days after receiving notice of termination the plaintiff announced her pregnancy to the defendant and submitted a medical certificate regarding interdiction of employment. However, the defendant did not continue to make salary payments. As a result the plaintiff initiated a suit for protection against dismissal.

Judgement of partial acknowledgement regarding the application for dismissal protection

Three months subsequent to the notice of termination the defendant announced "to take back the notice of termination" and also provided this information to the Arbeitsgericht. Moreover, in the oral hearing the defendant also acknowledged the application for dismissal protection.

Claim for compensation because of discrimination (sustaining the notice of termination after the pregnancy became known)

In addition the plaintiff asserted a claim for compensation, since her employment was terminated in spite of her pregnancy and because the defendant insisted on the notice of termination even after the pregnancy became known.

The action remained unsuccessful in all instances.

The Federal Labour Court (BAG) explained: Announcing a notice of termination did not justify a claim for compensation, because at that time the defendant had no knowledge of the pregnancy. Even adhering to the notice of termination did not constitute an illegitimate discrimination within the meaning of § 1 General Equality Act (AGG), because adhering to an ineffective notice of termination was free from any value.

Even the non-awarding of benefits pursuant to the provisions of the Maternity Protection Act did not represent an illegitimate discrimination, but only a breach of general obligations under labour contract law. In such a case the employee had to assert his/her claims by means of legal proceedings.

Practical considerations

The judgement of the Federal Labour Court (BAG) represents a necessary clarification to distinguish between general rights and duties under labour contract law – and their consequences – and the prerequisites of the Equality Act. The mere breach of obligations under labour contract law does not automatically constitute some illegitimate gender discrimination. Nonetheless, numerous pitfalls lurk for the employer in the field of application of the General Equality Act (AGG) thus requiring particular diligence or, possibly, consultancy.

Jörg Looman

H. Conducting Legal Proceedings and Mediation

Inadmissibility of an action without preceding (agreed) mediation – Benefits of mediation clauses

In its judgement of April 18, 2013 (270 O 576/12) the Landgericht Cologne has declared an action inadmissible due to the plea of a mediation clause (comp. also LG Munich II, decision of October 9, 2012 – 2 T 1738/12).

Inadmissibility of filing a suit in spite of the lapse of interest in mediation

Already prior to the coming into force of the new law on mediation 2012 the OLG Rostock ruled (judgement of September 18, 2006 – 3 U 37/06): Even in case of the retroactive lapse of interest in mediation, the implementation of mediation proceedings remained precondition for the admissibility of an action if a mediation clause existed; actually it could not be ruled out that the contracting party - assisted by a neutral third party and by the submission of a substantiated settlement proposal - regained the interest in an amicable settlement.

New version of § 253 Sec. 3 No. 1 Code of Civil Procedure (ZPO) by means of the Law on Mediation 2012

Due to the law on mediation and the respectively connected amendment of the Code of Civil Procedure (ZPO) (§ 253 Sec. 3 No.1 Code of Civil Procedure (ZPO)) the legislator regulated that a statement of claim “has to” include information as to whether an attempt of mediation or of other proceedings of out-of-court conflict settlement preceded the filing of action as well as a statement whether reasons opposed such proceedings. Its purpose was that conflicting parties gave some thought to this option prior to initiating legal actions as to whether they intended to prefer taking up communication again rather than legal proceedings. In doing so, the legislator assumed that such consideration might lead to reducing the pressure on courts. At the same time it took the fact into consideration that communication could be more expedient than a court decision.

Willingness regarding mediation

Current studies complain that the “advanced civil society is only able to warm up towards alternative dispute resolution (ADR) within limits (Handelsblatt of October 29, 2013, p.13)”. Mediation presupposes the willingness of the parties to commit themselves to arrive at an agreement instead of legal proceedings. This willingness, in fact, is often absent when a conflict has turned into something more concrete and if the contracting parties are facing each other no longer as partners but as opponents. In such a situation of a dispute one’s view is mostly too clouded to understand that out-of-court conflict settlement proceedings might, in fact, be more advisable. The recognition that conflicts can be solved by communication proves more difficult in case of an already existing conflict since one’s perception of the other has changed.

Ruling out the orderly legal action by mediation clauses

For that reason it is reasonable in the case of long-term contracts to include a regulation concerning conflict settlement in the form of a mediation clause. In that clause the parties undertake to implement mediation proceedings in the event of potential disputes arising from or in connection with the contract and prior to filing for legal proceedings. During mediation proceedings orderly legal action is, therefore, excluded except for legal remedies that have to be raised in order to preserve legal positions (for instance exclusion periods/period for bringing an action against someone), and except for proceedings of temporary legal protection. A mediation clause can already specify the details of mediation proceedings and one can refer to the application of rules of procedure of an acknowledged institute. The mediation clause

should be drafted in more detail if this contributes to increased acceptance for both parties. Otherwise a short mediation clause is sufficient if modalities of mediation proceedings are regulated in the contract concerning the implementation of mediation only at a later stage.

The advantage of a mediation clause is that the contracting parties contractually commit themselves to a joint attempt taking steps towards an out-of-court conflict resolution.

Practical considerations

plea of the mediation clause necessary

In order not to have to establish the willingness of the counter party to mediate in the event of a legal dispute, (long-term) contracts should include a mediation clause. Bear in mind that the mediation clause does not represent a procedural requirement to be reviewed ex officio, but a plea to be raised by the defendant (Federal Supreme Court (BGH), judgement of October 29, 2008, XII ZR 165/06 Rn. 19; judgement of August 11, 1998, VM ZR 344/97 Rn. 10).

Dr. Ursula Grooterhorst

Termine

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March 5, 2014

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in Düsseldorf
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