GROOTERHORST
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RECHTSANWÄLTE

NEWSLETTER 03/2011

Dear Readers

our third newsletter of 2011 calls attention to those topics of our field of activity which the legislator currently advances. They are dealing with the law of legal proceedings, of enforcement as well as with the "sustainable" real estate law.

The lawyers of our law firm also report about current rulings of the Federal Supreme Court and of Higher Courts concerning Corporate Law, Labour Law, Private Building Law, Commercial Landlord and Tenant Law as well as Public Building (Planning) Law.

I hope you enjoy reading this issue of our newsletter.

Dr. Johannes Grooterhorst
Lawyer

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A. CURRENT NEWS
LATEST LEGISLATIVE NEWS

I Procedural Law:
Strengthening Legal Rights (Press Release of the Federal Ministry of Justice (BMF)) Amendments in Appeal Proceedings – Amendments in Enforcing Claims of the Landlord

Current Legislation

1. Amendments in Appeal Proceedings

Pursuant to § 522 Sec 2 ZPO (Code of Civil Proceedings) Appeal Courts undertake to reject the appeal in clear cases without oral hearings and without any further possibilities to appeal. Instance Courts have used this possibility very differently, so that in legal protection a "strong regional gulf" emerged (Federal Ministry of Justice (BMJ)).

Always Oral Proceedings

In future, according to the legislator oral hearings always have to take place in appeal proceedings, if oral arguments are deemed advisable. This also applies in the event that the matter appears to be without a reasonable chance and is not of fundamental importance.

Terminating judicial proceedings by means of a non-appealable ruling shall be possible only if the appeal promises no chances of success.

New Remedies Against Appeal Rulings

In the event of dismissing an appeal by an oral decision, the defeated party can file an appeal against denial of leave to appeal in case its appeal amounts to at least 20,000.000 EUR: in future, decisions of rejection are equally subject to appeal as a judgement of an Appeal Court.

Proceedings in Case of Re-Curring Payments (for example: Rent)

2. Procedural Amendments concerning the Lawsuit between Landlord and Tenant

In connection with the expert draft as to energy-efficient modernisation of residential accommodation rented out, the Federal Government plans at the same time regulations securing monetary claims "becoming due for lis pendens": This involves typical lawsuits dealing with recurring payments, for example rent becoming due for payment every single month.

Escrow Order

For these claims a new § 302 a ZPO (Code of Civil Procedure) is planned. According to this the Court of First Instance can enact "an escrow order" provided that the extension of the lawsuit to this claim (due at a later stage) has the highest prospect of success and that the order is justified after having considered the mutual interest in order to avert special disadvantages for the suing holder of the claim.

Protection against the Risk of Delays

In its explanatory statement reference is made to the fact that the creditor of recurring payments (for example rent) can thereby suffer an economic damage resulting from the long-lasting principal proceedings, in that the debtor is no longer able to pay at the end of the legal proceedings.

The draft of the government deems the current regulation of the Code of Civil Procedure (ZPO) insufficient so that it intends to grant the creditor of recurring payments the possibility, according to §§ 258, 259 ZPO (Code of Civil Procedure), to obtain security concerning his/her future claims by means of an escrow order. Actual delays due to the procedure or a delaying tactic on the part of the creditor shall thus be counteracted.

3. Facilitated Enforcement of Eviction Orders

Eviction by Mere Provsion of Ownership ("Eviction per Berlin Model")

The planned Tenancy Amendment Act 2011 intends to legally regulate the so-called "Berlin Model" in case of eviction (especially for residential accommodation, but also applicable to commercial eviction: according to Art. 4 of the Tenancy Amendment Act 2011 § 888 a ZPO (Code of Civil Procedure) shall – as a new regulation – enable the creditor to restrict the enforcement order to the fact that the bailiff "gets the debtor out of the property and then introduces the creditor to the property" (§ 885 Sec. 1 Sent. 1 ZPO (Code of Civil Procedure)).

No Removal of "Items owned by the Tenant"

What is now new is that the bailiff does not have to organize the time- and cost-intensive removal and possibly storage of the items owned by the tenant (commercial facilities, office equipment).

Dr. Detlef Brümmer

II Tenancy Amendment Act 2011 (Expert Draft Federal Ministry of Justice (BMJ)) New Fact "Energy-Efficient Modernisation"

As Expert Draft of the Tenancy Amendment Act 2011 – of 11 May 2011 – Energy-Efficient Modernisation

Following lengthy as well as controversial discussions the Federal Government submitted the draft of a Tenancy Amendment Act 2011. Core element of the draft is the so-called energy-efficient modernisation. According to its wording it only affects residential accommodation, however, by referring to § 578 Sec 2 BGB (German Civil Code) the amendments shall also have an effect on Commercial Tenancy Law.

From a legislative point of view, the revised regulation shall come into effect by the fact that the subsection 2 of §§ 535 et seq BGB (Civil Code) (tenancy for residential accommodation) is supplemented by a new chapter "1 a Maintenance and Modernisation Measures". §§ 555 a to 556 c and a new version of § 559 (about rent increases) regulating the measures (§ 555 b), the announcement (§ 555 c), the tolerance (§ 555 d), and the exceptional right of termination of the tenant (§ 555 e) as well as the related agreement (§ 555 f).

Further draft regulations relate to the so-called Contracting (energy supply by heat suppliers).

Development of the Legislative Procedure

From the point of view of the commercial real estate industry, what continues to be problematic is that the exceptional right of termination of the tenant in the event of modernisation (§ 555 d Sec. 1 BGB (Civil Code)) shall obviously remain. This regulation reveals that some "trends" of the Tenancy Law for residential accommodation (now the "energy-efficient modernisation") have the tendency to "penetrate" Commercial Tenancy Law as well. Particulars of the new draft are definitely deemed controversial between politics – and its various representatives – as well as associations of interested parties. Consequently, people have to wait and see what finally "results from" this legislative procedure.

No Approval of the Federal Council as to Tax Reliefs for Energy-Efficient Modernisations

An initially planned "core element" of the energy-efficient modernisation scheme, the financing by tax depreciation options on the part of the landlord, at least failed at first as a result of the Federal States' opposition: on 8 July 2011 the Federal States have refused their approval of amendments concerning tax regulation agreed upon by the Bundestag.

Dr. Detlef Brümmer

B. COMMERCIAL AND CORPORATE LAW

I Stock Corporation Law/D&O Liability: Burden of Producing Evidence and Proof as to Forecast-Based Decisions

Liability of the Executive Board in the Event of Economic Forecasts

In its judgement of February 22, 2011 (File: 2 ZR 146/09) the Federal Supreme Court (BGH) had to rule on a claim for damages of a stock company against one of its board members for reasons of D&O liability. The previous instance affirmed a breach of duty, because the board member disregarded standard business-specific techniques common to forecast turnover and yield. For example, the board member had proposed to expand the subsidiary managed by him, comprising an increase of staff from 11 to 38 as well as an increase in office space from 280 sqm to 825 sqm. However, after the expansion it turned out that the turnover forecast could not be materialized and the subsidiary had to be closed down in 2004. Had the board member thoroughly reviewed the economic basics of the turnover forecast made by him, he could have noticed that the expansion had to lead to damage for the stock company.

No Exaggerated Requirements as to the Burden of Producing Evidence

The Federal Supreme Court (BGH) did not follow the decisive statements of the previous instance and referred the lawsuit back to the Appeal Court. First and foremost, the Federal Supreme Court (BGH) did not share the accusation of the previous instance that the defendant had not met the requirements of a substantiated explanation made in his speech that he had in the case of the proposed office expansion a view on the turnover development of the past, on the turnover volume of existing mandates, on existing initiations and planned measures of acquisition. The Federal Supreme Court considered this assessment of the Appeal Court an exaggerated requirement concerning the burden of producing evidence on the part of the board member.

No Recourse to Economic Competence by the Court (Without An Expert)

On the other hand, by stating that the defendant had not applied standard business-specific techniques, the Appeal Court availed itself of an economic competence to which it is not really entitled. The Appeal Court had thus to prove that it had expert knowledge in the field of corporate planning and is, therefore, well able to finally judge the litigious issues. Since the judgement of the Appeal Court does not provide such statements, the Appeal Court had not been able to specify the lack of business-specific techniques without having heard an official expert beforehand.

Practical Considerations

The Federal Supreme Court (BGH) warns in its judgement not to exaggerate the procedural burden of producing evidence of the board member. The Federal Supreme Court also sends an unambiguous message to the Instance Courts: in the same manner as board members have to make use of the professional competence of an expert in the context of economic decisions, also courts can not easily judge the correct application of business-specific techniques in the context of discretionary decisions.

This decision should strengthen the position of a board member in a lawsuit and should protect him against an excessive pressure due to the legal reversal of the burden of proof as specified in § 93 Sec. 2 Sent. 2 Stock Corporation Law (AktG). Accordingly the board member has to present and to prove the non-existence of a breach of duty.

Johanna Westermeyer

II Limited Liability Company Law – Duty of Notarization: Admissibility of the Notarization Effected Abroad for Assigning a Share in the Limited Liability Company

In its judgement of March 28, 2011 (File: I-3 Wx 236/10) the Higher Regional Court (OLG) Düsseldorf ruled that the duty of notarization of assigning a share of a limited liability company is also fulfilled by a notarization effected abroad, provided that the latter is deemed an equivalent to the German notarization.

In the special case the judgement is based on, a Swiss notary notarized in the canton of Basel the assignment of shares of a limited liability company and transmitted the new list of shareholders via a German notary in his/her function of a delivery person to the Register Court. The Register Court refused to enter the list into the Commercial Register. It justified this decision by arguing that the notarized assignment was not effective, since it could only be authenticated by a German notary.

Compliance with the Duty of Authentication By a Foreign Notary In the Case of Equivalence

The Higher Regional Court (OLG) Düsseldorf referred to the constant jurisdiction of the Supreme Court according to which the form of notarization of the German law would be fulfilled by an notarization effected abroad only if the notarization effected abroad is equal to a German one. A Swiss notary of the canton Basel meets these requirements, so that notarizations made by him are considered an equivalent to notarizations carried out by German notaries.

No Amendment due to the Reform of the Limited Liability Company Law

According to the Higher Regional Court (OLG) Düsseldorf the modernisation of the Limited Liability Company Law of 2009 also does not contradict the admissibility of notarizations effected abroad: With this reform the significance of the shareholder list had considerably gained importance. It is thus the duty of the notary involved to submit the updated list at the Register Court pursuant to § 40 Sec. 2 Limited Liability Company Act (GmbHG). However, from the fact that this duty to notify does not apply to foreign notaries one cannot infer, that these could not effectively notarize. The duty of submitting a shareholder list has to be separated from the act of notarization. The notary has no duty of verification as to whether the shareholder list is correct in terms of content.

Nor does the regulation concerning the bona fide acquisition of shares of a limited liability company pursuant to § 16 Sec. 3 Limited Liability Company Act (GmbHG) result in a duty of notarization by a German notary. The bona fide rights protection specified in § 16 Sec. 3 Limited Liability Company Act (GmbHG) does not only apply to shareholder lists submitted by a notary, but also to lists compiled by the managing director pursuant to § 40 Sec. 1 Limited Liability Company Act (GmbHG).

Practical considerations

In spite of the ruling of the Higher Regional Court (OLG) Düsseldorf it is possible in the individual case that Register Courts in other Higher Regional Court districts continue to refuse the registration of the shareholder list into the Commercial Register, if these had soleley been notarized by a foreign notary. In individual cases the jurisdiction of the Higher Regional Courts has to be reviewed in the district of which the Register Court is located. In the event that the registration of the shareholder list into the Commercial Register is delayed, the advantages of an notarization made abroad may get lost.

Dr. Steffen Schleiden

III BANKING LAW:
In Case of Res Judicata against Partners of a Civil-Law Partnership No Extension to the Partnership

Claim for Damages Against the Partnership and the Partners

In its judgement of March 22, 2011 (File: II ZR 249/09) the Federal Supreme Court (BGH) decided that a judgement against the partners of a civil-law partnership (GbR) can not develop res judicata with respect to the partnership. At first, the plaintiff unsuccessfully claimed for damages against the partners. She now claims damages against the partnership. The Federal Supreme Court (BGH), therefore, had to decide whether the judgement concerning the lawsuit brought against the partners is legally valid in the lawsuit against the partnership.

Missing Party Identity

Pursuant to § 325 Sec 1 ZPO (Code of Civil Procedure) res judicata delivered against the partners in a lawsuit does not extend to the partnership. The civil-law partnership was not involved in the preceeding lawsuit. According to the decision of the Federal Supreme Court (BGH) civil-law partnerships and their respective partners are considered separate legal entities (comp. Federal Supreme Court, judgement of January 29, 2001, File: II ZR 331/00). However, in exceptional cases, res judicata can extend to a third party involved in the legal proceedings. But this only applies if in this individual case this has been expressly ordered or if it has at least been considered following the intent and purpose of legislation. According to the Federal Supreme Court (BGH) these prerequisites were not the case here:

No Extension of Res Judicata pursuant to § 129 HGB (Commercial Code)

An extension of res judicata can not be derived from § 129 HGB (Commercial Code). Accordingly this regulation would also apply to civil-law partnerships and would regulate the content and scope of the binding effect of a final judgement delivered against a civil-law partnership for and against the partnership. This, however, does not allow to derive a binding effect for and against the partnership of a final judgement delivered in a lawsuit against all partners. § 129 Sec 1 HGB (Commercial Code) is an expression and consequence of the accessory liability of the partners for the liability of the partnership as regulated in § 128 Sec 1 HGB (Commercial Code). However, the partnership can not accessorily be made liable for the liability of the partners so that a respective binding effect can not be derived from this.

No Extension of Res Judicata pursuant to § 736 ZPO (Code of Civil Procedure)

The Federal Supreme Court (BGH) also rejected an extension of res judicata according to § 736 ZPO (Code of Civil Procedure). Accordingly, with a legally enforceable instrument against all partners, which was enacted with reference to their personal joint liability, it can be enforced with respect to the partnership assets. The possibility of claiming the partnership twice does not necessarily require the need of extending res judicata. The risk of double claim can be effectively opposed by objecting to comply.

Differing Interests

Moreover, an argument against extending res judicata is that in the partner's lawsuit no representation of the partnership by its partners is guaranteed justifying the lawsuit (Art. 103 Partnership Act (GG)) as well as res judicata. The interests of the partnership and those of the partners might, in fact, be of a contrary nature.

Practical Considerations

As to the practical application, this ruling implies that in case of a claim against the partners of a civil-law partnership, a second lawsuit against the company is possible covering the same matter in dispute. In order to avoid this the partnership itself can, in fact, join the lawsuit with the partners by acting as intervening assistants.

Dr. Steffen Schleiden

IV Banking Law:
Effectiveness of Assigning Claims under Loans to a Non-Bank

No Invalidity Due to Violations of the Banking Act (KwG), the Banking Secrecy or Data Protection

In its judgement of April 19, 2011 – XI ZR 256/10 – the Federal Supreme Court (BGH) decided that the assignment of claims under loans to a non-bank without permission to engage in the banking business is not considered invalid due to a violation of the Banking Act. This assignment is not even invalid due to a violation of banking secrecy or of the Federal Data Protection Act.

In the underlying case a public limited company (AG) had – in the function of a lender – granted two loans to a civil-law partnership – the plaintiff – amounting to a total of 1,000.000 DM. The public limited company sold and assigned the two loans as part of a loan portfolio to a limited liability company which in turn sold and assigned its claim to Ypsilon Ltd. located in London, which again in turn sold and assigned it to the defendant. In all cases the plaintiff was informed about these procedures in writing.

With its claim the plaintiff demanded from the defendant the repayment of the interest paid on the loans as well as to grant the authority of cancellation for the land charges set up and also assigned respectively within the context of granting the loans. According to the plaintiff the assignment of the claims under loans as well as of the land charges is invalid because neither the Y-Ltd. nor the defendant have entered into a security agreement beforehand and, on the other hand, because of a violation of the law regulating banking affairs (duty of permission to engage in financial services – § 32 Sec. 1 Sent 1 KwG (Banking Act)).

Assignment of the Land Charges Even Without Entrance of the Assignee into the Security Representation

First of all, the Federal Supreme Court (BGH) stated that the effectiveness of assigning land charges according to the generally valid pre-requisites does not necessitate that the assignee enters into a security agreement. Moreover, a potential violation of the Banking Law (§ 32 Sec. 1 Sent.1 KwG (Banking Act)) does not affect the effectiveness of the assignment contracts. According to consistent case law of the Federal Supreme Court (BGH) the missing permission to engage in banking services does not lead to the invalidity of the loan contracts entered into without permission. This already results from the fact that the interdiction – other than principally necessary pursuant to § 134 BGB (Civil Code) – is not directed towards both contracting parties, but only towards one party, namely the non-bank.

Furthermore, the effectiveness of the assignment is neither opposed by banking secrecy nor by the Federal Data Protection Act.

Practical considerations

As debtor you are principally never protected against the fact that the lender assigns his/her claims accruing from the loan contract to a third party. The only solution is to rule out the assignment to a third party when concluding a loan contract. This is the only possibility for the debtor to be sure not “to be passed on”.

Johanna Westermeyer

C. REAL ESTATE LAW

I Private Building Law: Period of Limitation for Liability Claims Against an Architect due to Deficient Advice

In many cases it takes years for defects in construction to become obvious, and the building owner will then be confronted with the limitations defence. In the event of claims against architects the question regularly arises which specific reproach can be brought against the architect.

Faulty "Recommendation"

The most recent judgement of the Higher Regional Court (OLG) Koblenz of May 30, 2011 – U 297/11 – is based on the following case: The architect sued recommended the owners of a single-family home built and moved into in December 1999 to instal windows with pine wood frames. This recommendation was also extended to that facade strongly exposed to weathering. The architect did not inform the building owners suing about the increased maintenance need involving protective coatings within short intervals. In 2008 the building owners taking legal action noticed wet rot at the window frames. The architect sued objected against the claim and invoked the statute of limitations.

Various Warranty Periods For Deficiencies in Planning And Implementation Or For Deficient Advice

The Higher Regional Court (OLG) Koblenz did not categorize the procedure as a deficiency in planning or supervision, but as an imparting incorrect advice. In the event of incorrect advice the regular statutory period of limitation pursuant to §§ 195, 199 BGB (Civil Code) applies. This period amounts to three years and commences with the end of the year of acquiring knowledge. Since the suing building owner took measures impeding the statutory period of limitation in time, the architect was not able to get away with his statute of limitations defence.

Practical considerations

As far as the statute of limitations regarding "construction defects" is concerned, it has to be verified whether they are (typical) planning and supervision deficiencies or whether they are (atypical, i.e. general) deficiencies in terms of giving advice.

Ralf-Thomas Wittmann

II Private Building Law: Tacit Acceptance of Building Work

In the lawsuit dealing with the wage of a screed layer before the Higher Regional Court (OLG) Stuttgart, the building owner notified defects concerning the industrial screed floor (Higher Regional Court (OLG) Stuttgart, judgement of April 19, 2011 – 10 U 116/10 (not final)). The contractor answered to the notification of defects with the information that he "could not do anything more". As a result the building owner himself applied a new coating and started to use the floor later. As far as the wage claim is concerned the building owner reacted with a counter-claim in which he demanded the refund of the instalments already made.

The Higher Regional Court (OLG) Stuttgart dismissed the claim of the contractor and admitted the counter-claim. The building owner could demand the refund of his/her instalment. The information of the contractor the customer had tacitly accepted his services was not accepted by the Senate. An implied acceptance can not be considered if the work was only carried out in parts or recognizably contrary to the contract or if the commencement of using it was forced by the circumstances in spite of existing defects.

No Tacit Acceptance in Case of Partial, Identifiably Contract-Violating or Circumstances-Enforced Use

Indeed the wage is due for payment even without an acceptance if there is a settlement relationship between the parties.

Acceptance and Settlement Relationship

However, according to the understanding of the Higher Regional Court (OLG) Stuttgart such a settlement relationship did not exist in this case, since the customer only removed the adverse impact of the defect. Consequently the contractor continued to be obliged to remedy the deficiencies.

With his explanation of not being able to do more, the entrepreneur has seriously and finally refused his/her performance. This makes it also dispensable to expressly withdraw the contract from the entrepreneur pursuant to § 4 Sec. 7 VOB/B (official contract terms for the awarding of construction contracts). In fact, the entrepreneur has once and for all lost his right to supplementary performance. He/She is not entitled to any wage. He/She is not entitled to keep the instalment.

Ralf-Thomas Wittmann

III Inadmissibility of a Contractual Exclusion of Set-Off in an Architectural Contract

Pursuant to § 309 No. 3 BGB (Civil Code) a provision in the General Terms and Conditions is invalid by which the contracting partner of the user loses his/her right to set off with an uncontested claim or one that is declared final and absolute by a court. Conversely, in General Terms and Conditions of Sale a clause is common practice in which set-off against the purchasing price claim is only admissible with an uncontested counter-claim or one that is declared final and absolute by court. This was obviously also the idea of an architect who, in his General Terms and Conditions as an attachment to the architectural contract, provided that his/her fee claim can only be set off with an uncontested claim or with one that is declared final and absolute by court.

When the architect claimed his/her fee at court and the building owner, on the other hand, set off with claims for damages, the question as to the effectiveness of a contractual exclusion of set-off arose.

Ineffectiveness of Contractual Exclusions of Set-Off

The Federal Supreme Court recognized in its judgement of April 7, 2011 – VII ZR 209/07 – that the contractual exclusion of set-off is invalid. It violates § 307 Sec. 1 BGB (Civil Code). The building owner is unreasonably disadvantaged contrary to principles of good faith. Because of the interdiction of set-off, the customer is forced in a settlement relationship of a contract for work to pay for incomplete and defective service to the full, although he/she is entitled to counter-claims amounting to the costs accruing for correcting the defects or for completing the work. In doing so, the equivalence between performance and consideration created by

the contract would be intervened in a manner which is unreasonable for the customer. The Federal Supreme Court already ruled in a previous judgement that a provisional judgement can principally not be delivered, if it implies that wage claims are awarded and setoff-based claims to pay for remedying defects are reserved for the subsequent proceedings. This contradicts the relationship of mutuality between the wage claim on the one hand and the claim for performance free of defects on the other hand.

Practical considerations

In contrast, the Federal Supreme Court (BGH) has not adjudicated on the question of how exclusions of set-off take an effect if they are not in a relationship of mutuality relating to the wage claim of the architect. How these cases have to be dealt with remains to be seen in further court rulings.

Since the Federal Supreme Court (BGH) places an emphasis on the relationship of mutuality and not on the distinctiveness of an architectural contract, the scope of the judgement is not limited to architectural contracts, but also comprehensively applies to contracts for work and services.

Ralf-Thomas Wittmann

D. LABOUR LAW

I No Implied Annulment of an Employment Contract Set Out in Writing by Concluding a Managing Director's Oral Service Agreement

In its judgement of March 15, 2011 (File:10 ZB 32/10) the Federal Labour Court (BAG) had to decide on the admissibility of the recourse to take legal action at the Labour Courts and incidentally about the effectiveness of annulling the employment contract. In this specific case the issue was, whether the former employment contract which was set out in writing can be impliedly annulled by concluding a managing director's oral service agreement.

Absence of a Contract in Written Form pursuant to § 623 BGB (Civil Code)

The Federal Labour Court (BAG) concluded with regard to the admissibility of taking legal action that the subject of the ruling is the existence or non-existence of an employment contract. The point is, therefore, whether the conclusion of a managing director's service agreement annuls the current employment contract of the plaintiff. With respect to the annulment of the employment contract the Federal Labour Court (BAG) ruled that the conclusion of the managing director's oral service agreement does not effectively annul the former employment contract due to the non-compliance with the written form requirement pursuant to § 623 BGB (Civil Code).

"Employment Contract Remains Suspended" and Annulment or New Conclusion of the Service Agreement

In providing grounds the Federal Labout Court (BAG) explained that according to the intent of the contracting parties apart from the newly concluded contract of employment no "suspended contract of employment" shall principally continue to exist. However, the effective annulment of the former contract of employment principally presupposes the compliance with the written form requirement (§ 623 BGB (Civil Code)). According to the jurisdiction of the Federal Labour Court (BAG) such a written form requirement is kept in those cases in which the continuing managing director's service agreement is concluded in writing. In the context of an orally concluded managing director's service agreement the employment can indeed not be effectively annulled due to the absence of the written form requirement.

Asserting the missing written form requirment does not violate the principle of good faith (§ 242 BGB (Civil Code)) either The written form requirement shall not be undermined in its function of warning and proof. The plaintiff's long period of working as a managing director may not in itself serve to justify regarding references made to this circumstance as an abusive.

Practical considerations

The ruling of the Federal Labour Court (BAG) shows that the written form requirement is unavoidable in the context of a termination notice or annulment of the employment contract and can also not be avoided by "conversion" or "adjustment" of contracts. An employer always has to be aware of this fact if he continues contracts of employment as managing director's service agreement. In this case a strict separation by written annulment of the old contract of employment and a new setting up of a written managing director's service agreement is to be recommended.

Johanna Westermeyer

II Interpretation of General Terms and Conditions in the Contract of Employment Reservation of Transfer in the Contract of Employment

In its judgement of January 1, 2011 (10 AZ R 738/09) the Federal Labour Court (BAG) had to decide on the transfer of a suing employee to another field service district. In § 1 Item 3 the employment contract provided the following: "The field of activity comprises AB 926." in § 16 Item 1 the employment contract in turn provided: "The company reserves the right to change districts or to allocate another district if this arises from a further development of the field service."

Interpretation of Contract: Reservation of Transfer or Contractually Specified Place of Work

The employer and defendant allocated to the plaintiff the working district No. 314. The plaintiff was of the opinion that the transfer was legally invalid. The reservation of transfer in § 16 item 1 was – as a suprising clause – not an integral part of the contract.

The Federal Labour Court (BAG) decided that the effectiveness of a transfer to another place of work in the context of General Terms and Conditions has to be ascertained by interpreting the respective provisions. It is essential whether a place of work is specified in the contract and what the content of a possibly agreed reservation of transfer is.

For this specific case in which an exact job for a specified place was defined, but where at the same time a reservation of transfer was included into the contract of employment, the Federal Labour Court (BAG) decided that due to this combination the contractual limitation to the place of work specified in the contract has been principally prevented. According to the Federal Labour Court the parties had expressly clarified – due to the regulation in § 16 No. 1 (reservation of transfer) –, that the authority of the employer to issue directives (§ 106 S.1 GewO (Industrial Code)) shall come into force and that the authority of transfer to another district of field service shall exist.

Regulation at the End of a Contract No Surprise Clause

The Federal Labour Court (BAG), furthermore, assumed that the clause did not come as a surprise for the employer. So it is not unusual to agree modalities of amendment at the end of a contract.

Practical considerations

The employer, however, should pay attention to the fact, that his authority to allocate different tasks or a different place to the employee by way of the employer's managerial authority goes even further the more general the service to be rendered or the place of work to perform is specified by the employer in the contract of employment. An employee is well advised to specify an explicit provision about the place of work if a transfer to another place is not acceptable for him/her.

Johanna Westermeyer

E. COMMERCIAL LANDLORD AND TENANT LAW

I The Tenant's Right to Remove Defects and to Reduce the Rent Even After Moving Out of the Rented Property

In its judgement of March 10, 2011 (8 U 187/10) the Supreme Court Berlin decided that a tenant can reduce the rent even after having moved out of the rented property if the landlord refurbishes the property rented out and if the use of these facilities is not possible during the refurbishment.

Notifications of Defects after Moving out of the Rented Property

In the case underlying the judgement the tenant terminated the lease effectiveley. Before expiry of the period of notice the tenant moved out of the rented property and informed the landlord about a defect of the rented property. In the process of removing the defects initiated by the landlord it was not possible to use the rented area so that the tenant reduced the rent.

Right to Reduce the Rent Even in Case of Not Using the Rented Object

According to the Supreme Court (KG) Berlin the right to reduce the rent was appropriate. It is not relevant that the tenant did not use the rented property during the period of removing the defects. The tenant is even entitled to reduce the rent if he/she does actually not use the rented object or not in the manner expected (comp. also BGH, NJW 1958, 785; LG (District Court) Cologne, WuM 1993, 670). It is also irrelevant whether the defect has already existed before the tenant moved out. Actually the right to reduce the rent does not manifest a claim, but it is an amendment of contractual obligations by act of law.

Practical considerations

Even after having moved out the tenant can place the landlord under the obligation to remove the defects. For the period covering the removal of defects the tenant then has the possibility to save rent by an act of reduction even if he is not negatively affected by the defect because of having moved out. In such cases landlords should take into consideration whether to immediately remove the defect or whether to wait until the end of the tenancy in order to avoid the fact that the tenant has the possibility to reduce the rent.

Dr. Rainer Burbulla

II Written Form Requirement When Signing a Lease by Partners of a Civil-Law Partnership

A Company Stamp is No Replacement for an Addendum as to Representation

In its judgement of February 16, 2011 (30 U 53/10) the Higher Regional Court (OLG) Hamm decided that a lease does not comply with the written form if in case of a civil-law partnership only one partner signs the lease and several partners are jointly entitled to function as

representatives. In this case an addendum regulating representatives of the signing partner is necessary. The use of the company stamp does not serve as substitute for the addendum regulating representation.

Regulations of Representation at a Civil-Law Partnership

In the case the judgement is based on the parties are in conflict about the effectiveness of a notice of termination announced by a tenant because of a violation of the written form. The tenant is a civil-law partnership jointly represented by all partners. The lease, however, was only signed by one partner who, however, made use of the company stamp on the signature line. The lease did not include an addendum regulating representation.

Similarities between the Representation of a Civil-Law Partnership and the Regulation of Representation in the Board of a Public Limited Company

The Higher Regional Court (OLG) Hamm confirmed a violation of the written form and hereby refers to the ruling of the Federal Supreme Court concerning the compliance with the written form of a public limited company represented by a multi-member board (comp. BGH, judgement of November 4, 2009 – XII ZR 86/07 – for further reference read our newsletter 2/2010, p.9). According to this either all board members have to sign the lease or an addendum of representation for the board members not signing has to be provided. The suing tenant was represented by a body of persons entitled only to joint representation, so that this case also required an addendum of representation in order to comply with the written form. The stamp provided by the civil-law partnership does not – according to the Higher Regional Court Hamm – replace an addendum of representation.

In the event that a civil-law partnership is a party of a lease an individual partner should not sign without an addendum of representation if only several partners are jointly entitled to represent the company.

Dr. Rainer Burbulla

F. Public Building Law

I Large-Scale Commercial Businesses with a Product Range Not Relevant To The City Center

In its judgement of June 1, 2011 (8A 10399/11) the Administrative Appeals Tribunal (OVG) Koblenz affirmed in second instance the rejection of an application for a planning permission to extend an existing grocery discounter and to build a new drugstore in Neustadt an der Weinstraße.

Specification in Development Plans and Exemplary Listing of Product Ranges

The location concerned is approximately 1 km away from the city center of Neustadt an der Weinstraße, calculated in terms of linear distance. For this area a development plan applies allowing large-scale commercial businesses only for retail product ranges not relevant to the city center. As stated by the Administrative Appeals Tribunal (OVG) the development plan is opposed to the settlement project of the plaintiff. The development plan is definitely specified in detail even if the list of the city center relevant or non-relevant product ranges are not conclusively formulated in writing in the development plan.

Inspecting Urban Planning with Respect to Product Ranges Relevant to the City Center

Excluding retail businesses is also justified from the point of view of urban planning: The explanation concerning the development plan puts forward that a shopping center located on the outskirts of Neustadt has established itself in a way which is in strong competition with the city center of Neustadt. Against this background it is only logical, if the city of Neustadt on the one

hand gives in to the settlement pressure and designates areas for the large-scale retail trade; on the other hand to only allow such product ranges at the decentrally located retail trade that do not continue to intensify competition with the city center.

Practical considerations

The decision highlights the fact that an effective control of the retail trade development is possible by applying the principle of urban land-use planning. A sound and conclusive planning concept is necessary although the justification of a development plan is not seldom accompanied by a community-wide retail trade concept.

Isabel Gundlach

II Grocery Discounter in the Unplanned Developed Area

No Admissibility of Projects in the Unplanned Developed Area in Case of Damaging Effects on Areas of Local Amenities (§ 34 Sec 3 BauGB (Federal Building Code))

As of now, the wish of settling a grocery discounter remained unsuccessful even in other places: In its judgement of April 14, 2011 (2 BV 10.397) the Bavarian Higher Administrative Court decided that the state capital Munich has correctly refused the planning application to build a grocery discounter in Munich Aubing. Actually the project which was intended to be approved of in the unplanned developed area based on § 24 BauGB (Federal Building Code) assumes to anticipate damaging effects on central areas of local amenities pursuant to § 34 Sec 3 BauGB (Federal Building Code).

No Recourse toTargets of the State Development Program (LEP) when Investigating Damaging Effects

The decision of refusal has already been subjected to judicial review processes several times: The Bavarian Higher Administrative Court had still granted the claim in 2007 and put the city of Munich correspondingly under the obligation to grant the planning permission applied for. As a consequence of the appeal of the city of Munich the Federal Administrative Court, however, set aside that decision with its judgement of December 17, 2009 (4 C 1.08, report see newsletter 1/2010) and referred the case back to the Bavarian Higher Administrative Court for a renewed hearing and decision. At that time the Bavarian Higher Administrative Court had consulted the targets specified in the State Development Program in order to verify whether damaging effects pursuant to § 34 Sec. 3 BauGB (Federal Building Code) are to be expected. The Federal Administrative Court stated that the targets specified in the State Development Program are, in fact, inappropriate as a standard to examine damaging effects.

After a further oral hearing the Bavarian Higher Administrative Court confirmed in a second attempt after getting a judicial expert opinion and after providing an expert opinion on effects adduced by the city of Munich that the city of Munich quite rightly rejected the planning permission applied for.

Practical considerations

Once again this proves that it is well worth the effort to have a “lot of staying power”. This time from the perspective of the municipality, which deemed the project inadmissible. It remains to be seen whether the case is now “finally concluded”: The Bavarian Higher Administrative Court did not admit the appeal. Against this an appeal can be lodged at the Federal Administrative Court.

Isabel Gundlach

G. CONDUCTING LEGAL PROCEEDINGS

Refraining from a Trial Based on Documentary Evidence in Appeal Proceedings

In its judgement of April 13, 2011 (File: XII ZR 110/09) the Federal Supreme Court (BGH) decided that refraining from a trial based on documentary evidence in appeal proceedings has to be treated like an amendment of the claim and is thus admissible if the defendant agrees or if the court deems it relevant to the case.

In the case the judgement is based on the landlord claims rental arrears as well as utilities costs in the trial based on documentary evidence. The regional court grants the claim on the basis of a provisional judgement. In the appeal proceedings the plaintiff delcares to refrain from a trial based on documentary evidence. The defendant objects to this. The Higher Regional Court deems the act to refrain inadmissible and rejects the claim in the trial based on documentary evidence as not allowed.

Refraining from the Trial Based on Documentary Evidence as Amendment of Claim

The plaintiff's appeal was successful. The Federal Supreme Court treated the act of refraining from the trial based on documentary evidence like an amendment of a claim. This is admissible if the defendant agrees and if the court deems it relevant to the case (§§ 533, 263 ZPO (Code of Civil Procedure)). That the defendant thus loses an instance for determining facts is considered insignificant by the Federal Supreme Court. Even the amended determination of function of the appeal instance as an "instance for error checking and removal" based on the reform law of the Civil Procedure Act (BGBl, I, p. 1887) does not contradict the admissibility of refraining from the trial based on documentary evidence. The appeal instance is, even according to the reform law of the Civil Procedure Act, an instance for determining facts, since new facts are introduced and a new assessment of the factual basis by repeating the hearing of evidence can be carried out. The relevance of the claim amendment does not even fail in case a substantial – first time – hearing of evidence has to be carried out in the appeal instance, if necessary.

Practical considerations

The dispute that arose following the coming into force of the reform law of the Civil Procedure Act about the prerequisites of refraining from a trial based on documentary evidence in appeal proceedings has been explicitly decided by the Federal Supreme Court. The Federal Supreme Court, however, has not decided whether refraining from the trial based on documentary evidence can only be based on facts which the Appeal Court have to take as a basis for its decision anyhow (§ 533 No. 2 ZPO (Code of Civil Procedure)). Refraining from the trial based on documentary evidence can then be risky for the plaintiff if he puts it on facts the Appeal Court is not allowed to use as basis for its decision, such as, for example, circumstances which were not the subject matter of the first-instance proceedings.

Dr. Rainer Burbulla

GROOTERHORST
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RECHTSANWÄLTE

Dates

06 and 07 September 2011

In Warnemüde / Baltic Sea, Hotel Neptun
Certification Course “Legal Knowledge Real Estate”
Speaker Dr. Rainer Burbulla, Lawyer, Partner
Grooterhorst & Partner, Lawyers

03 and 04 November 2011

in Düsseldorf, Industrieclub e.V., Elberfelder Straße 6,
German Council of Shopping Centers
Forum Law and Consultation

“Current (Legal) Developments in Project Development”

Moderation: Dr. Johannes Grooterhorst, Lawyer, Partner
Grooterhorst & Partner, Lawyers

Talk: “Landlord and Tenant Law in Project Development”
Dr. Rainer Burbulla, Lawyer, Partner
Grooterhorst & Partner, Lawyers

06 and 07 December 2011

in Düsseldorf, Hilton Hotel
Certification Course “Legal Knowledge Real Estate”
Speaker Dr. Rainer Burbulla, Lawyer, Partner
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If you have an interest in participating in the events,
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