GROOTERHORST
& PARTNER
RECHTSANWÄLTE

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Dear Reader,

On June 28, 2012 the German Bundestag passed the new law on mediation. As a result, the tool of out-of-court dispute settlement by means of mediation moved more into the focus of public attention. With Ms Dr. Ursula Grooterhorst our law firm has a certified business mediator und lawyer, who is able to practise mediation in cases of business mediation. Her main contribution to this newsletter explains the basic principle of mediation in business. Furthermore, this present newsletter covers a range of current topics of our core working area of commercial and company law as well as of commercial landlord and tenant law.
I wish you some stimulating reading.

Yours
Dr. Johannes Grooterhorst
Rechtsanwalt

Content

A. Current News

Mediation – the procedure of alternative dispute resolution

The new law on mediation and the amendment of the Code of Civil Procedure

The new law on mediation came into force on July 26, 2012. Under the pressure of an EU directive a statutory regulation has now been formed, which has increasingly won an important position in Germany for quite some time: mediation as extrajudicial dispute resolution proceedings terminating conflicts smoothly and leading to a solution that is satisfying for both parties, will therefore be strengthened in its significance.

If in the future legal claims will be asserted by means of legal action, it should be set forth in the statement of claim – as ruled by the Code of Civil Procedure with the introduction of the law on mediation, whether an attempt of mediation or of any other proceedings of extrajudicial conflict settlement preceded the legal action, as well as a statement whether there are reasons opposing such proceedings. This leads to the fact that conflicting parties have to think about the possibilities offered by mediation and about its difference from legal proceedings.

Mediation as opposed to legal proceedings

Court proceedings are exclusively about legal positions; in contrast to this, mediation has a focus on the interests of the conflicting parties. Motives can be communicated which are not supposed to find any consideration in court proceedings due to their legally irrelevant nature. It is these motives, however, that can be of prior importance to a conflicting party; and possibly they might even trigger an immediate understanding in the other conflicting party for the opposing party.

Procedure of mediation proceedings

Mediation is based on the fact that both conflicting parties elaborate voluntarily and autonomously with the help of a neutral mediator the solution of their conflict in structured proceedings. Until that moment they pass through the various stages of the procedure. First of all, they have to agree which target they intend to reach by using mediation. Then all topics will be mutually agreed which are related to the conflict case. On the basis of this list of topics, those issues have to be worked out that really affect the clients. The actual interests, which have been concealed until then and which have triggered the conflict, can and have to be discussed at this stage. By stating the needs of the individual parties, an understanding can be created among the parties involved. As soon as some understanding has been developed, the way to finding a solution is not far away. First of all, many ideas and solutions are developed together that are entirely neutral, in order to finally establish a solution that is convincing for both conflicting parties. This is then made part of a final agreement. In a new appointment with the mediator approximately 2 months later, it will then be verified whether the agreement has led to the desired result.

Fields of application of mediation

In cases of conflict, mediation can be applied in all areas of life, i.e. concerning conflicts of and in enterprises (for example, disputes between companies and business partners; disputes between shareholders and managers; disagreement concerning company succession), concerning conflicts at work (for example, between colleagues and teams) as well as concerning conflicts between private individuals (for example, in case of inheritance matters or of condominium owners associations). The diversity of disputes results from the diversity of life. It is not only possible to resolve conflicts that have arisen, but also potentially emerging conflicts can be preventatively avoided by mediation. Mediation proceedings are suitable whenever both conflicting parties intend to gain an added value for themselves, i.e. a so-called win-win solution. In contrast to this, court proceedings can only be judged for the benefit of one conflicting

party without having possibly reached the real objective. Which procedure should be applied is always subject to an exact preliminary analysis of the individual case.

Practical considerations

The decision of the German legislator to create rules for promoting mediation based on the law on mediation will result in the emergence of a new conflict culture. Clients should ask their lawyers which dispute settlement procedure is the suitable one for their case in order to satisfy their objectives. Whether mediation is the procedure to be preferred has to be elaborated by the client together with his lawyer given his pursued interests; as a matter of fact, a successful judgment does not always satisfy the client. Even in mediation proceedings the client does not have to waive the support of his own lawyer.

Dr. Ursula Grooterhorst

B. Commercial and Company Law

I. D&O liability under company law: Liability of the managing director of a private limited company in case of payments subsequent to insolvency proceedings already initiated

Duty to file for insolvency proceedings

In its judgement of March 27, 2012 (Az.: II ZR 171/10) the BGH substantiated its requirements to be posed to a managing director of a private limited company with respect to the application for insolvency in case of indications of a crisis of the company. According to this, the managing director of a private limited company who lacks personal knowledge as to whether he has to duly file for insolvency, must seek advice on the questions to be answered from professionally qualified persons and must work towards an immediate submission of the auditing result.

Requirement of immediate professional consultancy

In the case underlying the ruling the sole managing director of a private limited company commissioned a consultant with reviewing the financial situation of the private limited company as well as potential restructuring options in August 2003. It was not until November 9, 2003 that the consultant passed on her expert's report. As a result the private limited company filed for insolvency on December 12, 2003.

In the context of his decision of whether to file for insolvency the managing director has to apply the due care of a prudent businessman (comp. § 64 Sent. 2 Private Limited Companies Act (GmbHG)). It this sense, it can be expected from a managing director of a private limited company that he constantly ascertains himself the economic situation of a company. This in particular includes reviewing legal grounds for insolvency. If the managing director is not able to judge the situation himself he has to seek consultancy, if necessary. In this case the BGH puts an emphasis on the following: Professional consultancy has to be sought immediately. The managing director may not have to content himself with the immediate order commissioning, but he also has to work towards an immediate submission of the auditing result. The BGH did not deem the expert report of November 9, 2003 sufficient in this respect. As a prudent businessman the managing director should not have allowed an auditing period of a further 3 months to pass.

Practical considerations: The prudent and conscientious managing director

The ruling of the BGH is in line with its other rulings concerning D&O liability. Especially in a period of crisis the managing director of a private limited company or a public limited company is expected to particularly exercise due care with respect to his duties as a prudent and conscientious managing director.

Johanna Westermeyer

II. The managing director's contract of employment under company law: No claim for damages of a managing director of a private limited company following voluntary termination without notice

No entitlement to maintain the area of responsibility

With its ruling of March 6, 2012 – II ZR 76/11 – the BGH held that the managing director of a private limited company is not entitled to claim for damages pursuant to § 628 Sec. 2 German Civil Code (BGB) if he cancelled the contract of employment himself without notice, because he had been deprived of parts of his area of responsibility before.

In the underlying case the plaintiff was first of all sole shareholder and sole managing director of the private limited company sued. In 2006 the plaintiff sold his shares in the company to a GmbH & Co. KG (limited commercial partnership with a private limited company as a general partner) and he concluded a managing director's contract of employment with this company. According to this managing director's contract of employment, he should run the business of the company "independently" and "responsibly". The plaintiff was entitled to sole representation and the registration as managing director in the commercial register released from the restrictions set forth in § 181 German Civil Code (BGB). The managing director's contract of employment should be able to be orderly terminated not earlier than June 30, 2011 for the first time.

Distinctions between controlling company and controlled company – Position of the sole managing director

Thereafter, conflicts emerged between the managing director and the controlling GmbH & Co. KG (limited commercial partnership with a private limited company as a general partner). These conflicts culminated in the fact that in March 2009 the limited commercial partnership (KG) appointed the managing director of its general partner as further managing director of the defendant und delegated to him the overall responsibility for the management of the defendant. The plaintiff was subject to the directives of this new managing director, and furthermore, he lost his authority of sole representation as well as his release from the restrictions as set forth in § 181 German Civil Code (BGB).

As a result the plaintiff terminated without notice his contract of employment and demanded as compensation that amount he would have been entitled to until the end of the actual period of contract. Initially the action was successful before the Landgericht, however it was dismissed before the OLG and now before the BGH, too.

The BGH confirmed the judgement of the OLG, because the defendant did not commit any breach of duty as set forth in § 628 Sec. 2 German Civil Code (BGB). According to this regulation the person terminating the contract is entitled to damages, if he is prompted to terminate the contract on the basis of a contract-violating behaviour of the other party.

General right of self-organisation of the shareholders of a private limited company

The BGH explained that the company is broadly entitled to free self-organising rights and obligations and is, therefore, free to decide which competencies it would like to assign to a managing director or to withdraw from him. The managing director has to accept this, because

his interests are sufficiently protected due to the existing claim for remuneration resulting from the managing director's contract.

No BGH judgement on organisational influence of the managing director's contract of employment

The BGH left the question expressly unanswered, whether a managing director might explicitly be granted certain competencies by his contract of employment resulting in any company's cuts in competencies being treated as a contractual breach of duty of the company and as such entitling the managing director to compensation for damage pursuant to § 628 Sec. 2 German Civil Code (BGB). Since in the case ruled the managing director's contract of employment did not include any specific regulations with respect to his competencies, the BGH did not have to rule on this question.

The BGH confirmed the private limited company's right of free self-organisation as to the allocation of competencies and its restrictions without granting any compensation to the managing director.

Practical considerations

Provided, however, that the contract of employment stipulates specific competencies, there has been no binding judgement by the BGH so far whether a withdrawal of competencies may justify any claim for damages suffered: such right of compensation is supported by several OLGs, which has to be taken into particular consideration when developing and signing a managing director's contract of employment.

Jörg Looman

C. Real Estate Law

I. Commercial Lease Law: Validity of the restriction based on forms concerning the right of reduction and set-off in a lease contract

In its judgement of March 22, 2012 the OLG Celle (2 U 127/11) ruled that a clause included in the General Terms and Conditions of a lease contract concerning business premises is valid, according to which rent reduction and set-off towards the claim for rent of the landlord are excluded, provided that the claims are not legally established or are uncontested.

Rental Agreement: Reduction and set-off rights only in case of judgement or when being uncontested

In the case underlying the judgement the tenant reduced the rent due to defects at the rental object and set off with his own claims against the rental claim of the landlord. § 8.2 of the lease contract had stipulated: "Rent reduction unless such claims have been legally established or are uncontested." The landlord invoked e.g. this clause and enforced the outstanding rent by way of litigation. The tenant asserted that § 8.2 of the lease contract is to be treated as an invalid General Term and Condition.

So-called disconnection clause

The regulation in § 8.2 of the lease contract is a so-called disconnection clause, which is intended to secure the regular payment of the full rent independently of possible counter rights of the tenant. It is not unusual to find disconnection clauses in commercial leases, too. Principally they are deemed admissible in court rulings, if the tenant/leaseholder is not deprived of the possibility to assert potential counterclaims in a separate lawsuit. In its judgement of April 7, 2011 – VII ZR 209/07 – the BGH, however, generally deemed a disconnection clause in an architect's contract invalid (comp. our Newsletter 3/2011, p. 9). It was in part concluded from this ruling, that now even in commercial rent and lease contracts disconnection clauses are inadmissible (comp. Niebling, ZMR 2011, 620, 621).

Deviations from architect's contract law

The OLG Celle deems the disconnection clause in § 8.2 of the lease contract valid. The ruling of the BGH concerning architect's contract law is not transferrable to lease/rent law. The remuneration of the architect is a (regular, one-time) settlement relationship. The lease/rent, however, are dealing with current payments under a continuing obligation. Hence it is not possible to compare the two. Even the main duties (transferring a defect-free lease/rental object and payment of the lease/rent) resulting from a status reciprocitatis are not affected, if the leaseholder/tenant is deprived of the possibility of set-off with contested and not legally established claims towards the lease/rent due for payment.

Practical Considerations: Need for a diligent disconnection clause

When drafting a commercial lease/rent contract it is, therefore, (still) recommendable to provide disconnection clauses. The opinion of the BGH concerning the invalidity of disconnection clauses in the architect's contract does not seem to assert itself in the commercial rent and lease law. As in the present case of the OLG Celle, the LG Cologne has also only recently denied transferability in its judgement of March 7, 2012 (Az.: 32 O 353/11). In this case, however, it should be expressly stipulated that repayment claims of the leaseholder/tenant are not excluded. Furthermore, the disconnection clause should state clearly that the exclusion of set-off and retention rights is restricted to contested and not yet legally established counter claims.

Dr. Rainer Burbulla

II. Damages in case of culpa in contrahendo – no damages in case of "simple" breakdown in contract negotiations

Compensation claims in relation to confidence built up in negotiations

In its judgement of February 8, 2012 (Az.: 14 U 139/11) the OLG Celle ruled that a claim for damages from culpa in contrahendo which is asserted due to breakdown in contract negotiations, can only be taken into consideration if one negotiating party attributably created the justified confidence in the counter party that the contract will definitely take effect, but then breaks off the contract negotiations without any particular reason.

In the case underlying the ruling, there was an intensive business relationship between the suing plant construction firm and the defendant principal based on a frame agreement governing a pipeline project. The parties had been negotiating a contract aiming at the installation of some safety scaffolding for one section of the pipeline.

The principal refused to meet the requirement of the plant construction firm to pay a lump sum in the event of a non-occurring order commissioning or in the event of rescinding the contract.

No confidence building in spite of long negotiations

Irrespective of this the plant construction firm agreed – the only bidder right from the beginning – to submit an offer, which the principal rejected, however, on the basis of which detailed talks took place.

The principal promoted the project further and changed the construction specifically aligned to the plant construction firm in the expectation of a cost reduction.

The contractor thus submitted a last offer, which the principal rejected by pointing out that the offer would make the project uneconomical.

The contractor was of the opinion to be entitled to damages towards the principal because of breaking off the contract negotiations.

Basics for compensation of damage resulting from contract negotiations

Pursuant to § 241 Sec. 2 German Civil Code (BGB) a contractual obligation can according to its content require the consideration of the rights, legal interests and interests of the other party. Pursuant to § 311 Sec. 2 German Civil Code (BGB) a contractual obligation is to be respected according to § 241 Sec. 2 German Civil Code (BGB) even by starting contractual negotiations only or by initiating a contract in which one party with respect to the potential legal relationship grants the other party the possibility to act on its rights, legal interests and interests, or to entrust it with those, or similar business contacts.

If such a contractual obligation exists, the negotiating part might be entitled to claims against the other party resulting from the so-called fault in contract negotiations ("culpa in contrahendo").

No confidence building in spite of long negotiations

The OLG Celle dismissed the case. Even if intensive negotiations took place und even if the contractor had dealt with the project in detail, he was not entitled to take the conclusion of the contract for granted. Especially by declining the offers the principal sufficiently expressed his understanding of a not yet secure co-operational basis. The circumstance of negotiations only made with one bidder does not build up a confident contractor worth to be protected. I negotiations failed to match the principle expectations of considerable cost reduction, the principal had a valid reason to break off negotiations irrespective of whether mutual trust had existed or not.

Freedom of decision versus obligation to inform

The OLG, indeed, stated that a contracting partner who at first was prepared to award a contract, but who withdrew from it in the course of the negotiations, has to disclose his change of mind. Irrespective of this, the senate placed great emphasis on the principal's freedom of decision prior to concluding the contract. The senate pointed out it would have been possible and reasonable for the plant construction firm without any problem, to call the attention of the principal to the fact that he would not be prepared to continue the negotiations without commissioning or securing of expenditures at the tendering stage.

Practical considerations

A contractor who is still in the tendering phase prior to signing a contract should in any case try and clarify that he expects a reimbursement of his pre-contractual expenditures in case the contract does not materialize.

Ralf-Thomas Wittmann

D. Labour Law

I. Labour law in insolvency: No remedying of formal notification errors of collective redundancies by a binding decision issued by the Labour Agency

In its judgement of June 28, 2012 – 6 A ZR 780/10 – the BAG (Bundesarbeitsgericht) stressed the relationship between the employer's notification and the Labour Agency's decisions.

Termination by the insolvency administrator subsequent to balance of interests despite lack of evidence (participation of the works council)

The plaintiff had been employed at the debtor since 1990. On March 1, 2009 insolvency proceedings were instituted about the assets of the debtor and the defendant was appointed insolvency administrator. On the basis of a balance of interests including a list of names that was concluded with his consent even during the preliminary insolvency proceedings, the defendant terminated employment with the plaintiff as effective of June 30, 2009 on March 11, 2009. On February 26, 2009 the debtor notified collective redundancies at the Labour Agency without attaching the balance of interests. Contrary to § 17 Sec. 3 Sent. 2 Protection Against Dismissal Act (KSchG), the notification did not include any statement of the works council. On February 26, 2009 the works council ("Betriebsrat") of the debtor, however, notified the Labour Agency in writing, that it had been informed about sending the notification of collective redundancies. The plaintiff deemed the termination invalid, because of the missing formal statement of the works council relating to the formal notification of collective redundancies. Even the previous courts shared this legal opinion.

Extent of the binding effect of a notification – under public law – concerning a reduction of the retention period

Even the appeal of the defendant at the BAG remained unsuccessful. Attaching the statement of the works council, or as a substitute the balance of interests including the list of names, is a prerequisite for an effective notification of collective redundancies. Also the letter of the works council addressed to the Labour Agency did not contain any concluding opinion and was, therefore, not able to remedy the formal error. Finally a subsequent notification of the Labour Agency about the reduction of the retention period could not remedy this formal error. The BAG ruled that the efficacy of a notification of collective redundancies is not covered in the binding effect of such a notification. The BAG confirmed the legal opinion of previous courts and affirmed once again the immense significance of the participation of the works council in the context of cases concerning dismissals.

Practical considerations

The employer always has to involve the works council in decisions concerning dismissals in compliance with the legal requirements. This also applies in the case of collective redundancies.

Johanna Westermeyer

II. Gender equality law: two-month limitation period of § 15 Sec. 4 General Equal Treatment Act (AGG) applies to all compensation claims of an applicant

With the current ruling of June 21, 2012 – 8 AZR 188/11 – the BAG held that the two-month limitation period of § 15 Sec. 4 General Equal Treatment Act (AGG) also applies to all causes of action for compensation claims if discrimination is concerned due to characteristics that are forbidden according to the General Equal Treatment Act.

In the case underlying the ruling a 41-year-old plaintiff applied for a job at the company sued. In the job advertisement the company looked for "employees aged between 18 and 35". The plaintiff received a letter of refusal and it was only two months subsequent to the receipt of the letter of refusal that she filed claim for compensation, since she had been discriminated against due to her age. The legal action remained unsuccessful in all courts.

Limitation period for all compensation claims even beyond the General Equal Treatment Act

If an applicant is rejected because of his age without any objective reason, he is entitled to file a claim for compensation pursuant to § 15 Sec. 2 General Equal Treatment Act (AGG). This claim for compensation, however, has to be filed within two months (§ 15 Sec. 4 General Equal Treatment Act (AGG)). Since the plaintiff invoked causes of action for compensation claims beyond the General Equal Treatment Act (AGG), it was now arguable whether the regulation of § 15 Sec. 4 General Equal Treatment Act (AGG) also applies to non-AGG causes of action.

Age discrimination

The BAG ruled, that the period of § 15 Sec. 4 General Equal Treatment Act (AGG) also applies to all other causes of action, if basically discrimination characteristics are concerned which are forbidden pursuant to the General Equal Treatment Act (AGG). Due to this comprehensive validity of § 15 Sec. 4 General Equal Treatment Act (AGG) the plaintiff was not entitled to invoke any other causes of action beyond the General Equal Treatment Act (AGG).

Significance of the discrimination characteristics also for other causes of action

Due to this – from the point of view of employers – pleasant ruling, companies now have within two months after a rejection clarity as to whether a rejected applicant asserts compensation claims or not.

Practical considerations

Jörg Looman

III. Protection against Dismissal and General Equal Treatment Law

Age as legal criterion in the social selection process

In its ruling of December 15, 2011 – 2 AZR 42/10 – the BAG affirmed that the consideration of age as one of several criteria in the social selection in the context of dismissals for operational reasons does not violate the prohibition of age discrimination under Union law. Pursuant to § 1 Sec. 3 Sent. 1 Protection Against Dismissal Act (KSchG) a termination is socially unjustified if the employer – despite urgent operational requirements – has not sufficiently or not at all considered the seniority, the age, the maintenance obligation as well as the severe disability of an employee.

In the lawsuit the parties argued about the validity of a termination based on operational reasons. The plaintiff born in December 1971 was employed at the defendant since August 1999. In July 2008 the defendant decided to cut 31 jobs in the production area. On July 24, 2008 the defendant agreed together with the works council a balance of interests including a list of names, a redundancy programme as well as a selection guideline (pursuant to § 95 Works Constitution Act). The list of names includes the names of 31 employees to be dismissed, amongst them the plaintiff. The selection guideline provides the formation of age groups according to which – within these age groups – a social selection has to be implemented according to a rating scheme. In a letter dated July 28, 2008 the defendant terminated the employment with the plaintiff subsequent to a hearing of the works council and with its consent and effective of October 31, 2008. The previous courts dismissed the case. The appeal of the plaintiff remained unsuccessful.

Social selection prior to "formal" equal treatment

The BAG stated that the termination was based on urgent operational requirements (as set forth in § 1 Sec. 2 Protection Against Dismissal Act (KSchG)). The termination was not socially unjustified either. An elementary selection error was not given, since the consideration of the age in the social selection was compatible – according to the rulings of the BAG – with national as well as with Union law. Therefore the planned integration of the age (comp. § 1 Sec. 3 Protection Against Dismissal Act (KSchG)) into the social selection in case of a termination based on operational reasons had a legitimate objective rooted in the area of social policy. Older employees who due to their age typically have poorer prospects on the job market, are to be more protected in case of dismissals for operational reasons.

Not inappropriate unequal treatment

Furthermore, the emerging unequal treatment of employees due to considering the age is not only generally inappropriate for that reason because the selection criterion of seniority is also additionally taken into consideration. In fact, this selection criterion might also be of benefit to a younger employee who might have a longer seniority than an older member of staff.

Practical considerations

The employer is entitled to consider the age of the employee in the context of the social selection when considering a selection of employees in case of dismissals for operational reasons corresponding to the legal regulations (§ 1 Sec. 3 Protection Against Dismissal Act (KSchG)). This right of the employer represents, however, in turn an obligation. As a matter of fact the employer has to consider the age of the employee in his social selection, even if this runs counter to his own interests. In the event that the employer disregards the selection criteria as set forth in the Protection Against Dismissal Act (KSchG) a dismissal based on operational reasons can easily become invalid.

Johanna Westermeyer

E. Commercial Landlord and Tenant Law

I. Business Premises Lease: heat in the office as defect

Labour safety regulations versus legal validity under building law

In its judgement of March 5, 2012 (Az.: 8 U 48/11) the KG Berlin ruled that the non-compliance with regulations under labour safety law as well as the exceeding of an indoor temperature of 26 °C in rented offices without air conditioning did not imply a defect resulting in rent deduction. On the contrary, the non-existence of a defect is indicated if the building complies with building law.

In the case underlying the ruling the tenant rented office space in a multi-storey building. He reduced the rent because of the "consistent heating up of the offices during the summer months to temperatures of definitely more than 30 °C during the day". Only a limited normal working operation had been possible. Members of staff of the tenant had, therefore, communicated complaints and invoked non-compliance with regulations under occupational safety law.

Various assessments in court rulings

In the summer months the question regularly arises whether an excessive heating up of offices represents a defect of the rental object. With its judgement of December 15, 2010 (Az.: XII ZR 132/09 – comp. our Newsletter 2/2011, p. 10) the BGH principally affirmed this question. However, the BGH left the question unanswered which circumstances turn the excessive heating up of rental space into a deficiency of the rental object. This question is controversial in the high court ruling. To some extent the specifications of the labour safety law are referred to and a defect is affirmed, if the "comfortable temperature" of 26 °C is exceeded (comp. OLG

Cologne, judgement of October 28, 1991 – 2 U 185/90). On the other hand a material defect is – especially in recent rulings –denied if the building complies with the applicable building regulations and with the generally accepted engineering standards (especially DIN 4108 – values of sun intensity) (comp. OLG Karlsruhe, judgement of December 17, 2009 – 9 U 42/09).

Indicative effect of a permit under building law

In its result the KG Berlin leaves the question open which temperature in offices leads to a material defect. The court, however, tends to base the answer to the question on the agreements arranged in the lease and on the condition of the building under building law. Complying with building law, in fact, does not exclude that a material defect could exist at the rental object. Nevertheless, the technical building regulations have an indicative effect. If the rental object complies with the technical building regulations and if the purpose of the contract does not provide anything else, a material defect can principally not be assumed.

Practical considerations

Recent rulings that – in order to answer the question whether a material defect exists in case of excessive heating up of rental offices – are based on the structural condition of the building and on the arrangements regulated in the lease seem to solidify. Until a final ruling of the BGH it is recommendable that the contracting parties make clear arrangements when contracting concerning admissible room temperature and specific sanctions or remedies respectively.

Dr. Rainer Burbulla

II. Rent adjustment clause: validity of a unilateral right of decision on the part of the landlord in the General Terms and Conditions

In its judgement of May 9, 2012 (Az.: XII ZR 79/10) the BGH ruled that a rent adjustment clause in a commercial lease would withstand a review of the General Terms and Conditions if it grants the landlord a right of decision concerning performance to the extent that he can set down – in case of a modification of the locally customary or appropriate rent – the higher or lower amount to be payable by the tenant at his own discretion, would withstand a review of the General Terms and Conditions.

In the case underlying this ruling the parties agreed in a contract concerning the commercial use of jetty and water areas the following rent adjustment clause: “The landlord reviews after a period of 3 years respectively whether the user fee is still customary to the location or appropriate. In case of a modification he (the landlord) sets down the higher or lower amount to be paid at his own discretion (§315 German Civil Code (BGB)) und informs the user about the user fee to be paid in the future”. The landlord set down a respective increase and demanded payment from the tenant. The tenant invoked the invalidity of the rent adjustment clause: it violated the requirement of transparency (§ 307 Sec. 1 Sent. 2 German Civil Code (BGB)), since it left it undefined whether the rent was still “customary to the location or otherwise appropriate”. Furthermore the clause did not meet the requirement of transparency, because the benchmark was not obvious according to which the landlord could determine the amount of a rent to be set down anew.

Review according to Price Clause Act and General Terms and Conditions

Rent adjustment clauses have to be reviewed regularly by considering two legal aspects. On the one hand, rent adjustment clauses have to withstand a review of the Price Clause Act (PrKG). On the other hand, rent adjustment clauses designed as General Terms and Conditions are subject to a review of the General Terms and Conditions (content control pursuant to §§ 307 et seq. German Civil Code (BGB)).

No violation of the price clause in the event of a reservation of performance

The BGH deems the rent adjustment clause used in accordance with the Price Clause Act effective. It is a so-called reservation of performance clause, which is – pursuant to § 1 Sec. 2 No. 1 Price Clause Act (PrKG) – principally excluded from the prohibition of price clauses pursuant to § 1 Sec. 2 Price Clause Act (PrKG).

No violation of the transparency requirement in the law of the General Terms and Conditions

The rent adjustment clause does not even violate, according to the BGH, the General Terms and Conditions law. It satisfies the transparency requirement, since it clearly specifies the time as well as the reason of a rent adjustment. The term "customary to the location" is understandable. "Otherwise appropriate" means that the rent does (no longer) represent a sufficient counter value of the use and that, therefore, the balance between performance and consideration would be disturbed. A more specific description of the reason for adjusting the rent is not necessitated by the transparency requirement under the General Terms and Conditions law. A violation of the transparency requirement is also not given if the rent adjustment clause does not establish any benchmark for the rent to be newly determined. Due to the explicit reference to the regulation in § 315 German Civil Code (BGB) it is sufficiently identifiable for the tenant that a rent adjustment can only be taken into consideration if it complies with reasonableness. This is the case if the payment demanded is within the standard customary to the location and complies with what could be regularly charged for a comparable service (comp. German Civil Code (BGH), judgement of October 2, 1991 – VIII ZR 240/90). A further substantiation concerning the extent of a potential rent adjustment is not demanded by the transparency requirement.

Practical considerations: transparent contract design

Even rent adjustment clauses admissible pursuant to the Price Clause Act must be designed with sufficient transparency provided they are used in a form-like manner. It is quintessential that the rent adjustment clause describes with sufficient precision the reason for modifying the rent, the parameters as well as the extent of rent adjustment. A reference to considerations of reasonableness (§ 315 German Civil Code (BGB)) is sufficient in this case.

Dr. Rainer Burbulla

F. Public Law

I. Planning Law: the municipality of Bispingen was without success against the FOC (factory outlet centre) in Soltau – No protection for the "luxury facilities" of a basic centre

The municipality of Bispingen sustainably remains without success against the FOC in Soltau. The OVG Lüneburg also rejected in its current judgement of April 25, 2012 (1 KN 215/10) the application for a judicial review of the municipality of Bispingen against the legally binding land-use plan of the city of Soltau, which allows the construction of an FOC. In the meantime, the construction of the FOC has been almost completed after the municipality of Bispingen also remained unsuccessful in its proceedings against the building permit for the construction of the FOC Soltau (comp. Newsletter 1/2011, p. 13).

No judicial review in case of competition between the municipalities

As the OVG Lüneburg stated, a legally binding land-use plan for a FOC, which benefits from an exception provision in the Federal State Regional Planning Programme for a project of this kind in the "tourism region Lüneburger Heide significant beyond the region itself", can not be brought down via a judicial review by a neighbouring municipality competing for the location with reference to the freedom of establishment and to ongoing infringement proceedings. The background of this decision is, among other things, that the municipality of Bispingen itself

tries to establish a FOC in its own district, but the Federal State Regional Planning Programme of Lower Saxony, however, allows for the Lüneburger Heide, in which both Bispingen and Soltau are located, only one FOC in a size of up to 10.000 m².

Target quality of the prohibition of impairment

The OVG Lüneburg has, as part of the grounds of the judgement, attributed target quality to the prohibition of impairment included in the Federal State Regional Planning Programme of the Federal State of Lower Saxony and it stated that the prohibition of impairment had not been violated to the disadvantage of the municipality of Bispingen. In this respect the OVG Lüneburg pointed out that the municipality of Bispingen – different from the city of Soltau – can in terms of regional planning only claim for itself the role of a basic centre. This does not only provide orientation with respect to the legal question of an impairment concerning regional planning, but at least also of the harmfulness of impacts on central supply areas. Pursuant to § 2 Sec. 2 German Building Code (BauGB) the urban land-use plans of neighbouring municipalities have to be coordinated, whereby the municipalities can also refer to the function imposed upon them by the objectives of the land-use planning as well as to the impacts on their central supply areas. This regulation restricts, therefore, at the same time the impacts that qualify for complaints made by the respective municipality: In fact, a basic centre can acquire by its own efforts facilities that go beyond the actual role under regional planning law. The feeling of the municipality of Bispingen to be a "tourist regional centre", which is known with some pride, is, indeed, according to its actual development not without a basis. There are, however, no legal impacts as set forth in § 2 Sec. 2 German Building Code (BauGB) on the "limit of harmfulness", according to the OVG: More poignantly formulated, protection for "luxury facilities" to the disadvantage of a centre higher in rank can, indeed, not be demanded.

Isabel Gundlach

II. Planning Law: Failing application of the city of Rastatt and IKEA to obtain permission to deviate from planning objectives

In its judgement of June 26, 2012 (3 S 351/11) the VGH Mannheim rejected the applications of the city of Rastatt and the company IKEA for permitting a deviation from the objectives of the Federal State Regional Development Plan Baden-Württemberg 2002 (LEP 2002) for the construction of an IKEA furniture store, a DIY-market and garden centre, as well as for a kitchen store.

Proceedings at second instance

This ruling was preceded by a first round of appeal stages: The city of Rastatt has placed a claim against the Federal State Baden-Württemberg: The city of Rastatt applied to ascertain that the establishment of an IKEA furniture store with supplementing specialized markets close to the federal motorway A 5 is not opposed to any binding objectives of land-use planning. Alternatively, it applied to place the Federal State of Baden-Württemberg under the obligation to pass a permission to deviate from planning objectives. The VG Karlsruhe dismissed the case, the VGH Mannheim also rejected the appeal (judgement of December 17,2009 – 3 S 2110/08).

Violation of a prohibition of concentration and congruence regulation

The project was understood not to be compatible with the Federal State Regional Development Plan 2002 (LEP 2002). The project would contradict the prohibition of concentration and congruence as set forth in the LEP 2002. In its judgement of December 16, 2010 (4 C 8.10) the BVerwG confirmed this legal opinion in its result: The requirement of congruence was correctly classified by the VGH Mannheim as an objective of land-use planning and, therefore, as

a binding guideline for plans relevant to the region, and which can not be overcome in the context of urban land-use planning. Even if the congruence requirement is (only) formulated as a "target regulation" in the LEP 2002, it still represents a binding objective of land-use planning. With this decision of the BVerwG a ruling of a Supreme court concerning the binding nature of "target objectives" was made available which the OVG Münster and the VGH Mannheim had assessed differently before (comp. Newsletter 1/2011, p. 13).

Target objectives as binding regulations

The BVerwG, however, referred the matter for another hearing and ruling back to the VGH Mannheim, since the VGH Mannheim – according to the BVerwG – wrongly assumed a possibility of permitting the deviation from planning objectives provided for in the Regional Development Act as per se not applicable in the case of the settlement project IKEA-Rastatt.

No case of hardship – no violation of municipal planning sovereignty or freedom of establishment

On June 26, 2012, the VGH Mannheim now stated in its new ruling, the settlement project runs counter to the congruence requirement and the integration requirement of the Federal State Regional Development Plan 2002 (LEP 2002). These requirements are objectives of land-use planning of the LEP 2002, which, moreover, define the major content of the LEP 2002. Since a deviation from this essential content would affect the main features of the planning, the applied for permit to deviate from planning objectives could not be granted. There is neither a case of hardship, nor is the municipal planning sovereignty or the freedom of establishment of the company IKEA violated.

Practical considerations

The appeal against the decision was not admitted. It is up to the city of Rastatt and to IKEA to attack this ruling with a non-admission complaint at the BVerwG. The former decision of the BVerwG of December 16, 2012 still sparked some hope. It remains to be seen whether the tug-of-war concerning the settlement project IKEA-Rastatt will enter the next round.

Isabel Gundlach

TERMINE

28 to 29 November 2012	2. German Factory Outlet Conference 2012 in Neumünster Talk: Outlet Center in Planning Law: Tools, Measures, Practical Experience Speaker Rechtsanwalt Dr. Johannes Grooterhorst Partner, Grooterhorst & Partner Rechtsanwälte
14 November 2012	"Lease for Commercial Premises in the Legal Enforcement" "Modernisation Measures and Green Building pursuant to the Modernisation Act under Rental Law" in Düsseldorf, MaxHaus, Schulstr. 11 Speaker Rechtsanwalt Dr. Rainer Burbulla Partner, Grooterhorst & Partner Rechtsanwälte
24 to 25 October 2012	German Council of Shopping Centers in Düsseldorf, Industrie Club, Elberfelder Straße 6 Forum Recht und Beratung Speaker Rechtsanwalt Dr. Johannes Grooterhorst Partner, Grooterhorst & Partner Rechtsanwälte
23 to 24 October 2012	4. German Specialty Market Real Estate Conference 2012 in Wiesbaden, Dorint Pallas Hotel, Specialty Centres – The Forward Strategy under Planning Law for the Portfolio Speaker Rechtsanwalt Dr. Johannes Grooterhorst Partner, Grooterhorst & Partner Rechtsanwälte
20 September 2012	Current Court Rulings in the field of Commercial Landlord and Tenant Law in Düsseldorf, Specialist Bookshop Sack, Klosterstraße 22 Speaker Rechtsanwalt Dr. Rainer Burbulla Partner, Grooterhorst & Partner Rechtsanwälte
08 September 2012	Day of Experts of the Chamber of Trade Düsseldorf in Düsseldorf, Georg-Schulhoff-Platz 1 Conflict of Interest of the Expert Speaker Rechtsanwalt Ralf-Thomas Wittmann Partner, Grooterhorst & Partner Rechtsanwälte
27 to 30 August 2012	IIR Intensive Seminar in Berg at Lake Starnberg, Seehotel Leonie Legal Know-How Real Estate Speaker Rechtsanwalt Dr. Rainer Burbulla Partner, Grooterhorst & Partner Rechtsanwälte

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