GROOTERHORST
& PARTNER
RECHTSANWÄLTE

NEWSLETTER 04/2012

Dear readers,

Our fourth Newsletter of 2012 covers the current developments concerning – cross-border – insolvency law and the rights of members of supervisory boards with respect to stock corporation law. Jurisdiction had to decide on contractual problems in private building law and in commercial landlord and tenant law. The BVerwG and the Hessian VGH ruled on the term of central supply areas in the German Building Code as well as on the effectiveness of a regional plan. Court proceedings have obtained new impulses with the statutory regulation of mediation (comp. also Newsletter 3/2012); however they also have to expect the abuse of legal institutions (objection of limitation).

I wish you some stimulating reading.

Yours
Dr. Johannes Grooterhorst
Rechtsanwalt

Content

A. Current News

European legal systems serving as shopping cart available for free – the example of insolvency tourism between Germany and England; risks and chances of forum shopping

On September 20, 2012 – 6 AZR 253/11 – the BAG ruled for the labour law that even an English administrator (insolvency administrator) is entitled to conclude for German employees a balance of interests with a list of names pursuant to § 625 German Insolvency Code (InsO). The German employee (German Business Finance, Manager of an internationally operating consortium), however, only "wanted to be given notice" by a German insolvency administrator.

Basis of the ruling - and many cases that are rather related to insolvency tourism into the United Kingdom – is the regulation (EC) No. 1346/2000 of the council of May 29, 2000 (European Insolvency Regulation (EuInsVO)). Accordingly, what is important is where the debtor has the center of his/her main interest (Center of main interest, COMI) (Art. 16 Sec.1).

Insolvency tourism

The potential insolvency debtor might have an interest in the so-called forum shopping, for example, due to the fact that he opens insolvency proceedings in that state which instructs the discharge of residual debt after the shortest possible period of time. Clever debtors do not shift residence, but give it a try with a fictitious domicile abroad. Their efforts are supported by a service sector offering debtors – allegedly – interested in travelling a "comprehensive care-free package" in order to open insolvency proceedings in France (Departments Alsace and Lorraine) or in England respectively.

England: Discharge of residual debt after one year

Especially England is highly attractive, since in England the discharge of residual debt can be obtained after one year already, whereas in Germany in consumer insolvency proceedings the probationary period amounts to 6 years as of opening of the insolvency proceedings (§ 287 Sec. 2 German Insolvency Code (InsO)). Thus, in practice some real kind of "insolvency tourism" has developed.

A prerequisite for the legal recognition of the legal effects of insolvency proceedings is that they were opened by a competent court pursuant to the European Insolvency Regulation (EuInsVO).

COMI

The keyword for justifying competence is the "center of main interest" of the debtor (in legal jargon "COMI"). Defining COMI has been the subject matter of jurisdiction for years.

Recent German jurisdiction– LG Cologne 2011: Violation of the Ordre Public

Recently, the LG Cologne held in its ruling of October 14, 2011 (82 O 15/08) that a discharge of residual debt obtained in England could be denied recognition if the debtor has shifted his main place of residence to England as an abuse of law in order to evade justified claims of his creditors under false pretences. The LG thus referred to the so-called "ordre public" in Germany, i.e. the national public order.

In so doing, the LG dealt with an extreme case. The sued debtor allegedly shared an apartment with four other Germans in London. The co-residents, too, purportedly stayed in London in order to go through English insolvency proceedings. The LG Cologne deemed the apartment-sharing community "an insolvency nest" and considered it as proven that the defendant moved his place of residence to England as an abuse of law by exploiting "organised insolvency tourism" in order to evade justified claims of creditors under false pretences.

Thus the LG Cologne denied the debtor the recognition of a discharge of residual debt under German law.

Increasing sensitivity of the English judiciary, criteria

The sudden affinity to London exercised by German debtors without assets has been of interest for the English judiciary for some time.

These cases come to oath if insolvency proceedings were opened in England and if the creditor then contests in English insolvency proceedings that the debtor had in fact shifted his COMI to London.

High Court of Justice „Shierson v. Vlieland and Boddy [2005] EWCA CIV 974

Since the ruling of the High Court of Justice „Shierson v. Vlieland and Boddy [2005]" the English judiciary has established some criteria as to whether the COMI had actually been moved to England. According to these the official receiver has to review the COMI if the following facts exist:

(a) a debtor files for main insolvency proceedings in England or Wales pursuant to EU-regulation and
(b) the debtor is a foreign national who lives in England for less than 12 months
(c) all debts accrued outside Great Britain.

Duty of inquiry of the official receiver

Pursuant to the afore-mentioned ruling of the High Court of Justice the official receiver has to investigate the following in particular in order to verify the COMI:

- Inspecting the place of residence of the debtor in Great Britain in order to find out whether the debtor really lives there.
- Requesting the debtor to submit evidence for his daily living in Great Britain. Apart from leases telephone bills, credit card receipts, supermarket receipts, receipts from cash dispensers, etc. are requested.
- The official receiver demands the National Insurance Number (NIN) in order to find out whether wages were received from specified employers.
- Official receivers are informed by the German system of registration of citizens and by that of other EU countries. In Germany the official receiver requests a copy of the deregistration certificate either from the debtor or directly from the registry office in Germany.
- The official receiver sends letters in the German language to the creditors. The creditors are asked about the when and where of the last contacts to the debtor.
- In the event that the employer is an English Ltd. which had been founded shortly before the debtor entered the country, the official receiver has to review whether the debtor is shareholder of the Ltd.

In the event of reasons justifying the suspicion that moving the COMI was only of a temporary nature or was not made at all, the official receiver applies for a suitability test of the insolvency application initiated by the court pursuant to § 375 of Insolvency Law.

Even in the recent past the High Court of Justice has increasingly substantiated its rulings on reviewing the COMI.

High Court of Justice 2011, Sparkasse Hannover versus Official Receiver and Körffer
Good middle-class apartment in Germany – sleeping facility in London? – COMI?

The lawsuit "Sparkasse Hannover v. [2011] DPIR (bankruptcy and personal insolvency reports) 775" offers a very vivid case of a fictitious place of residence in London and its judicial review.

In the facts referenced the debtor worked a total of 33 years for the Sparkasse Hannover, in the end as senior executive before going into retirement. The Sparkasse Hannover as creditor granted him significant bank loans that were only secured in parts under the terms of land register law. In the year 2008, after calling in the loans without notice the Sparkasse Hannover requested the debtor to repay all existing liabilities.

To its surprise the Sparkasse Hannover was informed at the end of 2008 that the debtor had filed for insolvency proceedings in England.

As a result, the Sparkasse Hannover applied for the cancellation of the insolvency proceedings.

Hearing of witnesses

The Sparkasse Hannover managed to demonstrate and prove in a very complex lawsuit (the hearing of witnesses itself covered several days of trial), that the debtor had not moved his COMI to England thus effecting the cancellation of the insolvency proceedings.

Proofs of residence

In this case it was decisive for the court, amongst other things, that the debtor was not able to provide proofs of purchase, statements of account, gas, water and/or electricity bills or to possibly present someone who would have been able to confirm that the debtor actually lived in London. However, the debtor never even tried to supply respective evidence.

To complicate the matter, the debtor was seriously ill and in need of permanent medical treatment. It was indisputable in fact that the debtor had regular in-patient hospital treatment in Germany.

Yet, it was particularly decisive for the court that the debtor, who was 71 years of age, had lived in a good middle-class suburb of Hannover prior to his alleged move to London, whereas he - being a seriously ill man of pensionable age - purportedly rented a room, according to a fictitious address in London, which was basically nothing more than a bedroom with shared sanitary facilities with shower and toilets located in the hall. In addition, the debtor did not have any personal or economic contacts to England.

The debtor did not know what to reply to this submission.
The High Court of Justice inferred from this, that the debtor did not shift his COMI to England

A further landmark decision is the judgement “Steinhardt v. Eichler (2011) bpir 1293”.

Steinhardt versus Eichler (2011): permanent presence versus business trips

In that particular case the debtor, prior to filing for insolvency proceedings in England, accepted a temporary position in England, shifted his place of residence and transferred to his wife his real estate property in Germany. Although the debtor, apart from other activities, also paid taxes in England, he did not completely move his activity to England prior and subsequent to the judicial determination of personal insolvency. The High Court took the view that the presence of the defendant in England could not be deemed permanent. It considered the presence of the defendant as a sequence of business trips. As a result, the High Court annulled the determination of personal insolvency by stating the reason that the COMI was in Germany at the relevant point of time and not, as stated by the debtor, in England.

Therefore, the LG Cologne denied the debtor the recognition of the discharge of residual debt under German law.

Practical considerations

The attractiveness of England as a refuge for personal insolvency continues to exist. However, creditors are not without protection. The English judiciary increasingly tightens the criteria for recognizing the COMI. The German justice system, too, is getting more and more sensitized to the justification of a “bogus COMI”.

A creditor, and this also applies to a senior manager (as employee creditor) has always to carefully examine whether the German or a foreign legal system has to be applied. It will be a matter of filling the key term COMI with as many – positive or negative – facts as possible: the exact and legally structured clarification of the facts is imperative.

Nonetheless, the creditor will have to invest a considerable amount of time and costs in order to prove to the German or the English judiciary respectively the absence of a shift of the COMI to England.

Ralf-Thomas Wittmann

B. Commercial and Company Law

Stock Corporation Law – Supervisory Board: consultancy contracts with members of supervisory boards – illegal payments of a remuneration in the event of a consultancy contract of a member of a supervisory board concluded/authorized without legal effect; ineffective resolutions concerning the approval of actions

In its judgement of July 10, 2012, Az.: II ZR 48/11 the BGH ruled that the board of management of a public limited company acts unlawfully if it pays a consultancy remuneration to a member of the supervisory board although the supervisory board had not yet approved the consultancy contract underlying the remuneration pursuant to § 114 Sec. 1 Public Limited Companies Act (AktG).

Consultancy contract prior to approval by the supervisory board decision

In the case underlying the ruling the sued public limited company as well as its defendant subsidiary concluded a contract with a law firm. A partner of this law firm was at the same time deputy chairman of the supervisory board of the defendant. Although the supervisory board of the defendant had not yet agreed to the contract pursuant to § 114 Sec. 1 Public Limited Companies Act (AktG), the board of management of the defendant paid the accrued fees to the law firm. It was only at the end of the year that the supervisory board approved the consultancy contract.

The plaintiff is shareholder of the defendant and she brought an action of annulment against the resolutions concerning the approval of actions of the management board. The LG granted the claim; the appeal of the defendant before the OLG remained unsuccessful. The BGH confirmed the judgement of the OLG as regards contents, however it set the judgement aside for formal reasons.

Disputable resolution of the general meeting concerning approval of actions

The BGH stated that a resolution of the general meeting concerning the approval of actions of the management board and of the supervisory board violates § 120 Sec. 2 Sent. 1 Public Limited Companies Act (AktG) – and is, therefore, disputable pursuant to § 243 Sec. 1 Public Limited Companies Act (AktG), if a behaviour is approved representing a serious and unambiguous violation of law and statutes.

If a member of the supervisory board gives an undertaking outside his activity in the supervisory board by means of a contract of consultancy that does not establish an employment relationship, or by a contract for work and labour towards the company providing an activity of a higher nature, the effectiveness of this contract depends on the approval of the supervisory board pursuant to § 114 Sec. 1 Public Limited Companies Act (AktG). If the company grants the member of the supervisory board some remuneration due to such a contract prior to the board's approval, the member of the supervisory board may keep the remuneration, if the supervisory board approves the contract subsequently. According to the prevailing opinion up to now the board of management acted dutifully if the supervisory board approved the consultancy contract subsequently.

No subsequent approval

The BGH, however, did not support this view but decided that the board of management even acted contrary to its duty if the supervisory board authorized the contract at a later stage. The requirement in § 114 Sec. 2 Public Limited Companies Act (AktG) only represents a legal reason for being allowed to keep the remuneration received, however, it does not change anything with respect to the breach of duty constituted by the management board's action. The supervisory board must be in a position to effectively exercise its preventive control function, which is often a difficult thing to do when payments have already been made.

The BGH stressed that even aspects of practicability do not contradict this conclusion: The BGH expressly stated that the supervisory board can transfer the competence for decisions pursuant to § 114 Public Limited Companies Act (AktG) to a committee of the supervisory board thus enabling a short-term decision in urgent cases.

Only in consideration of both the long standing practice as well as the prevailing opinion in jurisprudence represented in literature, both advocating the opposite view, the BGH, exceptionally denied a serious and unambiguous violation of law and statutes as set forth in § 243 Sec. 1 Public Limited Companies Act (AktG).

Practical Considerations

In the future the payment of remuneration without prior approval of the supervisory board should be understood to represent a serious and unambiguous violation of law and statutes as set forth in § 243 Sec. 1 Public Limited Companies Act (AktG). In order to avoid the danger that the management board is denied the approval of actions at the general meeting, the board of management of a public limited company should take particular care that the approval of the supervisory board for a consultancy contract has already been granted prior to payment of the remuneration resulting from this contract.

Jörg Looman

C. Real Estate Law

Private Building Law – Contract Law: Radiating effect of individual contractual regulations on the contract as a whole

A ruling of the OLG Schleswig (judgement of March 11, 2011 – 5 U 123/08; dismissal of the appeal against denial of leave to appeal – VII ZR 73/11) has principally created legal clarity for a typical case-(contract-) constellation in private building law:

Sample contracts as General Terms and Conditions

Professional building owners commissioning a substantial number of building projects in Germany, regularly work with sample contracts that are adjusted to the special characteristics of the building project respectively. In the event that at a later stage a legal dispute emerges between the parties involved in the building project, it is often observed that the general contractor raises the objection that the contract and its individual clauses have the character of General Terms and Conditions which have to be reviewed pursuant to the conditions as set forth in §§ 305 ff German Civil Code (BGB) and are, therefore subject to a stricter control of content than individually negotiated clauses.

In such cases the court has to deal with the question whether or not they are General Terms and Conditions. Pursuant to § 305 Sec. 1 Sent. 3 German Civil Code (BGB) General Terms and Conditions shall not exist if the terms and conditions of contract were individually negotiated by the contracting parties.

Modification of a single clause

In the case to be ruled the building owner (CL = client) concluded with the general contractor (GC) a general contractor agreement about building a 4-star hotel. In the course of the contract negotiations concerning the GC agreement the GC managed to modify in his favour various regulations included in § 4 of that agreement ("Scope of service of the contractor") related to performance targets, subsoil risk, as well as to the cost risk in the event of modification of plans. It is indisputable that the draft version of the general contractor agreement was set up by the CL.

However, in § 4.4 of the general contractor agreement the regulation remained unchanged according to which the GC assumed the responsibility of planning, to provide all further planning services and – as far as the CL also contributed further planning services – to review these and to prepare these anew if necessary.

In the course of the building project the GC queried the provision of missing plans. The CL invoked § 4 of the GC agreement and did not provide any further plans. The GC, therefore, argued that there would be a necessary cooperation on the part of the client, and he, for that reason, terminated the GC agreement pursuant to §§ 642, 643 German Civil Code (BGB) because of an allegedly important reason.

The CL then completed the building project with another contractor. He took legal action against the GC for the additional costs that accrued. The GC defended himself by arguing that § 4 of the general contractor agreement represented General Terms and Conditions. These are deemed invalid, because they would place him at an inappropriate disadvantage (§ 307 par. 2 German Civil Code (BGB)).

Amendment of elementary regulations

The OLG Schleswig rejected the statement of the GC, stating that the GC agreement represented a negotiated individual contract. Elementary regulations of the GC agreement such as performance targets, subsoil risk and cost risk for modifications of planning formed part of an in-depth discussion between the parties and resulted in amendments. Even minor aspects had been modified. This proved the fact that the CL was prepared to negotiate. Furthermore it revealed that the GC acknowledged the specific version of the agreement to its full extent.

Sufficient willingness concerning contract negotiations

Furthermore: In business transactions it would be sufficient if the user granted the other contracting party possibilities of negotiation and if the latter could exercise his rights with some reasonable effort. Due to § 4 of the GC agreement the CL could have noticed that he took on planning responsibility. According to the OLG it would be a breach of trust to a high degree if the contractor could invoke that individual aspects had not been negotiated, and if he would thus be able to cause a General Terms and Condition control of those regulations that are to his disadvantage.

The "radiating effect" on further regulations

In the event of contracts between contractors negotiating individual clauses could have a "radiating effect" on technically interrelated regulations. This could justify an extended application of § 305 Sec. 1 Sent. 3 German Civil Code (BGB) according to which negotiated terms and conditions of contract are not subject to any General Terms and Conditions control.

Practical considerations
Contract design
"either – or"

If there is reason to assume that a contract General Terms and Conditions it has to be recommended to the contracting partner of the user either not to negotiate about the sample contract (in order to avoid that individual agreements nonetheless occur) or to try to amend all regulations that are to his disadvantage by means of negotiations. In doing so, however, it has to be taken into account that a negotiated clause, which has finally not been amended, still represents an individual agreement.

Ralf-Thomas Wittmann

D. Commercial Landlord and Tenant Law

I. Effectiveness of the termination of a residential lease for reasons of professional purposes of the landlord

In its judgement of September 29, 2012, Az.: VIII ZR 330/11 the BGH ruled that a landlord is entitled to effectively terminate a residential lease if he needs the apartment himself, even for professional purposes.

In the case the plaintiff had rented out an apartment to a defendant in Berlin. Both parties lived in the same house.

In 2009 the plaintiff gave notice of termination of the lease. The plaintiff specified as reason for the termination that his wife intended to relocate her law firm to Berlin and to operate it in the apartment rented by the defendant. The defendants objected to the termination and asserted compassionate reasons pursuant to § 574 German Civil Code (BGB). The action for eviction remained unsuccessful before the Amtsgericht as well as before the Landgericht. The BGH set aside the judgement and referred the lawsuit back to the Landgericht.

Commercial use as sufficient reason for own needs

The BGH stressed that the plaintiff can even provide a justified interest as set forth in § 573 German Civil Code (BGB) if he needs the apartment for professional reasons. Pursuant to § 573 Sec. 1 German Civil Code (BGB) the landlord is only entitled to give notice of termination if he has a justified interest in the termination of the tenancy. According to § 573 Sec. 2 No. 2 German Civil Code (BGB) a justified interest particularly exists if the landlord needs the rooms as apartment for himself, for members of his family or for relatives of his household (so-called "own needs"). The BGH stated that the interest of the wife in the professional use of the flat could not be rated lower than the use of the apartment by a member of the family as set forth in $ 573 Sec. 2 No. 2 German Civil Code (BGB). Background to the balance of these interests is the freedom to choose and practise a profession as enshrined in article 12 Sec. 1 Grundgesetz (GG). Furthermore the justified interest of the plaintiff was supported by the fact that the respective apartment was located in the same house in which the plaintiff lived himself.

The BGH has referred the lawsuit back to the appeal court for reviewing circumstances justifying the effectiveness of the termination.

Practical Considerations

The BGH made it clear with some pleasing clarity that the professional purposes of the landlord are not to be rated lower than his private purposes. A termination with notice pursuant to § 573 Sec. 1 can be effective even if the landlord needed it for his (and his family's) professional purposes.

Jörg Looman

II. Breach of duty related to protection against competition by the landlord as defect of the rental object

In its ruling of October 10, 2012 – XII ZR 117/10 – the BGH held that the violation of a protection against competition clause agreed on in a commercial lease caused by the landlord could be understood to represent a defect of the rental object entitling the tenant to reduce the rent.

Lease for a specialist doctor's surgery

In the case the tenant had rented rooms to operate a doctor's surgery. The parties had agreed in the lease that the landlord granted the tenant protection against competition for the special field of orthopaedics: Letting to a medical doctor of the same special discipline would only be valid upon the approval of the tenant. Subsequently the landlord concluded a further lease for a medical surgery in the building – without the approval of the tenant -, whose field of activity intersected in parts with the first doctor's surgery. The first tenant asserted a reduction of the rent by 50 % and claimed a repayment of the overpaid rent.

Liability for damages versus rent reduction

According to higher courts jurisdiction it is controversial whether a violation of the duty of protection is really understood to be a defect of a rental object. This question is answered positively in parts (KG Berlin, judgement of January 25, 2007 – 8 U 140/06) whereas the OLG Dresden, judgement of July 20, 2010 – 5 U 1286/09 argued that the violation of a competition clause represented a breach of duty of the landlord enabling the tenant to claim damages. The consequence of the latter opinion is that the tenants have to prove their damage resulting from the breach of duty of the protection against competition, which is regularly very difficult for tenants or which tenants regularly deny protecting themselves against the detailed presentation of "sensitive information" concerning calculations and profits.

Impairment of the use according to contract

In its ruling the BGH cleared the controversial issue – which is very relevant for the practical use – and supported the view that the landlord's violation of the agreed protection against competition is a rental defect. According to the BGH the violation of the so-called contract-intrinsic protection against competition as well as the one expressly agreed upon in the contract might directly impair the contractual suitability of the rental object: A contractually agreed use of the rental object included that the tenant is granted protection against competition – even without an express contractual regulation. In this contractually owed right to use the tenant would be directly impaired by a violation of the protection against competition. The impairment represented a defect for every tenant who intended to use the object for the same purpose. It opened up the tenant warranty rights under rental law with the consequence that the tenant is then entitled to directly reduce the rent.

The ruling of the BGH is very much in favour or tenants. It might lead to the fact that in future tenants increasingly assert rights because of possible breaches of duty concerning protection against competition. For the landlord this decision results in the fact that he has to pay attention when drafting the lease whether, and to what extent, protection against competition will be granted or not. If the landlord omits regulations on protection against competition in the lease, the tenant is entitled to a so-called contract-intrinsic protection against competition. If the landlord violates this contract-intrinsic protection against competition – for instance because he incorrectly believes not to owe any protection against competition – the tenant is entitled to the same claims for defects – subsequent to the unambiguous ruling of the BGH – as in the case of an expressly agreed protection against competition.

Practical considerations

Diligent contract design for contract-intrinsic and express protection against competition

Dr. Rainer Burbulla

E. Public Law

I. Central supply areas as set forth in § 34 Sec. 3 German Building Code (BauGB) are to be defined on the basis of the actual circumstances

In its current ruling (ruling of July 12, 2012 – 4 B 13.12) the BVerwG dealt with the question whether a local definition of a central supply area as set forth in § 34 Sec. 3 German Building Code (BauGB) may refer to the (regional) land-use planning objective determining a priority area and specifying a centrally located settlement and supply centre.

When settling projects in the so-called unplanned developed area as set forth in § 34 German Building Code (BauGB) it is essential whether the respective project is expected to have damaging effects on central supply areas in the municipality or in other municipalities.

Projects in the unplanned developed area with consequences on the central supply areas

As unambiguously stated by the BVerwG only what actually exists within the scope of § 34 has been generally and at all times deemed relevant; properties of the plots of land which were not reflected in the visually perceptible facts have to be disregarded. Objectives pursuant to regional planning at federal state level cannot be directly used for interpreting and applying § 34 Sec. 3 German Building Code (BauGB), because objectives are addressed to the urban development planning authorities and not to the approval authority, according to the BVerwG. Specifications of planning in this sense can also be relevant with respect to § 34 Sec. 3 German Building Code (BauGB), however, they are not binding but can only be used as guidance in the context of § 34 Sec. 3 German Building Code (BauGB).

If the objective pursuant to regional planning at federal state level has no counterpart in what actually exists, the respective area does not represent a central supply area as set forth in § 34 Sec. 3 German Building Code (BauGB) which would have to be considered when assessing the question whether damaging impacts are to be expected.

Isabel Strecker

II. Specifying priority areas for the use of wind energy in the regional plan Central Hessen 2010 is invalid due to a lack of a binding target quality

With its ruling of May 10, 2012 (4 C 841/11.N) the VGH Kassel deprived the specification of priority areas for the use of wind energy as objective of land-use planning in the regional plan Central Hessen 2010 of its binding character and declared it invalid.

The respective specification of the regional plan provides that in the specified priority areas for the use of wind energy the construction and operation of space-consuming wind energy facilities have priority over other opposing planning and uses and that the planning and construction of space-consuming wind power stations are not admissible outside these priority areas. The provider of the regional plan intended to allocate a binding target quality to this regulation.

Binding objectives of land-use planning are to be strictly observed in the context of municipal urban land-use planning, and they cannot be overcome by means of consideration in line with municipal urban land-use planning.

Municipal planning competence and regional planning

The city of Alsfeld opposed this specification in the regional plan, after the regional plan of their municipality had defined two priority areas for the use of wind energy for two already existing wind farms as established constituents and, at the same time, three further priority areas for the use of wind energy had been defined in the area of the city of Alsfeld. With this the city of Alsfeld considered itself prevented in its municipal planning competence from defining in the context of its urban land-use planning other locations for wind power plants deviating from the predefined priority areas and, furthermore, deemed itself exposed to the pressure to adapt its remaining urban land-use planning to the predefined priority areas.

The application for judicial review of the city of Alsfeld was successful before the VGH Kassel: The regional plan includes - in its explanation concerning the respective target definition with reference to a total of 15 areas of the regional plan area described individually and in detail - a “planning note” suggesting that for these areas “it is envisaged” to designate a priority area for wind energy planning; moreover it is stated that “due to a lack of a current basis of assessment a concluding coordination concerning regional planning has not yet been made”. In these areas the regional planning specifications pursuant to the regional plan map would apply.

Notes in the argumentation constitute no definition (“Decision“)

As the VGH Kassel held these explanations revealed in their argumentation that the definitions did actually not represent a finally balanced textual and graphic definition of the regional planning authority. The definitions lack the character of a regional planning “final decision” which is based on a settlement of conflicts as well as on a concluding consideration concerning aspects of regional planning, and which offers solutions that do not require any supplement on the regional planning level. Therefore, there is no binding objective of land-use planning with respect to the definition of priority areas for wind power plants that would be opposed to some urban land-use planning contradicting the definition.

The ruling of the VGH Kassel has become legally binding in the meantime, an application for approving an appeal was not filed. The city of Alsfeld is now free to practise its own urban land-use planning which involves other locations for wind power plants deviating from the priority areas represented in the regional plan.

ISABEL STRECKER

F. MEDIATION AND CONDUCTING LEGAL PROCEEDINGS

I. MEDIATION PROCEEDINGS – LEGAL SUPPORT FOR THE CLIENT BY A LAWYER IN THE MEDIATION PROCEDURE

NEW LEGISLATION ON MEDIATION AND PROFESSIONAL LAWYER'S LAW (BORA)

In future lawyers should ask their clients prior to bringing an action and should make it part of the statement of claim, whether they have attempted mediation before filing an action, and whether there are reasons opposing such proceedings. This new regulation is in line with § 1 Sec. 3 Professional Rules for Attorneys at Law (BORA) according to which lawyers have to protect their clients against loss of right and have to accompany them in a constructive, conflict-avoiding as well as a conflict-solving manner.

MEDIATION AND PROTECTION BY A LAWYER AGAINST LOSS OF RIGHT

The task of the lawyer towards his client to act in order to avoid conflict is not a contradiction to the fact that lawyers, in the first place, have to grant their clients professional protection against loss of right. First of all protection of the client by a lawyer always requires an analysis of the legal position of the client. It is only dispensable at the request of the client, if the latter with a clear vision concerning mediation seeks such an out-of-court settlement procedure. However, if the client does not exactly know whether mediation grants the adequate procedure for him compared to litigation, the lawyer has to work out the legal claims of the client. The client will be informed about his legal position and can decide whether there are reasons allowing mediation to be preferred. Such an added value can, for instance, be the fact that he does not have to wait for a court ruling a long time (= time factor) or that, for example, his legal position, which might be uncertain due to a lack of evidence, can lead to more detailed results in mediation compared to court proceedings.

Upon approval by the respective counter party each conflicting party can be accompanied by a lawyer it trusts during mediation. This may be useful because the mediator does not provide the parties with any legal advice; in fact legal positions are not the subject matter of mediation. The mediator does not assess or estimate prospects of success of a legal action.

LAWYER'S SUPPORT IN THE MEDIATION PROCESS

The client does not have to fear any loss of legal positions resulting from a mediation agreement. In the course of the mediation process the lawyer can call his client to the attention in due time whether he possibly waives any legal claims due to his negotiations. He can question whether this is really intended with respect to other motives.

Recommended condition of the final agreement

If the client conducts mediation proceedings without a lawyer, he should only conditionally conclude the final agreement. Then he is in a position to subsequently submit it to a lawyer in order to be reviewed. This guarantees that the conflicting party is informed about the extent the final agreement has with respect to existing legal claims. It is ensured that one conflicting party can consciously and freely decide whether a waiver of rights has been intended by the party for specific reasons (for example, because the business relationship is intended to be continued).

Therefore, protection by a lawyer is also guaranteed when conducting mediation proceedings. In any case, mediation takes place on a voluntary basis, can be cancelled at any time, in order to then take legal action before a court.

Personal participation in the mediation proceedings and contribution of a lawyer

Principally the parties personally participate in mediation proceedings. The parties can also be represented by a lawyer if they do not want to appear themselves. However, they then have to ask themselves whether this really helps to achieve their objectives. Often the legal representative can only contribute the facts justifying a legal claim. The interest underlying the legal claim as well as the motives of his client are not always known to the lawyer to their full extent.

If the parties are organisations the competent representative of the organisation personally participates in the mediation proceedings.

If the parties are represented, the representatives have to provide a power of attorney in order to be able to conclude a mediation agreement. If the person entitled to conclude a mediation agreement requires a permit for the end result of the agreement, he has at least to submit a concluding power of attorney with a reservation of approval.

Lawyer's review of form and content of final agreement

Reviewing the mediation agreement by a lawyer guarantees that it is made in the legally correct manner (for example, in the event of real estate transactions, dealing with a transfer of property of a plot of land).

Effects of a final agreement

Furthermore it has be taken into consideration that drafting a final agreement at the end of mediation proceedings represents in legal and technical terms a settlement as set forth in § 779 German Civil Code (BGB). For this reason formulations have to be chosen that withstand any judicial review. This means that it must be verbally expressed that both conflicting parties intend to bindingly regulate an issue with the final agreement, and that the two parties do not intend to conclude any further agreement for its implementation.

Practical considerations

Reviewing the final agreement is possibly dispensable if conflicts are dealt with that are not yet actionable (for example, conflicts at the workplace because of bad social interactions with each other). However, in order to be on the safe side, a review made by a lawyer can be useful depending on the individual case.

Dr. Ursula Grooterhorst

II. Court proceedings – abusive use of the statute of limitations objection

Especially in the event of construction disputes it is a popular means to raise the objection of the statute of limitations. In particular with private clients it often happens that architect contracts are concluded without any or with – at best - some rudimentary written basis. It is not unusual that this involves the difficulty of precisely defining the commencement of the statute of limitations in the event of claims for defects against the architect.

In a recently published ruling the OLG Jena had to deal with the question under which conditions it is invalid to raise the objection of the statute of limitations (judgement of July 13, 2011 – 7 U 689/19; the appeal against denial of leave to appeal was dismissed by the BGH in its ruling of September 6, 2012 – VII ZR 166/22).

In the facts the senate had to decide, the client (CL), a GmbH in the process of liquidation, sued the principal (PP) for paying remaining claims of remuneration for construction services rendered at its estate. The special nature of this case is that the PP was at the same time the former managing sole shareholder of the client. The PP invoked, amongst other things, that the claim for wages had expired by limitation. Furthermore this claim is contradicted by the fact that any potential liquidation proceeds have to be paid out to him as sole shareholder.

§ 242 German Civil Code (BGB) and the objection of the statute of limitations

The OLG Jena awarded the CL the claim for wages. In fact, the prerequisites for the statute of limitations of the claim for wages have been fulfilled. However, the PP cannot invoke in good faith pursuant to § 242 German Civil Code (BGB) the objection of the statute of limitations. Because at the time, when he was still managing sole shareholder of the client, he should have pressed the claim for wages against the PP in due time. This is exactly, in fact, where he failed to fulfil his obligation.

Now to gain profit from this omission in breach of his duty and to invoke objection of the statute of limitations, represents a gross violation of the criteria of good faith. Even the objection that he is in any case entitled to the remuneration as sole shareholder of the CL, is not sustainable. Since there is a multitude of creditors of the CL, he is not in a position to prove exactly this fact.

Practical considerations

The breach of faith when raising the objection of the statute of limitations is only acknowledged in very rare cases. In doing so, a gross violation of good faith has to exist. Such a constellation is, among other things, the case if the creditor prevented the entitled party from the timely assertion of his claims. In this case the PP could not be heard with the objection that he as sole shareholder of the CL was free to let its claims expire by limitation. In fact, the PP had by means of his behaviour – without any proper documentation – deprived assets of the GmbH at the disadvantage of the creditors of the GmbH and at the advantage of his private assets. That was the decisive reason why the OLG Jena assumed a breach of faith.

Ralf-Thomas Wittmann

TERMINE

20 to 21 March 2013

9. German Conference for Retail Real Estate
in Berlin, Esplanade Grand Hotel, Lützowufer 15
March 3, 2013: The Retail Property in Planning Law –
Current Legal Development
Speaker: Dr. Johannes Grooterhorst
Partner, Grooterhorst & Partner Rechtsanwälte

28 to 29 November 2012

2. German Factory Outlet Congress 2012
in Neumünster
Talk: Outlet Center in Planning Law: Instruments, Measures,
Practical Experience
Speaker Rechtsanwalt Dr. Johannes Grooterhorst
Partner, Grooterhorst & Partner Rechtsanwälte

20 November 2012

Düsseldorfer AnwaltService: Mediation
"Impact of the Law on Mediation on Lawyers (Non-Lawyers Mediators)"
in Düsseldorf, MaxHaus, Schulstr. 11
Speaker: Rechtsanwältin und Mediatorin Dr. Ursula Grooterhorst
Rechtsanwältin, Grooterhorst & Partner Rechtsanwälte

In case you are interested in participating in one of these events,
please contact the speakers: www.grooterhorst.de

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