GROOTERHORST
& PARTNER
RECHTSANWÄLTE

NEWSLETTER 01/2012

Dear Readers,

In the first Newsletter of 2012 we present the current court decisions relating to corporate law in Europe (Spain). At the moment German corporate law is frequently strained by claims against members of the executive board and members of the supervisory board of large public limited companies. The private real estate law deals with the supervision of the contractor by the building owner, with the right of access to the land register and to the land registry documents; and with problems of the commercial lease in case of termination with respect to a civil law association [BGB Company] acting outwards or with the question of contra bonos mores in case of imbalances between an agreed rent and the market rent. Time and again, public building law has to concentrate on the permissibility of retail businesses. Topics focussing on labour law and procedural law supplement our legal news coverage.

I wish you some stimulating reading.

Yours
Dr. Johannes Grooterhorst
Rechtsanwalt

Content

A. Current News

A view across the border: remarkable new regulations in the Spanish law of corporations

Initial situation: a uniform corporation law since 2010

The middle Europeans must have been quite surprised that – in the middle of the Spanish summer, on 2 July 2010, – the fundamental new version of the law of corporations was passed (real decreto legislativo 1/2010 de 2 behulio, published BOE – BOLETIN OFICIAL DEL ESTADO (Spanish law gazette) No. 162, 03.07.2010, pages 58472 et seq.).

This comprehensive legal reform of corporations includes uniform rules – just as in Germany – about the public limited company (SA Sociedad Anonima including a commercial partnership limited by shares) regulated in special laws, the private limited company (SL Sociedad de responsabilidad limitada) – as well as its own rules for public limited companies quoted on the stock exchange (sociedades anonimas cotizadas).

New partial reform of the reform
The act 2520/2011, in force since 2 October 2011

One year after the comprehensive reform of the corporation law, again in the summer, King Juan Carlos I promulgated the act 2520/2011 of 1 August 2011 (BOE No. 184 of 2 August 2011, Part 1, p. 87462) about the partial reform (reforma parcial) of the corporation law.

According to the preamble, the act intends to reduce the costs accruing from organising and making corporations work as well as to introduce some regulations concerning the ”modernisation“ of a corporation which were insistently (insistentemente) requested by business, and to repeal some regulations implying unjustified differences between the constitution of the public limited company and that of the private limited company. Furthermore, an EU directive of the European Parliament and the European Council is intended to be implemented which deals with specific rights of shareholders of a public limited company quoted on the stock exchange.

The new amendment act came into force on 2 October 2011.

Objectives: saving company costs – a legal entity as managing director – waiving formalities – further approximation of public limited company (SA) and private limited company (SL)

The special situation of the financial crisis in Spain also puts strain on the economy. Obviously the government considered it necessary to relieve the companies of unnecessary costs by all means: the newly introduced amendments in the corporation law enable the company to predominantly use electronic media (for invitations, announcements, resolutions, publications) and to waive the – expensive – costs for publications in official gazettes and large regional daily newspapers. This, it seems, is currently practised all over Europe.

Under the term “cost saving” the act also covers the replacement of public auctions of plots of land in the event of liquidation by a private sale carried out by the public limited company as well as the waiver of notarial attestation of signatures of managing directors when the annual accounts are submitted.

The reasons for liquidation are also newly regulated: ceasing business operations for a period of one year manifests a reason of liquidation for all corporations.

By way of derogation from §§ 6 Private Limited Companies Act (GmbHG), 76 Public Limited Companies Act (AktG) Art. 212 BIS allows a legal entity to be the managing director of a corporation.

For the German understanding of a membership in corporations the new regulation to withdraw from the corporation (Art. 348 BIS of the law) is of particular interest:

Remarkable: right to withdraw in case of refusing dividends/payouts

From the beginning of the 5th business year subsequent to their entry into the commercial register members of the corporation are entitled to withdraw from the corporation if the general meeting of partners/annual general meeting (junta general) does not pay out at least one third of the – legally distributable – profit of the previous business year. Public limited companies quoted on the stock exchange are exempted from this regulation (Art. 348 BIS No. 3).

Germany: no legally regulated right to withdraw in case of an important reason

The new Spanish regulation for all corporations not quoted on the stock exchange is intended to protect the minorities with respect to a policy of the corporation's majority shareholders that is aimed at accumulation – or at the displacement of the minority. The German law governing private limited companies (GmbH) has developed in doctrine and jurisdiction under § 34 Law on Limited Liability Companies (GmbHG) a right to withdraw [basically: Federal Court of Justice (BGH), judgement of 16 December 1991 – II ZR 58/91, Judgements of the Federal Court of Justice for Civil Matters (BGHZ) 116, 359, 369 "Basic principle of the law of association"]. While in Germany the scope and the significance of an important reason are being discussed, the Spanish legislator has formulated a mandatory right of withdrawal. It is determined on the basis of objective criteria and waives, according to its wording, all subjective elements (sphere of the company members, behaviour, unreasonableness, etc.). Practical experience in Spain will reveal whether such textual strictness can be adhered to.

Economical considerations: protection of the minority

In practice the right of withdrawal implies that the minority shareholder who is "kept small" in the course of the profit payout can return his share against a compensation. The legal form of the corporation is irrelevant though.

Dr. Detlef Brümmer

B. Commercial and Corporate Law

D&O Liability – Executive Board and Supervisory Board

In its judgement of September 20, 2011 (II ZR 234/09) the Federal Court of Justice (BGH) had to rule on a claim of a liquidator of a public limited company (AG) against its former members of the executive board ("Vorstand") – the defendants listed under 1 and 2 – as well as against the former vice chairman of the supervisory board ("Aufsichtsrat") – the defendant listed under 3.

In the case the judgement is based on, the defendants listed under 1 and 2 and assisted by the member of the supervisory board, the defendant listed under 3, had issued shares to D. AG, although D. AG did not comply with its duty of cash contribution. In fact, a legal construction was agreed, in which D. AG was to pay its contribution in such a manner, that it waived the right to recover from a security loan contract. Before that D. AG assigned the public limited company 679.133 shares based on a securities loan agreement. The assisting member of the supervisory board, the defendant listed under 3, was at the same time the partner of a law firm that is the permanent legal advisor of the debtor.

Loan waiver as contribution in kind – liability

The Federal Court of Justice (BGH) came to the conclusion that D. AG had to make a contribution in cash for receiving the shares, because arranging to waive the repayment of the securities loan was invalid as a contribution in kind [§ 205 Public Limited Companies Act (AktG.) previous version].

As part of this decision the Federal Court of Justice (BGH) once again emphasized the following principles of law in the context of the liability of members of the executive board and the supervisory board:

Legal advisors are no vicarious agents of the executive board

- In principle lawyers are no vicarious agents of the executive board if they are appointed – as it is the case here – on behalf of the company. The members of the executive board do not have to assume in principle any fault caused by the advising lawyers. Thus the lawyers of the law firm appointed by the public limited company (AG) are principally not considered to be vicarious agents of the executive board. Apportioning any fault to an appointed third party shall only be possible if the executive board member him-/herself assigns an agent for the fulfilment of his/her own liabilities. In case a law firm is assigned on behalf of the company, the lawyers regularly take action in the scope of obligations of the company and not in that of the executive board members.

Independent duties of the supervisory board and the executive board

- The executive board cannot discharge itself with reference to incorrect advice rendered by the supervisory board in the context of the supervisory board's work. The supervisory duties of the supervisory board exist alongside the duties of the executive board [§ 93 Sec. 4 Sent. 2 Public Limited Companies Act (AktG)]. Therefore, a joint and several liability of the supervisory board members can be taken into consideration alongside the executive board members.

- The member of the supervisory board who has professionally acquired specialized knowledge is thus subject to a higher standard of due care for assessing a breach of duty – provided that his special field of knowledge is affected.

Practical considerations

The judgement of the Federal Court of Justice (BGH) reveals that breaches of duty of the supervisory board members cannot in the end discharge a member of the executive board from his/her own breaches of duty. However, the judgement also puts forward that in practice even supervisory board members cannot be protected and are held liable alongside executive board members. This particularly applies if a higher standard of due care exists due to specialized knowledge of the supervisory board member. The supervisory board member is expected, in case of such specialized knowledge, to carefully review the object of his/her consent.

Johanna Westermeyer

C. Real Estate Law

I. Private Building Law: no contributory negligence of the building owner in case of lacking supervision of the contractor

The building owner indisputably owed a compensation for work and labour in the amount of approximately 67,000.00 € accrued from a contract for work and labour for building an apartment and office building. The principal invoked his right of retention because of claims for defects due to the faulty construction of a drainage system. After the contractor had introduced independent proceedings for taking evidence, the expert confirmed the existence of these defects and identified the costs for eliminating the defects in the amount of 112,484.21 €.

In technical terms, the contractor did not oppose the expert opinion. He assigned his remaining compensation for work and labour to a third party, who thereupon brought an action for payment.

The principal made a stand against this action by offsetting the claims for defects, which were ascertained by the expert in an independent procedure for taking evidence.

Amongst others, the cedent opposed the claims for defects with the argument that the managing director of the principal had taken on the site management/object monitoring. The principal had not prevented the contractor from the incorrect execution of the work.

No claim for supervision of the contractor towards the principal

In its ruling of September 8, 2011 – VII ZR 153/09 – the Federal Court of Justice (BGH) has recently confirmed the judgement of the Higher Regional Court Munich (OLG) [Higher Regional Court (OLG) Munich, judgement of June 23, 2009 – 13 U 5313/08]. Just like the Higher Regional Court (OLG) Munich it was of the opinion that the fact that the managing director of the principal did not prevent the contractor from incorrectly executing the work, could not discharge the contractor, not even in part. The contractor has no right towards the building owner to be supervised by him during the building work, thus preventing poor performance.

The decision of the Higher Regional Court (OLG) Munich represents the variation of a classic case concerning the building process. It may occur that contractors defend themselves by stating that the architect commissioned by the principal to supervise the object had equally not realized the construction defect and had not intervened in the work of the contractor. According to established case law, however, it its not the task of the object-supervising architect to safeguard the interests of the contractor. Therefore, defects that are down to the project-supervising architect do not discharge the contractor [Higher Regional Court (OLG) Celle, judgement of June 2, 2010 – 14 U 205/03].

Parallel case: no claim for supervision of the contractor against the object-supervising architect

This ruling, however, needs to be consistently applied to this legal case here where the principal takes on the object supervision him-/herself. On the other hand the facts of the case are different if the defects result from a planning error made by a planner who was commissioned by the principal. In this case the object-supervising architect and the company executing the work can principally invoke contributory negligence of the building owner
(Federal Court of Justice [(BGH), IBR 2009, 92].

Ralf-Thomas Wittmann

II. Access to the Land Register and Land Registry Documents by the Press

In its decision of August 17, 2011 (V ZB 47/11) the Federal Court of Justice (BGH) ruled that the press is entitled to a (comprehensive) right of access to the land register and to the respective land registry documents, provided that the informational interest of the press regarding knowledge of the content of the land register has priority over the right of the owner as to the confidentiality of land register data. This is the case if getting access to the data serves the purpose of doing research and reporting about a question that is of major public interest, and if this research helps to prepare a serious and relevant discussion.

Weighing up the confidentiality interest of the owner and informational interest of the press

In the contexts of the facts the judgement of the Federal Court of Justice (BGH) is based on the publisher of a news magazine applied for accessing the land register of a plot of land that is owned by a famous politician and his wife. The news magazine invokes the suspicion that for purchasing a plot of land the married couple was granted financial benefits from a well-known entrepreneur. The land registry office rejected the application for granting access to the

land register and to the respective land registry documents. The appeals authority rendered information to the applicant that an owner's mortgage had been entered into the land register and, apart from that, rejected the application.

Application for access concerning journalistically useful information in the context of the protection of the freedom of the press

According to the opinion of the Federal Court of Justice (BGH) the applicant is entitled to a comprehensive right of access concerning the land registry documents. Therefore, the necessary legitimate interest in getting access to the land register [§ 12 Sec. 1 Sent. 1 Land Registration Code (GBO)] exists, because the application for access by the applicant intends to gather journalistically useful information in connection with the purchase of the plot of land and has, consequently, to be attributed to the journalistic preparation activity included within the context of protection of the freedom of the press.

Weighing up the right of personality

The right of the press to receive information about the content of the land register has priority over the (personality) right of the owner. In the light of the high-ranking political position of the owner of the plot of land the research deals with a question of essential public interest. Indeed, it does not serve the purpose of satisfying curiosity and a craving for sensation existing in the public.

Accessing all land registry documents

According to the Federal Court of Justice (BGH) access is not even restricted to the created mortgages on that plot of land (Sec. III of the land register). In fact the right of access applies to the entire content of the land register and to all land registry documents. A preselection of the land registry office or by courts concerning a relevant or irrelevant content of the land register can, therefore, not be taken into consideration. For this reason the applicant is entitled to access all land registry documents.

Practical Considerations

Accessing the land register may also reveal special personal data of the owner of the plot of land – such as, for example, the existence of liabilities to banks or the like. For this reason accessing the land register requires a legitimate interest of the person granted access. As far as the existence of a legitimate interest is concerned, the requested access for mere reasons of curiosity or for an unauthorized reason is insufficient. A person interested who by means of accessing the land register only intends to figure out the name of the owner of the plot of land, in order to contact him because of a possible sale of the plot of land, has no legitimate interest either. If the press requests access to the land register, the general interest of information of the press has to be weighed up against the right of the plot of land owner to keep his data private and confidential. The right of access of the press prevails if the access serves the purpose of media coverage dealing with a question of fundamental public interest.

Dr. Rainer Burbulla

D. Labour Law

Payment in lieu of holiday in the event of inheritance

In its judgement of September 20, 2011 – 9 AZR 416/10 – the Federal Labour Court (BAG) has ruled that claims for payment in lieu of holiday are not heritable.

In the case underlying the judgement a lorry driver was permanently incapacitated due to illness since April 2008. For that reason it was not possible to grant holidays in the years 2008 and 2009. Subsequent to termination of the employment between the employee and the employer (the defendant) due to the death of the lorry driver, the plaintiff as heiress claimed from

the defendant a payment in lieu of holidays not granted in the years 2008 and 2009.

Expiry of the claim for a payment in lieu with the death of the employee – no conversion into monetary claims

After the labour court had dismissed the case, the Regional Labour Court (LAG), however, assigned a payment in lieu for 35 holidays in the gross amount of 3,230.00 EURO, the senate of the Federal Labour Court (BAG) decided that the claim for holidays expires with the death of the employee. Consequently, the holiday entitlement is not converted into a claim for a payment in lieu after the death of the employee following § 7 Sec. 4 Federal Leave Act (BUrlG).

Practical Considerations

The decision of the Federal Labour Court (BAG) must be agreed with. The holiday entitlement is a strictly personal claim and only intended to be of benefit for the employee in person. Heirs should not benefit from such a holiday entitlement.

Johanna Westermeyer

E. Commercial Landlord and Tenant Law

I. Termination with respect to a civil law association action (BGB company)

Notice of termination with respect to the partnership and forwarding it to a partner entitled to act

In its judgement of November 23, 2011 (XII ZR 210/09) the Federal Court of Justice (BGH) ruled that it is sufficient in case of a notice of termination with respect to a civil law association acting outward (BGB company), if the termination is declared to the partnership and if the notice of termination is forwarded to a partner who is entitled to act.

Contract for garage use as lease

In the case the judgement is based on the plaintiff gave notice to a contract for garage use entered into with a community of citizens [§§ 266 et. seq. Civil Code of the GDR (ZGB-DDR)]. The plaintiff delivered the notice of termination to all members of the community known to her. A delivery to all actually existing members did not take place. Furthermore, a delivery of the notice of termination to the community as such did not occur either.

Principle of the partnership under civil law: Notice of termination from all and to all partners – exception: outside partnership under civil law

The Federal Court of Justice (BGH) deems the termination effective. The court considers the contract for garage use as a lease and applies to the community of citizens the regulations of §§ 705 et. seq. German Civil Code (BGB) concerning the civil law association [§ 4 Sec. 2 Sent. 2 Law of Obligations Adjustment Act (SchuldrechtsAnpG)]. Due to its participation in legal relations the Federal Court of Justice (BGH) classifies the partnership as an outside partnership under civil law.

In case of a civil law association as a body of persons it is a prerequisite that the notice of termination is submitted by and towards all partners. In case of the civil law association acting outwards an exception concerning this applies. According to the understanding of the Federal Court of Justice (BGH) it is sufficient that the notice of termination is forwarded to a partner who is entitled to act, if the termination expressly states that the tenancy with the partnership shall be cancelled.

Practical Considerations

In the event of a termination with respect to a civil law association the person issuing the notice of termination should deliver the termination to all partners if possible. Indeed, according to the Federal Court of Justice (BGH), it is sufficient to deliver the notice of termination to one partner who is entitled to act. However, since in the case of a civil law association there is no register corresponding to the commercial register, it may be difficult to figure out a partner's authority of representation and it can, for example, be uncertain with respect to (subsequent) deviating agreements between the partners.

Dr. Rainer Burbulla

II. No contra bonos mores solely on the basis of an imbalance between the agreed rent and the rent customary to the market

Higher rent for an individual area than the rent customary to the market by means of a value protection clause

In its judgement of July 28, 2011 (24 U 35/11) the Higher Regional Court (OLG) Düsseldorf ruled that the agreement of an (overcharged) rent is not only contra bonos mores and, therefore, invalid if there is an obvious imbalance between the agreed rent and the one customary to the market. There must be an added reprehensible attitude of the beneficiary.

In the case underlying the ruling of the Higher Regional Court (OLG) Düsseldorf the parties entered into a lease on an ice cream parlour in a shopping centre. In the lease they reached an agreement for value protection according to which the landlord is entitled to increase the rent within a particular scope. According to a rent increase by the landlord on this basis, the rent increased by 21.00 €/m2 to 51.34 €lm2, thus exceeding the payable rent of the other tenants in the shopping centre – and therefore, the rent customary to the market – of approximately 21.00 to 45.00 €/m2. The tenant invokes violation of moral principles and requests an adjustment of the rent to the rent customary to the market on the ground of frustration of contract.

Prerequisite for contra bonos mores "imbalance" and "further circumstances violating moral principles"

According to the Higher Regional Court (OLG) Düsseldorf the agreement about the rent is neither violating moral principles nor does the rent increase lead to a frustration of contract.

An agreement of the parties regulating the amount of rent is deemed to be in violation of moral principles (§ 138 Sec. 1 German Civil Code (BGB)) if it is in a noticeable imbalance to the return of the tenant's use, and in the case of further circumstances violating moral principles, such as a "reprehensible attitude" of the person objectively benefitting from the contract or an exploitation of the inexperience of the contracting partner (comp. in principle Federal Court of Justice (BGH), judgement of April 28, 1999 – XII ZR 150/97).

According to the Higher Regional Court (OLG) Düsseldorf the underlying case was lacking the second prerequisite of the violation of morale principles, i.e. the reprehensible attitude of the beneficiary. From an obvious imbalance between the agreed rent and the one customary to the market one cannot possibly infer a reprehensible attitude of the person benefitting, according to the senate. Instead in case of a dispute judges have to find out whether the economically and intellectually superior person has consciously exploited, to his/her own advantage, the weaker position of his/her contracting partner. The fact that the landlord granted discounts to other tenants in the shopping centre and that he arranged lower leases with tenants moving in later, does not satisfy such type of exploitation.

No contract adjustment due to a development of the business basis – sphere of risk of the tenant

As a matter of fact, the tenant is not entitled to an adjustment of contract due to frustration of contract, because the rent owed according to the lease has developed beyond the customary rent. The Higher Regional Court (OLG) Düsseldorf decisively relies on the respective risk spheres assumed in the rental law for commercial space. The risk that the rent agreed in the lease develops away from the rent customary to the market is one assumed by the party accepting the contractual provisions concerning the rent.

Practical Considerations

In order to avoid the risk of a (considerable) departure of the rent from the contractually owed rent and the one that is customary to the market during a long period of contract, the parties can agree upon a so – called market rent clause in the lease. When arranging such a clause in the lease the two parties have to review the rent after a specific period of contract (for example, after termination of the fixed period of lease or using the option of a renewal of

contract) and then, if necessary, to negotiate again the rent based on the market rents valid at that point in time.

Dr. Rainer Burbulla

F. Public Law

I. Agglomeration of retail businesses with a sales area of 3,360 m2 in total regarded as shopping centre as defined in § 11 Sec. 3 German Land Use Ordinance (BauNVO)

In a current decision (judgement of November 3, 2011 – 1 A 10270/11) the Higher Administrative Court (OVG) Koblenz had to rule whether extending an agglomeration of several small-scale retail businesses in Nievern is admissible according to planning law. The local industrial park "Maaracker" already has a grocery supermarket of approx. 800 m2 of sales area, a "Dänisches Bettenlager" (shop for mattresses, duvet covers, cushions and bed linen) with a sales area of 451 m2, a drug store and further retail businesses.

Contesting the additional permit for a specialty store by the neighbouring municipality

The owner has now applied for an additional building permit for constructing a textile store and a shoe store. The neighbouring city Bad Ems took legal action against the building permit – with success. Pursuant to the Administrative Court (VG) Koblenz (judgement of September 23, 2010 – 7 K 220/10.KO) the city of Bad Ems was able to successfully contest the permit because, amongst others, their right of intermunicipal alignment had been infringed. Since in the present case, with the two further retail businesses, the successive creation of a shopping centre in the sense of § 11 Sec. 3 German Land Use Ordinance (BauNVO) had been finally approved, which could only have been permitted in a special area and in agreement with the neigbouring municipalities.

The term shopping centre – no minimum size as to the sales area

The ruling has now been confirmed by the Higher Administrative Court (OVG) Koblenz: pursuant to the rulings of the Federal Administrative Court (BVerwG) a shopping centre is deemed to be one, if a spatial concentration of retail businesses of various types and sizes is in place, which is either uniformly planned or which presents itself as having "grown". This corresponds to categorizing the project in Nievern as a shopping centre: the retail businesses were uniformly planned, financed and successively implemented by the owner of the premises in the area under discussion. The businesses are located on an island-like common site that can only be accessed via a uniform access road; they were built by being connected to each other without observance given to distances or are to be built and, furthermore, they are arranged around a car park. From the point of view of customers, such a complex is in fact perceived as interlinked and is thus considered a shopping centre. Finally, this is not contrasted by the relatively small overall size of 3,360 m2 of sales area. As a matter of a fact, a minimum size of sales area has not been legally defined for a shopping centre. A size should be required that considerably exceeds that of large-scale retail businesses pursuant to § 11 Sec 3 Sent. 1 No. 2 German Land Use Ordinance (BauNVO) (800 m2of sales area, assumption of considerable long-distance effects with 1,200 m2 of floor area and more). This requirement has been sufficiently met by the project in Nievern with a sales area of 3,360 m2.

Practical Considerations: possible successive developments towards a shopping centre

As revealed in the ruling, in individual cases even relatively small agglomerations of retail businesses can be categorized as shopping centres according to planning law. The Higher Administrative Court (OVG) Koblenz has, furthermore, underlined once again that a shopping centre might as well be developed successively and that an agglomeration of businesses inde-

pendent of each other might also grow together into one. The so-called policy of small steps (in German so-called "Salami Taktik") intended by the principal did not work out in Nievern.

Isabel Gundlach

II. Emergency petitions against furniture stores in Gütersloh remain unsuccessful

Following the analysis of experts no unacceptable consequences for neighbouring cities with respect to urban development

In its rulings of October 28, 2011 the Higher Administrative Court (OVG) Münster rejected the eagerly requested interlocutory legal protection of Bielefeld and Rheda-Wiedenbrück against the building permit granted by the city of Gütersloh for the construction of two furniture stores (2 B 1037/11, 2 B 1049/11). Even the petitions of the two neighbouring cities to temporarily suspend the respective underlying development plan remained unsuccessful (2 B 1078/11. NE, 2 B 1172/11.NE).

It was about the settlement of two furniture stores with a maximum sales area of 29,500 m2 or 4,000 m2 respectively on a former derelict industrial site in Gütersloh that is close to the inner city. The Higher Administrative Court (OVG) Münster stated that neither the building permits for the furniture stores nor the underlying development plan are objectionable. The development plan reveals a planning concept based on comprehensible reasons regarding urban development. Unacceptable consequences concerning urban development at the expense of the neighbouring cities cannot be seen, as shown in the currently available investigation of the retail trade that is free from methodical errors. Therefore, the neighbouring municipalities have to accept the implementation of the plan by building the two furniture stores.

Practical considerations: methodically convincing forecast by the expert concerning redistribution of turnover

In the context that was decided the expert's forecast redistribution of turnover, which the Higher Administrative Court (OVG) Münster considered worked out in a methodically convincing manner, was not as high as to constitute a violation of the neighbouring municipalities. It is evident that a professionally and methodically faultless preparation of basic groundwork is the key to a successful settlement of retail businesses.

Isabel Gundlach

G. Procedural Law

I. Maintaining the jurisdiction at the special place of performance even in case of a subsequent change of residence – No commitment to orders of referral in the event of procedural errors

General and special places of jurisdiction

The Code of Civil Procedure (ZPO) specifies so-called General Places of Jurisdiction, Special Places of Jurisdiction and Exclusive Places of Jurisdiction. The place of jurisdiction at the place of performance counts, amongst others, as a Special Place of Jurisdiction. In case of a dispute arising from a contractual relationship about its existence, and pursuant to § 29 Sec. 1 Code of Civil Procedure (ZPO), the place at which the obligation in dispute has to be fulfilled is also that of the competent court.

Regulation of competence by the OLG: priority of the special place of jurisdiction of the place of performance

In a recently published resolution (21.10.2011 – 31 Sa 72/11) the Higher Regional Court (OLG) Hamm had to deal with the following question: the plaintiff made claims for damages against a broker – the defendant. As a matter of fact, the defendant moved to the jurisdiction of the Magistrates' Court Andernach. The Magistrates' Court Essen, therefore, no longer accepted jurisdiction and referred the legal dispute to the Magistrates' Court Andernach. The Magistrates'

Court Andernach in turn also declined jurisdiction and asked the Higher Regional Court (OLG) Hamm for determination of competence pursuant to § 36 Sec. 1 No. 6, Sec 2 Code of Civil Procedure (ZPO).

According to the understanding of the Higher Regional Court (OLG) Hamm the Magistrates' Court Essen had to be determined as competent court. The subject matter of the dispute was compensation claims of the plaintiff resulting from a purported violation of duties arising from the brokerage contract by the defendant. Place of performance, according to the plaintiff, for violated duties of information, notification and control of the broker is, as a rule, pursuant to § 269 Sec. 1, 2 German Civil Code (BGB) his place of residence and business at the time when the contractual obligation came into existence. Since at the time of concluding the contract Essen was the place of the defendant and also the place of performance of the violated primary obligation to perform, a jurisdiction of the Magistrates' Court Essen results from this in the understanding of the Higher Regional Court (OLG) Hamm, and the same applies to the compensation claim asserted pursuant to § 29 Code of Civil Procedure (ZPO). The fact that the defendant moved to the jurisdiction of the Magistrates' Court Andernach after completion of contract, did not change anything about the competence of the Magistrates' Court Essen.

Practical Considerations

In order to avoid an endless referral to various courts, § 281 Sec. 2 Sent. 4 Code of Civil Procedure (ZPO) requires that the order by which the initially seised court declares itself incompetent and refers to the next court be binding for the court of referral. In principle the Magistrates' Court Andernach was not entitled to refer the legal dispute back to the Higher Regional Court (OLG) Hamm.

Effectiveness of orders of referral

As a matter of fact, the order of referral to the Magistrates' Court Essen had by way of exception no binding force. For the order, as stated by the Higher Regional Court (OLG) Hamm, was based on a violation of the right to be heard.

The Magistrates' Court Andernach has correctly noticed that the Magistrates' Court Essen had granted the defendant – by means of an order of July 6, 2011, which was delivered to the defendant on July 14, 2011 – a period of ten 10 days for submitting a statement; irrespective of this the court had, however, not waited for the statement, but enacted the order of referral already on July 15, 2011.

According to the Higher Regional Court (OLG) Hamm this was a reason for refusing the binding force of the order of referral.

Ralf-Thomas Wittmann

II. Absence from the hearing date – sanctions against a managing director of a private limited company (GmbH)

Pursuant to § 278 Sec. 1 Code of Civil Procedure (ZPO) the court should in a case of civil action be intent, in every situation of the legal proceedings, on an amicable settlement of the dispute or of individual aspects of it. In accordance with § 139 Sec. 1 Sent. 1 Civil Code of Procedure (ZPO) the court has to discus within the context of the oral proceedings the circumstances and the dispute, where required, with the parties involved with respect to their actual and legal perspective, and also to pose questions.

Court order summoning the personal appearance of a managing director of a private limited company (GmbH)

Against this background it regularly happens in court practice that the court orders the personal appearance of the parties for the first oral hearing (or even for further proceedings). If one of the parties is a private limited company (GmbH), the court regularly summons the managing director as its legal representative.

A court order summoning the personal appearance has to be taken very seriously. This exactly happened in a ruling of the Regional Court (LG) Dresden. The court at first instance ordered a fine in the amount of 240.00 € against an absent managing director. The managing director filed an appeal against this.

Ordering a fine against the private limited company (GmbH) – not against the managing director

The appeal was successful but probably not with the legal consequence she desired. The Higher Regional Court (OLG) indeed confirmed the legitimacy of the fine. However, the Higher Regional Court (OLG) took the view that the court order to participate in the proceedings is addressed to the legal entity and not to the managing director personally. The fine should not have been imposed on the managing director personally but only on the private limited company (GmbH) (Higher Regional Court (OLG) Dresden, order of November 2, 2011 – 5 W 1069/11).

Practical Considerations: Necessity to order a qualified representative for the court date

It is not unusual that the managing director – due to time constraints – is not available or is not able to contribute information concerning the facts. In this case it is advisable to either ask the acknowledging court to desist from the order of personal appearance or to send a so-called representative for that date to the oral proceedings who is also equipped with a respective power of attorney. This person, however, needs to be able to explain the facts and must be authorized to submit the necessary explanations and, especially, to reach a final settlement, § 141 Sec 3 Code of Civil Procedure (ZPO).

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Events

May 09 2012	Crenet Spring Conference 2012, in 28217 Bremen, H. Siedentopf (GmbH & Co. KG), Lloydstraße 4-6 Legal General Conditions in Revitalizing Industrial Facilities Speaker Dr. Johannes Grooterhorst, Lawyer Partner, Grooterhorst & Partner Lawyers
June 14 2012	IREBS Immobilienakademie GmbH, in Eltville, Kloster Eberbach Intensive Study Retail Real Estate Basics Rental Law for Retail Real Estate Speaker Dr. Rainer Burbulla, Lawyer Partner, Grooterhorst & Partner Lawyers
June 29 2012	ZfIR Zeitschrift für Immobilienrecht, Jahrestagung in Frankfurt Current Developments in Law in Commercial Landlord and Tenant Law Speaker Dr. Rainer Burbulla, Lawyer Partner, Grooterhorst & Partner Lawyers

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