HANDELSBLATT (26.06.2015): GERMANY´S BEST LAWYERS 2015

NEWSLETTER 03/2015

Dear readers,

Our law firm is proud about the fact that we are able to report on our achievement concerning the public and publishing recognition of its work: In the assessment of the Handelsblatt (June 26, 2015) our law firm received the following award:

Germany's Best Lawyers
2015
Dr. Johannes Grooterhorst
Grooterhorst & Partner

This third Newsletter has once again put its focus on the law governing the real estate industry: In court rulings the written form requirement of the German Civil Code (BGB) is increasingly under scrutiny.
Private and public law, company, insurance and labour law form further topics.

In gratitude for decades of offering us your staunch support, I wish you some stimulating reading.

Yours
Dr. Johannes Grooterhorst

Dr. Rainer Burbulla
Partner

A. Current News

Written form of the rental agreement – Developments in 2015 – Emphasis on the validity of existing contracts?

Commercial rental agreements concluded for more than one year require the written form (§ 550 German Civil Code (BGB)). In the event that the written form has not been observed, the rental agreement involves a substantial risk. It will then be considered as concluded for an indefinite period (§ 542 Sec. 1 German Civil Code (BGB)) and can be (prematurely) terminated within the statutory period of notice (§ 580 a Sec. 2 German Civil Code (BGB)). In practice, the written form often serves as "lifeline" which is preferably opted for by somebody who intends to withdraw from the contract earlier than agreed. For that reason, questions concerning the written form have been dealt with by court rulings for years. In 2015, the Federal Supreme Court (BGH) has already discussed questions regarding the written form in four cases. In addition, court rulings of higher courts exist as well. This is why one is getting increasingly the impression that in recent times courts have wanted rental agreements "to be kept" rather than making them terminable. Recent developments (of court rulings) constitute the content of this contribution.

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Denomination of the contracting parties

Scope of the written form requirement

The written form requirement of § 550 Sent. 1 German Civil Code (BGB) principally applies to all agreements which form the rental agreement by virtue of the will of the parties in fact. In fact, the written form has only been observed if the material terms and conditions of the contract can be clearly identified: the contracting parties, the rental object, the rent and the period of the contract. Any amendments to the contract subsequently agreed are also subject to the written form requirement if they are of a material nature.

Insignificance of accidentally made incorrect denomination

The Federal Supreme Court (BGH) has already clarified in its ruling of January 29, 2015 (IX ZR 279/13, Newsletter 2/2015, p. 9), that in the event of an accidentally incorrect denomination of a contracting party in the rental agreement it is not the incorrectly stated that applied but the real intention of all parties concluding the contract was decisive. In case of a written rental agreement specifying both owners of a property as landlords, a contract consequently came into being with a partnership under civil law formed by the owners and acting as landlord if that corresponded to the intention to conclude the contract of all parties authorized to represent, both on the side of the tenants and of the landlord. In that case, the written form requirement of § 550 Sent. 1 German Civil Code (BGB) was observed. The interpretation of the real intention, therefore, had priority over an (accidentally) incorrect denomination in the rental agreement.

In its rulings of March 17, 2015 (VIII ZR 298/14) and of April 22, 2015 (XII ZR 55/14) the Federal Supreme Court (BGH) has respectively dealt with the question when a sufficient denomination of the contracting parties had come into being. In practice, particular attention had to be regularly paid to the respective representation in case that multiple persons and companies are involved.

Community of joint heirs

Sufficient determinability of the landlord

The ruling of March 17, 2015 (VIII ZR 298/14) has been about the denomination of a landlord consisting of a community of joint heirs. The Federal Supreme Court (BGH) has been of the opinion that it was sufficient to observe the written form if the (co-) heirs offering rental space could be “determined” from the contractual document. In the case underlying the ruling the “community of joint heirs of M.M.” was specified as landlord in the rental agreement. A (new) landlord acquired the rental object and was put down as new owner in the land register. He declared the rental agreement terminated and invoked among other things a violation of the written form, because the members of the community of joints heirs had not been listed in writing. The Federal Supreme Court (BGH) took a different view. Actually, the testator as the former owner of the property had been mentioned by name (M.M.) in the rental agreement. The members of the community of joint heirs following her could, therefore, be identified without any problems on the basis of the rental agreement and the land register. Any further information was not been necessary to identify the members of the community of joint heirs of the testator M.M. and, thus, the landlords. Consequently the Federal Supreme Court (BGH) has focused on the denomination “community of joint heirs of M.M.” used in the rental agreement and on the fact that a purchaser of the property mainly protected by the written form requirement of § 550 German Civil Code (BGB) could determine the individual heirs by inspecting the land register.

As far as legal practice is concerned, this ruling of the Federal Supreme Court (BGH), in fact, implies that in case of renting out property by or to a community of heirs, it is not advisable to use cachphrase-like denominations such as, for example "community of joint heirs XY", but that it is instead necessary (in cases of doubt) to use the entire names of all co-heirs in the rental agreement.

Public limited company (AG)

REFERENCE TO THE REPRESENTATION BY AN EXECUTIVE BODY

Its further ruling concerning the written form with respect to the denomination of the contracting parties dating back to April 22, 2015 (XII ZR 55/14) has dealt with the representation of a public limited company (AG) (this Newsletter, p. 10). In that case the recitals of the rental agreement concluded with a public limited company (AG) did not include any (specific) information about the company's regulation of representation. In that respect, the Federal Supreme Court (BGH) has delivered the opinion that the written form of the rental agreement had been observed if only one member of the board of management signed the contract without a separate statement concerning representation.
Background to this ruling of the Federal Supreme Court (BGH) was the ruling whereby upon conclusion of a rental agreement with a public limited company (AG) all members of the management board had to sign the rental agreement in order to observe the written form or one signature had to include the information, that the signing member of the management board also intended to represent the (other) members of the management board who did not sign it personally. According to the Federal Supreme Court (BGH), however, this ruling did not apply if the recitals of the rental agreement only specified that the public limited company (AG) was represented by the "board of management". In this case, the priniciple of the completeness of the document would not be affected. Actually the management board of a public limited company (AG) could consist of one or of several persons (§ 76 Sec. 2 Stock Corporation Act (AktG)). Even if the management board consisted of several persons, the articles of association of a public limited company (AG) could determine that individual board members are entitled to solely represent the company (§ 78 Sec. 3 Stock Corporation Act (AktG)).

In practice, this ruling of the Federal Supreme Court (BGH) (again) leads to the question how detailed the powers of representation have to be in the recitals of a rental agreement. If there is no information provided as to the powers of representation in the recitals of the rental agreement or if reference is only made to the fact that that the company is represented by "the management board" or by the "managing director", this variant offers a safe option with respect to written form aspects. If, for example, not all persons with the authorization of representation provide their signature, the contact then observes the written form. It is, however, of a problematic nature whether the contract is also effective if there is an (absent) power of representation. For that reason it is – still - recommendable to specify powers of representation in as much detail as possible. In the event of a due diligence at the latest both the written form as well as the effective representation can then be "ticked off".

Clauses remedying written form deficiencies

EFFECTIVENESS OF THE CLAUSE REMEDYING WRITTEN FORM DEFICIENCIES TOWARDS A PURCHASER

In the previous year the Federal Supreme Court (BGH) ruled that a so-called clause remedying written form deficiencies did not impede a (new) landlord who had entered into the rental agreement subsequent to a sale of the property (§ 566 German Civil Code (BGB)) to terminate the rental agreement by invoking a violation of the written form (Federal Supreme Court (BGH), ruling of April 30, 2014 – XII ZR 146/12, News-letter 3/2014, p. 10 ff). In that ruling the Federal Supreme Court (BGH) left a number of individual questions unanswered

such as, for example, whether a clause remedying written form deficiencies towards a purchaser or in the relationship between the original contracting parties respectively was effective. The OLG Frankfurt has only recently dealt with this question in its ruling of February 17, 2015 (2 U 144/14). The OLG Frankfurt was of the opinion that a clause remedying written form deficiencies in a commercial rental agreement was also effective if a purchaser of the property was not prevented by that clause from an orderly termination due to the non-compliance with the statutory written form. A violation of the General Terms and Conditions did not apply, because clauses remedying written form deficiencies have been frequently used in business these days. Against this ruling of the OLG Frankfurt an appeal is being made at the Federal Supreme Court (BGH) (XII ZR 34/15). For that reason the Federal Supreme Court (BGH) will (once again) comment on clauses remedying written form deficiencies in the foreseeable future.

Written form and supplements

Remedying and damaging consequences of supplemental agreements

In the abovementioned ruling of the Federal Supreme Court (BGH) of April 22, 2015 (XII ZR 55/14) the Federal Supreme Court (BGH) has also dealt with the question relating to the compliance with the written form of supplements. If the rental agreements revealed a written form deficiency, it could be remedied by means of a supplement compliant with the written form. Conversely, a violation of the written form in a supplemental agreement resulted in the fact that also the (original) rental agreement was "infected" with a written form deficiency. For that reason supplemental agreements also had to observe the written form. It was, therefore, necessary that the supplemental agreement denominated the parties to the rental agreement, made sufficiently clear reference to the original rental agreement and all potentially existing supplemental agreements, listed the amended regulations and indicated that for the remaining part the provisions of the original rental agreement continued to exist in its form. Last but not least, the supplemental agreement had to include complete reference to all agreements. However, what often happens in practice is that the parties do not provide a consecutive numbering of supplements, but (apart from supplements), for example, conclude "additional or ancillary agreements" to the rental agreement. Then "such complete reference" can easily be lacking. As far as its ruling was concerned, the Federal Supreme Court (BGH) was "generous". The senate concluded from the designation "second supplement", that there had to be a first supplement – to which reference had not been made. Here too, it became clear that the Federal Supreme Court (BGH) – by way of interpretation – intended to "keep" the rental agreement. However, one should be warned against generalisations. As a matter of fact, the Federal Supreme Court (BGH) stated further arguments (in the case ruled: the regulations concerning renewal options) to support its point of view.

The Federal Supreme Court (BGH) has declared in its ruling for the avoidance of doubt that a subsequent amendment of or supplement to the rental agreement (supplement) did not require the written form if the supplement did not include any independent regulations, i.e. if it was not "material". In practice difficulties of differentiation often occur in connection with material and immaterial amendments and supplements of contract. In this context quite a number of case groups have evolved thereof. Nonetheless, in case of doubt parties should pick the safest option and conclude a supplement to the rental agreement.

Compliance with the written form requirement in case of an oral or implied confirmation of the subject matter of the contract

Importance of a contractual document in case of oral or implied rental agreements

The tendency to treat written form violations rather restrictively has also been revealed in the ruling of the Federal Supreme Court (BGH) of June 17, 2015 (XII ZR 98/13). In that ruling the Federal Supreme Court (BGH) has been of the opinion that the written form as set forth in § 550 Sent.

1 German Civil Code (BGB) has also been observed if the conclusion of contract did not correspond to the (written form) requirements of § 126 Sec. 2 German Civil Code (BGB), but if a rental agreement document signed by both parties existed which entirely included – as far as the content is concerned – the terms and conditions of a rental agreement which was orally or impliedly concluded at a later stage.

Practical considerations

The already very comprehensive rulings of 2015 concerning questions relating to the written form indicate that the rulings apply stricter requirements to the non-compliance of the written form of a rental agreement und will (probably) do so in future, too. For that reason tougher requirements will, therefore, have to be set to written form terminations. The situation will become rather exciting if the Federal Supreme Court (BGH) will now again pass a ruling on the clause remedying written form deficiencies. In this case, too, the mentioned tendency could offer a hint.

Dr. Rainer Burbulla

B. Commercial and Company Law

Dr. Moritz Ulrich
Rechtsanwalt

I. 1. Liability of the managing director in spite of not being compe-tent for that area of responsibility – Trust, but verify!

The managing director of a private limited company (GmbH) was also held liable for the orderly payment of social insurance contributions if the duty to pay the contributions was assigned to a co-managing director or to other members of staff, according to the OLG Düsseldorf, ruling of September 16, 2014 – I 21 U 38/14.

Failure of social security payment – internal competence

The plaintiff, a health insurance, sued a former managing director of private limited company (GmbH), that had since become insolvent, for damages regarding employee contributions to the social insurance which it had been deprived of. The defendant managing director who was competent for the areas sales, development and production assumed that his co-managing director had paid the social insurance contributions to the health insurance, which the latter confirmed upon request. There was an internal distribution of competencies that allocated to the co-managing director, apart from the commercial operations, also this task.

Competence of a managing di-rector

The OLG ruled that the managing director was competent for the orderly payment of the social insurance contributions by virtue of his position and his statutory full competence even if the task had been passed on internally and even if the managing director was only authorized to act jointly and had not been able to effect any payments on his own. Every managing director had to attend to his supervisory duty and had to intervene if grounds existed that the delegated tasks had not been fulfilled by a co-managing director adopting them or by a member of staff who had been commissioned with them. This would apply in particular in the case of a private limited company (GmbH) in crisis. It would be insufficient if a managing director relied on the assurance of his co-managing director or on that of the commissioned member of staff. The managing director ought to have checked whether the co-managing director had actually paid the contributions.

Practical considerations

The ruling illustrates that managing directors can be quickly held personally liable in situations of crisis. For that reason, the liability risk of the managing director has to be reduced. However, the legal possibilities are, in fact, limited so that the implementation of an effective control

regime (key word: compliance) and the topic of D&O insurance shift into focus. As a rule, a reduction of liability can only succeed if some compe-tent consultation with respect to company law is sought.

Dr. Moritz Ulrich

II. Stock Corporation Law – Competence of the supervisory board in connection with remunerations of the board of management – Payment effected by a third company

In its ruling of April 28, 2015 (II ZR 63/14) the Federal Supreme Court (BGH) has ruled that the supervisory board of a public limited company (AG) was also competent regarding the remuneration of the board of management if the board member did not directly receive the remuneration from the public limited company (AG) but on the basis of a consulting contract of an intermediate private limited company (GmbH).

Member of the management board indirectly paid by a third company

The defendant was managing director of a private limited company (GmbH) which provided consulting services for the subsequent applicant public limited company (AG). For that purpose, a consulting contract had been concluded between the public limited company (AG) and the private limited company (GmbH). After some time the defendant should also have been appointed management board member of the public limited company (AG). No direct remuneration should have been paid to him by the public limited company (AG), but his remuneration should have been exclusively continued by the private limited company (GmbH) on the basis of the consulting contract.

Signature of contract without supervisory board approval

As a result, the public limited company (AG) commissioned a law firm to review the issue of competence relating to the conclusion of the consulting contract. The law firm communicated the fact that the management board would be responsible. Subsequently the consulting contract was signed. The defendant did not take part for the public limited company (AG) but two other board members; the defendant abstained. The private limited company (GmbH) was represented by the defendant.

Shortly after that, the defendant was recalled as member of the management board of the public limited company (AG). Subsequently, the public limited company (AG) was sued by the private limited company (GmbH) to pay the consulting fees agreed. The public limited company (AG), in turn, brought an action against the defendant to seek declaration that the defendant was obliged to compensate any damage resulting from the conclusion of this consulting contract.

Referral

The action was successful before the Landesgericht (LG) and the Oberlandesgericht (OLG). The Federal Supreme Court (BGH) granted the appeal of the defendant and referred the legal matter back to the Ober-landesgericht (OLG).

Objective breach of duty of the management board member by signing without approval of the supervisory board

The Federal Supreme Court (BGH) explained that the defendant had objectively acted in breach of his duty because he had not taken any active steps against the action of his two board colleagues when concluding the consulting contract. The conclusion of management board remunerations was solely encumbent upon the supervisory board pursuant to § 112 Stock Corporation Act (AktG). The sole competence of the supervisory board also existed if

the remuneration regulations were not directly made with the board member but in the form of a consulting contract concluded with an intermediate private limited company (GmbH). It was only decisive for the competence of the supervisory board whether a payment was directly or indirectly considered as management board remuneration.

Jörg Looman
Rechtsanwalt

A management board member could not only act in breach of his/her own duty if he/she committed a breach of duty him-/herself; in fact, a board member also undertook to ensure that also his/her board colleagues complied with the competence regulations within the public limited company (AG) and that they did not exceed their competencies. By abstaining from voting in his function as board member of the public limited company (AG) the defendant did not take sufficient action against the breaches of duty of his board colleague.

No culpability

In order to claim some compensation for damage, not only the breach of duty was a prerequisite but also that the board member acted in a culpable manner, i.e. with intent or negligently. According to court rulings, culpability principally applied if an objective breach of duty existed. Insufficient skills and knowledge not meeting the expected standard of a board member or of a managing director did not, in fact, represent an excuse. In the present case it had, however, to be taken into consideration that the public limited company (AG) had sought legal advice and that the legal consultancy had furnished the information that the management board was competent for concluding the consulting contract.

Effects of comprehensive external consultancy

According to court rulings, some external consultancy could only result in culpability being dropped if the public limited company (AG) or the management board sought consultancy from an independent professional qualified for the respective issue and by comprehensively presenting the legal circumstances of the company and by disclosing the necessary documents and if the legal advice provided was subjected to a diligent plausibility check.

Prerequisites of the necessary plausibility checks

The Federal Supreme Court (BGH) has stated that the plausibility check did not refer to the rendered legal advice as such, but that the board member only had to review whether the consultant had obtained all necessary information according to the content of the advice, whether he processed that information comprehensively, whether he answered in a non-contradictory way all burning questions a legal layman may have, concerning the issue, and whether further questions inevitably turned up due to the nature of the advice provided.

The Oberlandesgericht (OLG) itself stretched the requirements concerning the plausibility check too much so that the Federal Supreme Court (BGH) referred the legal matter back to the Oberlandesgericht (OLG); the OLG could now review the question of culpability in the light of the ruling now made.

Practical considerations

The aforementioned ruling of the Federal Supreme Court (BGH) clarifies that the supervisory board is also competent for questions concerning the management board if a board member only indirectly receives some board remuneration. This also appears to be appropriate because otherwise there would be substantial conflicts of interest within the management board. Furthermore, the management board should not trust an external legal advice without reviewing it, but has to review it carefully regarding plausibility.

Jörg Looman

C. Real Estate Law

I. Private Building Law – Compensation for terminating a building contract – risk premium (venture) no "saved" cost

In its ruling of July 23, 2015 (5 U 53/14) the OLG Düsseldorf has decided that in the event of an "independent" termination of a building contract given by the principal and the claim of the contractor a compensation for construction work not rendered, the contractor did not have to offset a risk premium (venture) generally calculated by him as saved.

Building contract pursuant to the German Standard Building Contract Terms/B (VOB/B) – Form sheet 221 Manual of Contract Awarding for Construction Work of the Federal Government 2008 (VHB Bund 2008)

Subsequent to a public tender the parties concluded a building contract for a hall for vehicles. The building contract was based on the regula-tions of the German Standard Building Contract Terms of 2006 (VOB/B 2006). In the form sheet 221 Manual of Contract Awarding for Construction Work of the Federal Government version of 2008 (VHB Bund 2008) risk and profit are as such uniformly specified in the amount of 5%. After an expert had determined the existence of considerable damage at the existing building, the principal terminated the building contract seven months subsequent to its conclusion yet prior to the contractor being able to render any building works. The contractor claimed from the principal his compensation for work by presenting saved expenses on the basis of the original calculation and by considering payments made. The contractor did not have to offset a venture as saved expenses.

Venture premium no cost but a profit component

The OLG Düsseldorf has ruled that a potential risk premium was not saved. Actually it would not be a case of costs in the sense of construction works. In fact, the risk had to be attributed to the profit because it represented the reward for the general entrepreneurial risk. Even if this would be considered as a special risk of a specific building contract, it had to be taken into account that this risk now particularly materialized with the termination of the principal and which was already revealed by the increased costs for the difficult billing and enforcement of the claim for remuneration. For that reason the additional effort related to this came into being as risk and was not saved.

Practical considerations: Not finally ruled

The OLG Düsseldorf has decided contrary to the ruling of the Federal Supreme Court (BGH) (comp. ruling of October 10, 1997 – VII ZR 222/96) and has shared the contradictory position expressed in rulings and the literature. The ruling of the OLG Düsseldorf has not yet become legally effective. It remains to be seen whether the Federal Supreme Court (BGH) has the opportunity to revise its ruling or to stick to it.

Dr. Rainer Burbulla

II. Private Building Law – On the deficiency of composite thermal insulation systems

Claim of a condominium association for an advance payment towards the remedy of defects

Composite thermal insulation systems (WDVS) are increasingly dealt with by court rulings. It has been only recently that the OLG Stuttgart (ruling of March 31, 2015 – 10 U 46/14) has addressed the following issue: The applicant condominium association invoked a claim for an advance payment towards the remedy of defects and as compensation. The defendant developer had built a property. A kindergarten was on the ground floor of the facility. There were six condominiums on the upper floors. Subsequent to acceptance various types of damage to plaster became apparent, for example, in the plinth area, under the sills as well as on the upper edge of the façade.

Independent taking of evidence

Prior to the legal dispute the condominium association conducted an independent taking of evidence. The expert involved had establised that it had not been possible to determine a general building approval for the composite thermal insulation system used by the developer and that it had also not been possible to determine an approval for an individual case. Consequently the condominium association sued for the payment of an advance payment in order to remedy the defects at the composite thermal insulation system established in the independent taking of evidence and it made an application for ordering the defendant to reimburse the plaintiff any further costs and damage which would be incurred by the plaintiff to remedy existing damage.

Evidence of usability pursuant to the State Building Regulations (LBO) of Baden-Wuerttemberg

The OLG has granted the action. It was particularly decisive that according to the State Building Regulations (LBO) of Baden-Wuerttemberg in the version applicable since September 1995, building products for the construction of structural works were only allowed to be used if the evidence of usability is proved by means of norms or – in case of non-regulated building products – by a general building approval, a general building authority test certificate or by means of an approval for that individual case. The defendant developer was not able to provide that evidence.

Tacitly agreed condition of complying with the statutory regula-tions

Furthermore, the OLG has declared that the entrepreneur usually promised upon conclusion of contract in an implied way to comply with the applicable laws and with the generally established engineering practice. If the works provided did not correspond to that, a defect of the work regularly applied. In this case a work would already be considered defective if the materials did not have an evidence of usability pursuant to the generally established engineering practice (comp. Federal Supreme Court (BGH), ruling of March 7, 2013 – VII ZR 134/12). It did not matter – the OLG continued to explain – for the question whether the rules had been violated, whether the properties might have been achieved in another manner and that for that reason the non-compliance with the rules would not have any further disadvantageous consequences in the individual case. This did not change the fact that the tacitly agreed condition of complying with the statutory regulations and with the generally establisehd rules was not fulfilled. The mere fact that building products had been used for constructing the composite thermal insulation system for which a general building approval could not be determined, turned the work of the defendant into a defective one.

Practical considerations

This ruling is also of interest if seen against a further background:

The General Terms and Conditions of the developer contract provided the following clause: “The communal property will be accepted on behalf of the apartment owners by a sworn expert.”

The OLG Stuttgart deemed this a violation of § 9 Sec. 1 German Act concerning General Terms and Conditions (AGBG) old version (today: § 307 Sec. 1 German Civil Code (BGB)), thus leading to an ineffectiveness of the clause. Actually, it did not allow the individual purchaser to leave open the possibility to accept the joint property him-/herself or be accepted by a person of trust of his/her own choice. In fact, the individual purchaser irrevocably undertook to commission an expert with the acceptance and to renounce his legal right as set forth in § 640 Sec. German Civil Code (BGB) to carry out the test of acceptability him-/herself and to declare the acceptance him-/herself.

Ralf-Thomas Wittmann
Partner

Violation of § 307 German Civil Code (BGB)

A further clause violated § 307 German Civil Code (BGB), too, and was thus null and void: It was determined that "the expert had to be appointed by resolution on the occasion of the first apartment owner meeting and that he/she carried out the acceptance in lieu of the individual appartment owners for which he/she is already authorized by the purchaser today." Actually this clause deprived the purchaser of his/her right to decide on the acceptability of the work him-/herself. Furthermore, this clause also violated the transparency requirement, because it did not become obvious to the individual purchaser that the power of attorney would be of a revocable nature and that he/she could declare acceptance him-/herself at any time.

Ralf-Thomas Wittmann

D. Commercial Landlord and Tenant Law

I. Conclusion of contract – Written form regulated in § 550 German Civil Code (BGB) – Requirements relating to representation in the recitals of the rental agreement

In its ruling of April 22, 2015 (XII ZR 55/14) the Federal Supreme Court (BGB) has commented on the issue in how far representation regulations had to be represented in the rental agreement in order to comply with the written form requirement of § 550 German Civil Code (BGB).

Public limited company (AG) as tenant

The tenant was a public limited company (AG). The recitals of the rental agreement did not specify any information relating to the representation of the public limited company (AG). In the recitals of a later supplement to this rental agreement it was stated that the public limited company (AG) was represented by two board members mentioned by name. But in fact, the rental agreement had been signed by one of the mentioned board members as well as by a third board member, which, however, made it clear that he/she acted "in representation" of the second board member.

After some time the land-lady terminated the rental agreement referring to an alleged violation of the written form. The action for eviction of the land-lady this termination was based on remained unsuccessful in all instances.

Valid naming of an executive body vs naming the members of the executive body

The Federal Supreme Court (BGH) has explained in its ruling that it sufficed for the written form of § 550 German Civil Code (BGB) if the recitals generally specified that the public limited company (AG) was represented by its management board (the same applied to other legal entities such as, for example, private limited companies (GmbHs)). It was, however, also legitimate to mention the members of the board by name. In that case, in fact, it would be necessary that all board members mentioned in the recitals signed the rental agreement or that one of the mentioned board members was explicitly represented by a person with a power of representation.

Conformity of recitals and signa-ture line

If, however, the number of board members mentioned in the recitals and the number of actually signing board members differed or the names differed, it would not be obvious for the other party of the rental agreement whether the rental agreement had already been bindingly concluded or whether the rental agreement was still subject to the approval of the non-signing board member. In this case a violation of the written form pursuant to § 550 German Civil Code (BGB) applied.

Since the rental agreement underlying the legal dispute as well as the associated supplements complied with the written form requirement, the termination was unjustified.

Practical considerations

The Federal Supreme Court (BGH) has ruled on a frequently occurring question relating to regulations of representation. When setting up the rental agreement parties, therefore, have to pay particular attention to the recitals and the signature line being identical. If no person has been expressly named in the recitals, the respective other party is strongly advised to check by means of doing research in the commercial register whether the contractual partner is duly represented by the representatives provided for.

Jörg Looman

II. Warranty subsequent to termination of contract – No reduction of the compensation for use by defects occurring for the first time subsequent to the continuation of use and termination of contract

The Federal Supreme Court (BGH) has decided in its ruling of May 27, 2015 (XII ZR 66/13) that a deterioration of the rental object coming into being for the first time subsequent to the termination of contract did not result in reducing the claim of the landlord for paying the compensationfor use by respectively applying the warranty rights.

Continuation of use in spite of an eviction order and reduction of usability and damage to goods due to damage caused by water in the continuation period

The legal dispute was based on the following facts: The plaintiff rented out a shop to the defendant. The plaintiff duly terminated this tenancy and obtained a legally binding eviction order against the defendant. At first the defendant did not move out of the shop and continued to pay a monthly amount that was identical to the rent agreed for the following 8 months. After that he stopped paying and moved out of the rental object 4 months subsequent to stopping the payments. Now the plaintiff as-serted a compensation for use amounting to the (full) contractually agreed rent for the months between cessation of payment and the evic-tion. The defendant sought the rejection of the action, because in the period following the eviction order 5 types of damage caused by water – resulting from some blocked roof drainage – occurred in the shop that considerably reduced the usability of the rental object in the period being the subject matter of the legal dispute. Furthermore, goods of a substan-tial value had been destroyed by the damage caused by water.

Minimum compensation pursuant to § 546a German Civil Code (BGB) independent of any considerations

Just like the previous instances, the Federal Supreme Court (BGH) has ruled, too, that the landlord was entitled to compensation for use corresponding to the value of the amount claimed with respect to the original rent. Pursuant to § 546a Sec. 1 German Civil Code (BGB) the landlord who was deprived of the rental object subsequent to the termination of the rental agreement could claim that amount as minimum compensation that had to be paid as agreed rent upon the termination of the tenancy. This provision regulated a contractual claim of its own nature that did not depend on any consideration. Subsequent to the termination of the tenancy the landlord did not owe any transfer for use or had to maintain the rental object in a condition as stipulated in the contract. For that reason there was principally no room for a reduction of the compensation for use by applying the relevant warranty right as set forth in the rental agreement because of defects that only occurred after the termination of the contract.

Potential exception as in equity and good faith (§ 242 German Civil Code (BGB))

An exception to this principle (and thus a practical possibility of reduction subsequent to the termination of contract) could result from the in equity and good faith principle (§ 242 German Civil Code (BGB)). This, however, would essentially only be the case if some imminent and serious danger posed to the life, health and high property values of the tenant impended by omitting measures of maintenance and repair. In case of the latter it would be additionally required that circumstances occurred letting the non-return of the rental object by the tenant appear in a "somewhat softer light". As examples for such circumstances the Feder-al Supreme Court (BGH) mentioned the statutory regulations on the exemption from judicial execution and cases in which the tenant – reasonably - assumed its ineffectiveness during the dispute about the effectiveness of the termination.

Practical considerations

The ruling only applies to defects appearing for the first time subsequent to the termination of contract. If the rent has already been reduced for reasons of defects at the time of terminating the contract, the compensation for use is – according to the ruling – calculated on the basis of the (reduced) rent owed at that point in time.

Even in case of defects that occur for the first time subsequent to the termination of contract, it should be examined and weighed up whether an exception applies and whether the landlord wants to perform maintenance measures after all in order to retain his claim to the full.

Leonie Munz
Rechtsanwältin

Leonie Munz

III. Compensation of the damage caused by the non-fulfilment of contractual obligations when violating the duty of information of the landlord in the context of a statutory right of first refusal

Pursuant to the ruling of the Federal Supreme Court (BGH) of January 21, 2015 (VIII ZR 51/14) the landlord who contrary to his duties had not informed the tenant entitled to the right of first refusal about the existence of a right of first refusal and about the conclusion and the content of a purchase agreement with a third party was obliged to compensate the damage caused by the non-fulfilment of contractual obligations, if the tenant had only been informed about these facts subsequent to the completion of the purchase contract with the third party. This also applied if the tenant no longer practiced his right of first refusal after becoming aware of the facts.

Collision between sale and the statutory right of first refusal of the tenant

In the case underlying the ruling the plaintiff was tenant of an apartment in an apartment building. As far as the apartments in the building were concerned, residential ownership was established. The defendant land-lady had sold all condominiums to a third party without the tenant being informed about her right of first refusal or about the sale. In consequence the third party had been entered in the land register as the new owner. The new owner had offered the tenant the apartment for sale – at a purchase price that was about € 80.000.00 above the price de-manded by the former land-lady.

Duty of information of the landla-dy/vendor

If rented-out residential space for which residential ownership was established subsequent to transferring it to the tenant was sold to a third party (first buyer), the tenant was entitled to a statutory, non-modifiable right of first refusal. In order for the tenant to have the chance to make use of this right of first refusal, the landlord was obliged to inform him/her about the existence of the right of first refusal and about the completion as well as the content of the initial purchase agreement.

Exercising the right of first refusal could lead to the fact that in addition to the purchase agreement between the vendor and first buyer a second purchase agreement came into being. Since the vendor/landlord could only fulfil one of the two contracts he would have become liable for damages towards one contracting party – either the first buyer or the tenant.

Double conclusion of contract

In the present case the tenant had never exercised his right of first refusal because – due to a lack of orderly information by the landlord – he only became aware of the existence of the prerequisites when the first buyer had already been entered as the new owner and the landlord would have no longer been in a position to transfer the ownership of the apartment to him. In contrast to the previous instances, the Federal Supreme Court (BGh) confirmed the claim for damages of the tenant as if the latter had exercised his right of first refusal. In that respect the frustration of exercising the right of first refusal due to a lack of orderly information was identical to the non-performance of the second rental agreement subsequent to exercising the right of first refusal. The landlord owed compensation for the damage caused by the non-fulfilment of contractual obligations – among other things the difference between the purchase price and the fair market value (minus the purchase costs saved)

Practical considerations

In the event of a statutory or (in case of commercial space) a contractual right of first refusal there is always a substantial risk for the vendor regarding damages claims due to the possibility that two identical purchase agreements come into being at the same time and have to be fulfilled. However this risk can be countered by carefully drafting the purchase agreement – for instance by agreeing a term and condition or a right of first refusal.

Leonie Munz

IV. Fulfilling the obligation of the tenant to return the rental object in spite of leaving behind bulky waste

In its ruling of April 13, 2015 (8 U 212/14) the KG Berlin has decided that the obligation of the tenant to return the rental object when terminating the rental agreement also comprised the removal of objects brought into the rental object apart from procuring possession of the rented space. Leaving behind bulky waste in the cellars, however, did not oppose the fulfilment of the obligation to return the rental object.

Dispute over furniture

There was a commercial rental agreement between the parties relating to a restaurant. The land-lady terminated the contract without notice for reasons of defaulting in payment. Then return took place. On the occasion of the return appointment the parties produced a record of acceptance/transfer and the tenant returned the keys for the rental object. The land-lady claimed that the tenant had left behind pieces of furniture in the rental space and did not clear the cellar either, since the latter was cluttered with bulky waste. The tenant objected to this. She claimed that the furniture (left behind) had belonged to the original equipment of the rental space, since a restaurant had also been operated in that space before.

Scope of the obligation to return (Rooms and objects brought in)

The KG has deemed the return of the rental areas by the tenant orderly. The obligation of the tenant to return the rental space comprised apart from the procurement of possession of the rooms in favour of the land-lady (also by returning all keys) also the clearance of the rental object from all objects brought in. The condition of the rental object was basically insignificant upon return. A partial clearance only applied if the rental space was still accessorized with objects

which were obviously still in the possession of the tenant. This would be the case if the tenant left behind a considerable amount of objects belonging to him/her. Leaving behind some junk did not oppose the acceptance of a return. In that respect it was immaterial that there had still been bulky waste in the cellar. For that reason partial clearance did not apply, but rather (only) a poor fulfilment of the obligation to clear.

Practical considerations

After terminating the tenancy the tenant undertakes to principally return the rental object in the condition in which it was upon transfer. For that reason, the tenant has also to remove or deconstruct fittings, conversions or superstructures – unless otherwise agreed in the rental agreement. The obligation to deconstruct also applies if the tenant has taken over the fittings from the previous tenant.

Dr. Rainer Burbulla

E. Public Law

I. Planning Law – Federal Land Utilization Ordinance (BauNVO) – Invalid fixing of noise emission quotas relating to a building area

In its ruling of March 9, 2015 (4 BN 26.14) the Federal Administrative Court (BVerG) has once again dealt with the invalidity of noise emission quotas relating to a building area in a legally binding land-use plan. The court has stated that noise emission quotas could only be fixed in relation to facilities and companies, but not, however, in relation to building areas.

Noise emission quotas for two building areas

Eva Appelmann
Rechtsanwältin

The applicant objected to a legally binding land-use plan that fixed a noise emission quota for two commercial areas respectively: In the commercial areas CA 1 and CA 2 companies and facilities were permitted of which the noise did not exceed emission quotas of 59 db during the day and 44 db during the night, and 55 db during the day and 40 db during the night respectively. Reviewing the compliance was to take place according to DIN 45961. The fixed noise emission quotas were to ensure that the commercial area to be developed did not generate any relevant noise contribution to the environment. In both commercial areas several facilities and companies could domicile. The OVG Münster (ruling of June 12, 2014 – 7 D 98/12. NE) has declared the legally binding land-use plan invalid. Fixing noise emission quotas relating to a building area would be contrary to law, thus resulting in the ineffectiveness of the entire legally binding land-use plan. The OVG Münster has not permitted the appeal. The defendant filed a complaint against the non-approval of the appeal at the Federal Administrative Court (BVerwG).

No total level for several companies and facilities

The Federal Administrative Court (BVerwG) has stated that noise emission quotas could only be fixed pursuant to § 1 Sec. 1 Sent. 1 No. 2 Federal Land Utilization Ordinance (BauNVO) if the noise emission quotas bindingly regulated the emission behaviour of each individual company and of each individual facility in the area concerned. A total level for several companies and facilities would be inadmissible, because with a total level no type of use, especially no specific emission behaviour as “property” of facilities and companies within the meaning of § 1 Sec. 4 Sent. 1 No. 2 Federal Land Utilization Ordinance (Bau NVO) would be fixed. Since no internal structure within the building areas CA 1 and CA 2 took place concerning the noise emission quotas, the fixing of noise emission quotas was not covered by § 1 Sec. 4 Sent. 1 No. 2 Federal Land Utilization Ordinance (BauNVO).

The ruling illustrates that each and every fixing has to be carefully reviewed when setting up a legally binding land-use plan. In fact, already the ineffectiveness of individual fixings can result in the ineffectiveness of the entire legally binding land-use plan. Declaring the ineffectiveness of a legally binding land-use plan can lead to considerable delays, especially in case of large building projects, thus generating substantial costs.

Practical considerations

Eva Appelmann

II. Planning Law – Ineffectiveness of a legally binding land-use plan because of a legal ex ante commitment of the municipal council

§ 1 Sec. 3 Sent. 1 German Build-ing Code (BauGB)

The OVG Lüneburg has ruled a case (April 22, 2015 – 1 KN 126/13) in which the planning municipality made binding ex ante approvals in real estate deals for commercial and building plots in a specific location. Initial situation: The municipalities had to set up urban land-use plans as soon and – only – as far required for the development and regulation concerning urban planning. This stipulation very clearly arose from the German Building Code (§ 1 Sec. 3 Sent. 1 German Building Code (BauGB)). The law further clarified that there was no entitlement to setting up urban land-use plans and statutes concerning urban development and that such an entitlement could not be established as per con-tract (§ 1 Sec. 3 Sent. 2 German Building Code (BauGB)). Urban land-use plans, therfore, had to be measured according to whether they were also necessary for the development and regulation concerning urban planning within the meaning of this statutory stipulation.

Isabel Strecker
Rechtsanwältin

Unlawful weighing up in case of a prior contractual binding of the municipality

For that reason the OVG Lüneburg has once again made it expressly clear that a legally binding land-use plan became ineffective due a a mistake made in the weighing up process if the planning municipality in the preliminary phase to the statute resolution concerning the legally binding land-use plan – contrary to the regulation in § 1 Sec. 3 Sent. 2 German Building Code (BauGB) - entered into contractual agreements for adopting specific arrangements in the legally binding land-use plan and if the council was (also) guided by these obligations on the occasion of taking the decision.

Decision of the municipality in a free and unbiased manner

As explained by the OVG Lüneburg, an orderly weighing up can only be achieved without mistakes if the council as the competent body of the municipality decided in a free and unbiased manner which development and regulation relating to urban planning should be materialized in the area of the municipality. For that reason the municipality would not be allowed to establish claims for the introduction and implementation of an urban land-use planning procedure with which the bodies of the municipality to be involved in the course of the procedure would be bound by their decision. The decision-makers had to be free in stopping their work on the draft version of the legally binding land-use plan if they considered that as appropriate for factual or, at least, justifiable reasons. In light of the foregoing, the municipality should not be obliged to do more than to “rule on the introduction and continuation of an urban land-use planning procedure according to their ideas about urban planning”, according to the OVG Lüneburg.

In this case the obligation of the municipality exceeded what was permissible in advance. A notarial contract that had been concluded prior to the resolution included an obligation of the municipality to transfer building plots to be designated individually. The areas, at least in parts,

Purchase agreements concerning building plots still to be created in the legally binding land-use plan

were outer areas so that the obligation taken on could only be fulfilled in setting up a legally binding land-use plan and respectively defining it as building area. To satisfy the deciding senate, the planning municipality, therefore, had entered into contractual commitments to adopt specific arrangements in a legally binding land-use plan in the run-up to the resolution and the council had thus made its decision on the basis of these obligations when passing a resolution concerning the legally binding land-use plan. Actually it was established to the satisfaction of the court that the administration of the municipality had, in fact, concluded these unlawful contracts, however, with the knowledge and approval of the council. As a matter of fact, the purchase and sale of plots of land had been decided by the council of the planning community, which resulted in the fact that the municipal bodies were aware – in accordance with weighing up – of the objectives and development potentials which the real estate deals involved. For the court this led to the consequence that the council of the planning municipality was informed about the commitments made and that it agreed to them. The ex ante commitment concerning the weighing up of the legally binding land-use plan by means of the property contracts resulted in the conviction of the court, not least due to the scheduling of the planning: As a matter of fact, at the beginning no plan specifications had been provided for in the present outer area; it was only after the completion of the property contracts that the draft version of the plan had been amended in such a manner that even in the present outer area were building areas provided. The OVG Lüneburg concluded from this that the definition of building areas did not appear necessary concerning urban planning in the proper meaning of the word, but had rather been taken into consideration due to the property contracts entered into.

Practial consideration

There is no entitlement to set up urban land-use plans – often to the disappointment of the investors interested in settling in the area. It is not possible to get round that stipulation; therefore, it is not feasible to reach more than an obligation of the planning municipality to the effect that it decides on the introduction and continuation of a legally binding land-use plan procedure according to its ideas concerning urban planning if the effectiveness of the legally binding land-use plan is not intended to be questioned.

Isabel Strecker

III. Planning Law – Federal Land Utilization Ordinance (BauNVO) – "Fraudulent labelling" when defining a core area

In its ruling of January 29, 2015 (1 C 10442/14.OVG) the OVG Rhineland-Palatinate has dealt with the question whether the designation of a core area is permissible if only one large-scale retail trade business should settle while virtually ruling out any other use typical of core areas.

Legally binding land-use plan in the core area pursuant to § 7 Sec. 1 Federal Land Utilization Ordinance (BauNVO) specially tailored to the needs of one specific investor

The subject matter was about the effectiveness of a legally binding land-use plan defining a core area within the meaning of § 7 Sec. 1 Federal Land Utilization Ordinance (BauNVO) in which only one large-scale commercial business was meant to be permitted. The specifications of the legally binding land-use plan were, in fact, tailored to the needs of one specific investor and actually did not allow any further core area typical use.

The OVG Rhineland-Palatinate has ruled that the justification regarding urban planning within the meaning of § 1 Sec. 3 Sent. 1 German Building Code (BauGB) was missing in such a legally binding land-use plan. According to that, urban land-use plans would have to be set up as soon as and in so far as necessary for the development and regulation concerning urban planning.

Lacking justification pursuant to § 1 Sec. 3 Sent 1 German Building Code (BauGB) – necessity for development

Therefore, the necessity could only be affirmed if the specification concerned was appropriate according to the planning conception of the municipality, i.e. if with that objective it pursued legitimate interests re-garding urban planning.

According to the OVG Rhineland-Palatinate that necessitiy concerning urban planning was missing in the present case, since a core area as set forth in § 7 Federal Land Utilization Ordinance (BauNVO) primarily served the purpose to accommodate commercial establishments as well as to establish industry and culture. A special feature of the core area was actually to accommodate specific commercial businesses as well as public and private institutions for which another building area would not be appropriate.

Term "core area"

For specifying a core area it was, therefore, necessary that the planner wanted the legally intended co-existence of various forms of use or, at least, had to anticipate as definite that such a mixing would take place in the building area in question.

Principle of the mixing of use

If such a mixing, however, was actually not wanted or if that mixing was practically not achievable due to the specification of the legally binding land-use plan, the specification of the core area represented some "fraudulent labelling" which was not justified regarding urban planning within the meaning of § 1 Sec. 3 German Building Code (BauGB).

Dr. Steffen Schleiden
Rechtsanwalt

The OVG, therefore, has ruled to declare the legally binding land-use-plan invalid.

As far as the practice is concerned, this ruling is of particular importance since the prerequisites for specifying a core area within the meaning of § 3 Federal Land Utilization Ordinance (BauNVO) has been clarified. After all, it is actually not possible to specify a core area in which only one single large-scale retail trade business could be permitted.

Practical considerations

In the individual case it has, therefore, to be reviewed very precisely when setting up a legally binding land-use plan and also on the occasion of the subsequent investment planning on the basis of the existing legally binding land-use plan whether the specification of a core area in which only one large-scale retail trade business could be permitted is legally valid.

Dr. Steffen Schleiden

IV. Planning Law – Art. 12 EU Seveso II Directive (now Seveso III Directive) – Inadmissibility of a garden centre in the immediate vicinity of an incident-prone facility

Courts have concentrated on the planned construction of a garden centre in the immediate vicinity of an incident-prone facility in Darmstadt for almost ten years. Now the VGH Kassel has made a landmark ruling (ruling of March 3, 2015 – 4 A 654/13). The VGH Kassel has stated that the settling of a garden centre in the immediate vicinity of an incident-prone facility

Issue of deterioration prohibition by building projects

was inadmissible. Since the new settlement of the project fell below the appropriate distance for the very first time, the deterioration prohibition applied: The protection of the customers of the garden centre as well as the interests of the incident-prone facility outweighed the interests of the project developer concerning the settlement of the garden centre.

Garden center up to 10.000 m² usable area in the unplanned inner area, application of Art. 12 Seveso II Directive

Originally there was a preliminary building permit which specified the permissibility under planning law of a garden center with a sales area of about 10.000 m² in the unplanned inner area. The operator of the neigh-bouring incident-prone facility objected to this preliminary building permit. According to the opinion of the operator of the incident-prone facility an appropriate distance had to be observed when newly settling a gar-den centre representing a protection-worthy use within the meaning of Art. 12 Seveso II Directive.

First legal move VGH and Federal Administrative Court (BVerwG)/ European Court of Justice (EuGH): distance test also in the context of individual approvals

The VG Darmstadt and the VGH Kassel rejected the action since the compliance with the appropriate distance would not have to be reviewed in the context of an individual approval. Subsequently the Federal Ad-ministrative Court (BVerwG) has submitted the question to the European Court of Justice (EuGH) as to whether the compliance with appropriate distances pursuant to Art. 12 Seveso II Directive would also have to be reviewed in case of individual approvals. The European Court of Justice (EuGH) has ruled that the compliance with appropriate distances would also have to be reviewed in case of individual approvals. As a result of that, the Federal Administrative Court (BVerwG) has reversed the ruling of the VGH Kassel and determined that the directive-compliant interpretation of the requirement of consideration under planning law required the taking into account of Art. 12 Seveso II Directive.

Second legal move VGH

Distance allowance: requirement consideration versus distance requirement

In its ruling of March 3, 2015 the VGH Kassel has now ruled that the settlement of a garden center in the immediate vicinity of an incident-prone facility violated the requirement of consideration, thus making it inadmissible. At first the court reviewed whether the planned garden centre was within the appropriate distance. After the court had affirmed that question by means of an expert opinion the court reviewed whether the project could still be approved in spite of falling below the distance. Falling below the incident-specifically determined appropriate distance would be permissible as an exception, if in the individual case sufficiently important, non incident-specific concerns – especially those of a social, ecological and economic nature – were in dispute for the approval of the project. If the appropriate distance were undercut by a project for the very first time, the distance requirement would have to be regularly understood as a deterioration prohibition and the project would become inadmissible on that ground alone. The court left it open whether the project was already invalid on the ground that planned project moved closer to the incident-prone facility than other buildings equally located within the appropriate distance. The court stated that the power of assessment of the court would in any case not be in favour of the project. The court opposed the interest of the project developer in implementing his project to the protective interest of the clientele of the public building. The protection of the project users outweighed the interest of the project developer in building a garden centre on his plot of land. Actually he also had the possibility to continue with the operation of his current recycling company. Accordingly, not each and every use of the plot of land of the project developer would be ruled out. Finally the court determined that the unlawful preliminary building permit violated the operator of the incident-prone facility in his rights. The distance requirement as set forth in Art. 12 Seveso II Directive also served - apart from protecting the public visiting the project - the interest of the operator of an incident-prone facility in preserving his business and his interest in its operational development.

The rulings have an immediate effect on the legal admissibility of individual projects. If Art. 12 Seveso II Directive (since June 1, 2015 Art. 13 Seveso III Directive) is applicable and if the individual project requesting approval is located in the unplanned inner area or if the applicable legally binding land-use plan did not observe the principles of the Seveso II Directive, Art. 13 Seveso III Directive had to be reviewed also when approving individual projects. The applicability of the regulation is to be considered if the issue is one about the settlement or change of an incident-prone facility or if it is about some protection-worthy use to be described in detail within the meaning of the Seveso III Directive. Protection-worthy utilizations are, apart from residential areas, especially publicly used buildings, i.e. buildings open to the public. The issue of incidents can, therefore, play a considerable role when settling retail trade businesses in the vicinity of an incident-prone facility.

Practical considerations

Dr. Johannes Grooterhorst

F. Insurance Law

I. Pecuniary damage liability insurance – Sample General Conditions of Insurance (Muster AVB) – On the scope of exclusion of insurance coverage in case of a deliberate breach of duty

In its ruling of May 27, 2015 (IV 322/14) the Federal Supreme Court (BGH) has dealt with the scope of exclusion of insurance coverage in case of a deliberate breach of duty. As far as the content was concerned, it was about an exclusion of insurance coverage of the pecuniary damage liability insurance. § 4 No. 5 of the Sample General Conditions of Insurance (Muster AVB) (General Conditions of Insurance concerning the liability insurance for pecuniary loss) specified that insurance coverage did not refer to liability claims which resulted from causing damage by means of deliberately departing from the law, regulation, instruction or condition of the authorising power (entitled person) or by means of any other conscious breach of duty.

The previous instance was of the opinion that the exclusion of insurance coverage only applied if the insurance holder committed all breaches of duty consciously.

The Federal Supreme Court (BGH) has rejected this legal opinion. Decisive was the interpretation of § 4 No. 4 General Conditions of Insurance (Muster AVB) from the perspective of an average insurance holder. From his/her point of view exclusion of insurance coverage would also be ruled out if apart from the consciously committed breaches of duty other non-consciously committed breaches of duty contributed to caus-ing the damage.

Exclusion of insurance coverage pursuant to § 4 No. 5 Sample General Conditions of Insurance (Muster AVB)

Even if clauses regulating the exclusion of insurance benefits had to be narrowly interpreted in general, the average insurance holder realized that the exclusion of insurance benefits did not intend to privilege those insurance holders who caused a damage by several, in parts conscious and in parts unconscious breaches of duty. Otherwise the insurance holder could exonerate himself and could receive insurance coverage by referring to the fact that – apart from the conscious breach of duty – he had additionally and unconsciously been in breach of further duties and thus having also contributed to causing the damage. To put him because of such an increased degree of carelessness in a better position than that of an insurance holder who had only committed a conscious breach of duty would be – according to the Federal Supreme Court (BGH) – obviously absurd.

Interpretation from the perspective of an average insurance holder

Practical considerations

A ruling of the OLG Frankfurt am Main of March 20, 2014 – 3 U 233/12, DStR 2014, 1894 – has gone in a similar direction. According to that ruling, the awareness of several consecutive breaches of duty of an auditor could not be artificially "split up". If the basic breach of duty (in that case: omission of duly setting up a special account as well as the review of dispositions of the managing partner of the investment company of this account which were potentially contrary to the contract) had been of a conscious nature, any following breaches of duty referring to that basic breach of duty (in that case: omitting to inform potentially further investors about the possibility that financial means of the investment company had already been used in an inappropriate manner) could not be considered separately. In fact, they represent merely further elements of the basic conscious breach of duty and, therefore, also exclude the duty of the insurance company to provide insurance benefits.

Ralf-Thomas Wittmann

II. Insurance Contract Law – Annuity contract – Policy model – No further explanations concerning the term of the text form

Contract according to policy model § 5a Insurance Contract Act (VVG) old version

The effectiveness of instructions concerning an opposition especially in case of life insurances is regularly subject matter of court rulings. In a recently published ruling (ruling of June 10, 2015 – IV ZR 105/13) the Federal Supreme Court (BGH) has dealt with the following subject matter: On December 1, 2004 the applicant insurance holder concluded an annuity contract according to the so-called policy model of § 5a Insurance Contract Act (VVG) old version. The insurance contract was supplemented by the insurance policies, the terms and conditions of insurance, consumer information pursuant to § 10 a Insurance Supervision Act (VAG) as well as a written instruction concerning the right of opposi-tion in a typographically clear form according to § 5a Sec. 2 Sent. 1 In-surance Contract Act (VVG) old version.

Termination and payment of the surrender value

The plaintiff, i.e. the insurance holder consequently paid premiums amounting to a total of € 5.380,00. In a letter of May 2008 he, in fact, terminated the contracts. The defendant insurer then paid out the surrender value. In letters of September and November 2008 the insurer additionally declared his opposition pursuant to § 5a Insurance Contract Act (VVG) old version.

By arguing that the insurance contracts did not validly come into being because he had not been duly informed about his right to opposition, the insurance holder demanded the repayment of all contributions made to the contracts plus interest minus already paid surrender values, i.e. a total of € 4.315,22. The insurance holder was of the opinion the term of text form in the instructions concerning an opposition required further explanation. For that reason the payment of the premiums had been made without any legal ground; he would have a claim based on unjust enrichment amounting to the said claim against the insurer.

No need for explaining the term "text form" – ability of the average insurance holder to comprehend this

The Federal Supreme Court (BGH) objected to these statements of the insurance holder. Without having to know the statutory explanation of the term "text form" in § 126 b German Civil Code (BGB) the insurance holder may deduct from this term without any problems that he had to convey his opposition in a finally readable form to the insurance company and that he had to be identified as the originator. He could also understand without any statutory explanations that he had to record his statements in characters and in a manner suitable for permanent reproduction so that a statement only orally made would be insufficient. In doing so, the information included in the instruction served the purpose that in order to meet the deadline it would be sufficient to send the opposition in time.

The sentence in brackets "in writing or in another readable manner" was also not of the kind to keep the insurance holder from lodging an opposition. An average insurance holder whose ability to comprehend this had to be focused on would correctly understand the bracketed sentence in such a manner that it sufficed if the statement could be made readable in text form. However, in doing so the applicant insurance holder did not observe the objection period of two weeks thus initiated.

Furthermore, the insurance holder invoked that the insurance contracts concluded on the basis of the policy model were subject to doubts of effectiveness because of a violation of § 5 a Insurance Contract Act (VVG) old version against the law of the European Union. For that reason the Federal Supreme Court (BGH) would have to submit the legal issue to the European Court of Justice (EuGH) for reasons of a socalled preliminary ruling.

No submission to the European Court of Justice (EuGH) due to a violation of § 5a Insurance Contract Act (VVG) against EU law: breach of good faith subsequent to many years of performing the contract

The Federal Supreme Court (BGH) rejected this request of the plaintiff, too. Even if it was assumed that the policy model violated European law the insurance holder would be refused in good faith because of a contradictory exercise of a right to invoke an alleged ineffectiveness of a contract which had been performed for years, thus deriving claims of enrichment. The breach of trust, according to the Federal Supreme Court (BGH), was based on the fact that the insurance holder -subsequent to an orderly information about the possibility not to let the contract come into being without any disadvantages - executed it for years by regularly paying the premiums and only then demanded from the insurance company, which assumed trust in the continued existence of the contract, to repay all premiums by invoking the alleged ineffectiveness of the contract. The presentation of insurance holders with respect to the breach of trust had already been confirmed by the Federal Constitutional Court (BVerfG) (ruling of February 2, 2015 – 2 BvR 2437/14).

Ralf-Thomas Wittmann

G. Labour Law

I. Employment Contract Law – Employment Protection Law – Ineffective termination in a small business due to age discrimination

In its ruling of July 23, 2015 (6 AZR 457/14) the Federal Labour Court (BAG) has ruled that even in small businesses termination could be ineffective if it violated the prohibition of age discrimination.

The plaintiff born in 1950 worked in the doctor's surgery of the defendant as a doctor's assistant. 4 employees worked in the doctor's surgery. In 2013, the defendant terminated her employment because of some changes in the laboratory area and added as an extra that the plaintiff "had become entitled to a pension" in the meantime. The action against protection against dismissal of the plaintiff has been successful before the Federal Labour Court (BAG).

Termination of employment for operational reasons plus addition "entitled to pension in the meantime"

Pursuant to § 23 Protection against Dismissal Act (KSchG) this act could only be applied, if more than 10 employees worked for the business. The Federal Labour Court (BAG) has explained that the discrimination prohibition of § 7 Sec. 1 General Equal Treatment Act (AGG), in fact, also had to be considered outside the area of application of the Protection against Dismissal Act (KSchG). According to § 6 General Equal Treatment Act (AGG) employees were not to be discriminated against because of the reasons specified in § 1General Equal Treatment Act (AGG) (race, ethnic origin, gender, religion, or philosophy of life, disability,

Relationship of § 23 Protection against Dismissal Act (KSchG) to § 7 Sec. 1 General Equal Treatment Act (AGG) (prohibition of

DISCRIMINATION) MITIGATION OF THE BURDEN OF PROOF FOR THE PLAINTIFF PURSUANT TO § 22 GENERAL EQUAL TREATMENT ACT (AGG) – PRESUMPTION RULE

age or sexual identity). Pursuant to § 7 Sec. 2 General Equal Treatment Act (AGG) agreements violating this discrimination prohibition were invalid. The Federal Labour Court (BAG) has, therefore, stated in its ruling that the termination was ineffective, because the plaintiff had only been given notice for reasons of age. The employer justified her statement concerning the entitlement to a pension in that respect that the termination was intended to be formulated in a friendly and binding manner. The courts did not follow that opinion so that the plaintiff was able to also invoke the mitigation of the burden of proof of § 22 General Equal Treatment Act (AGG); according to that, if in a case of dispute one party produced evidence that discrimination might be assumed because of one of the reasons in § 1 General Equal Treatment Act (AGG), the other party bore the burden of proof that no violation of those provisions had applied.

PRACTICAL CONSIDERATIONS

The aforementioned ruling of the Federal Labour Court (BAG) illustrates that an employer is not free in his/her decisions outside the applicability of the Protection against Dismissal Act (KSchG) when deciding on the declaration of terminations, but that it always required a factual reason. When declaring a termination the employer has to pay particular attention to and to comply with the statutory requirements of the General Equal Treatment Act (AGG), so that it is certainly not advisable to make careless statements or remarks. Otherwise, there is the considerable legal risk that such termination will be declared legally invalid.

JÖRG LOOMAN

I. CURRENT NEWS – EVENTS – PUBLICATIONS

EVENTS

26. 08. 2015
Trade Dialogue North Rhine-Westphalia
in Mönchengladbach, Borussia-Park, Hennes-Weisweiler-Allee 1
“Full of plans or without plans: Federal (development) planning in North Rhine-Westphalia”
Speaker: Rechtsanwalt Dr. Johannes Grooterhorst, Partner
Grooterhorst & Partner Rechtsanwälte mbB

22. 09. 2015
Mobile Dialogue Reuse – new life in old fields
in Düsseldorf, Bleichstraße 8 - 10
Catella Projekt Management GmbH
„Amendment of use – legally binding land-use plan and/or building permit?“
Speaker: Rechtsanwalt Dr. Johannes Grooterhorst, Partner
Grooterhorst & Partner Rechtsanwälte mbB

20. 10. & 21. 10. 2015
7th German Specialist Store Real Estate Congress 2015
in Essen, Atlantic Congress Hotel, Norbertstraße 2 a, 45131 Essen
“From North to South, from East to West – Federal state development plans and their effect on the development of locations and projects”
Speaker: Rechtsanwalt Dr. Johannes Grooterhorst, Partner
Grooterhorst & Partner Rechtsanwälte mbB

11. 11. 2015 Commercial Landlord and Tenant Law 2015 – Up-to-date and compact
in Düsseldorf, Königsallee 53-55
Speaker: Rechtsanwalt Dr. Rainer Burbulla, Partner
Grooterhorst & Partner Rechtsanwälte mbB

19. 11. 2015 Current Commercial Landlord and Tenant Law
in Düsseldorf, Fachbuchhandlung Sack, Klosterstraße 22
Speaker: Rechtsanwalt Dr. Rainer Burbulla, Partner
Grooterhorst & Partner Rechtsanwälte mbB

Publications:

Purchasing property does not break the rent
Commenting on §§ 566 to 567 b German Civil Code (BGB)
in: Ghassemi-Tabar/Guhling/Weitemeyer, Gewerberaummiete, 2015, C.H. Beck
Author: Rechtsanwalt Dr. Rainer Burbulla, Partner

Sales-based rent and online trade
Author: Dr. Rainer Burbulla
in: polis 02/2015, p. 54 – 55

"Limited" municipal rights of first refusal – Acquisition of partial areas and effects on the purchase agreement of a plot of land
Author: Dr. Rainer Burbulla
in: Haus und Grund Düsseldorf, Nr. 6/2015, p. 10

Forced eviction of the apartment – How landlords do it correctly
Author: Dr. Rainer Burbulla
in: Immobilien Zeitung 15/2015, p. 13

Tenants in commercial premises
Author: Dr. Rainer Burbulla
in Immobilien Zeitung 16/2015, S. 13

Wrong names turn into expensive mistakes
Author: Dr. Rainer Burbulla
in: Immobilien Zeitung 18/2015, S. 11

Legal proceedings based on documentary evidence in landlord and tenant law
Author: Dr. Rainer Burbulla
in: MietRB 2015, p. 149 - 156

Special edition "Commercial Law Firms" of the Rheinische Post March 20, 2015, page E 4

Comment on foundation law
Author: Dr. Johannes Grooterhorst
in: BGB Online-Kommentar – von Göler Kommentare

Planning law in the transaction
Shopping Centres and other huge commercial properties are still highly regarded
Author: Dr. Johannes Grooterhorst
in: German Council Magazin 01/2015, pp. 62 – 63

Legal obstacles when re-using quarters
Requirements for urban land-use planning in case of the co-existence of living and working
Author: Dr. Johannes Grooterhorst
in: Magazin polis 01/2015, to be published soon

Legal consequences of assigning the right to exemption against the insurance company in the context of the D&O insurance
Authors: Dr. Johannes Grooterhorst and Jörg Looman
in: NZG 6/2015, p. 215

The expensive sub-tenant
Author: Dr. Rainer Burbulla and Prof. Dr. Klaus Schreiber
in: JURA Juristische Ausbildung 2015, Volume 37, booklet 3, pp. 276 – 281

Interlocutory legal protection in Slovenia (Part I)
Co-author: Ralf-Thomas Wittmann
in: AnwaltZertifikatOnline, juris, Deutsche Anwalt Akademie, 4/2015

Interlocutory legal protection in Spain (Part I)
Co-author: Ralf-Thomas Wittmann
in: juris, Deutsche Anwalt Akademie, 4/2015

Interlocutory legal protection in Spain (Part II)
Co-author: Ralf-Thomas Wittmann
in: AnwaltZertifikatOnline, juris, Deutsche Anwalt Akademie, 2/2015

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