

German News Flash



GERMAN NEWS FLASH

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Corporate

LEGISLATIVE INITIATIVE AGAINST SO-CALLED “PROFESSIONAL PLAINTIFF SHAREHOLDERS”

The German Federal Government has started a legislative initiative aimed at so-called “professional plaintiff shareholders”.

The intention is to prevent that the shareholders’ right to file a lawsuit is abused by a small group of litigious shareholders. Under German law, a decision made during a general assembly is only valid once it has been registered in the commercial register. Such registrations are usually suspended, if a shareholder files a lawsuit, for example based on alleged faults in the decision making process. Important operations such as necessary capital increases can thus be blocked. Professional plaintiff shareholders use these legal possibilities and the companies’ fear of long-term proceedings to launch court battles in order to force the companies to pay them for dropping their action.

The goal of the new legislative initiative is to speed up legal proceedings, amongst others by reducing the stages of appeal. Instead of the Regional Court (*Landgericht*) the Higher Regional Court (*Oberlandesgericht*) is proposed to be the court of first instance in disputes according to stock corporation law. The underlying idea is to encourage the companies to await the issue of the legal proceedings in lieu of paying the plaintiffs for withdrawing the complaint.



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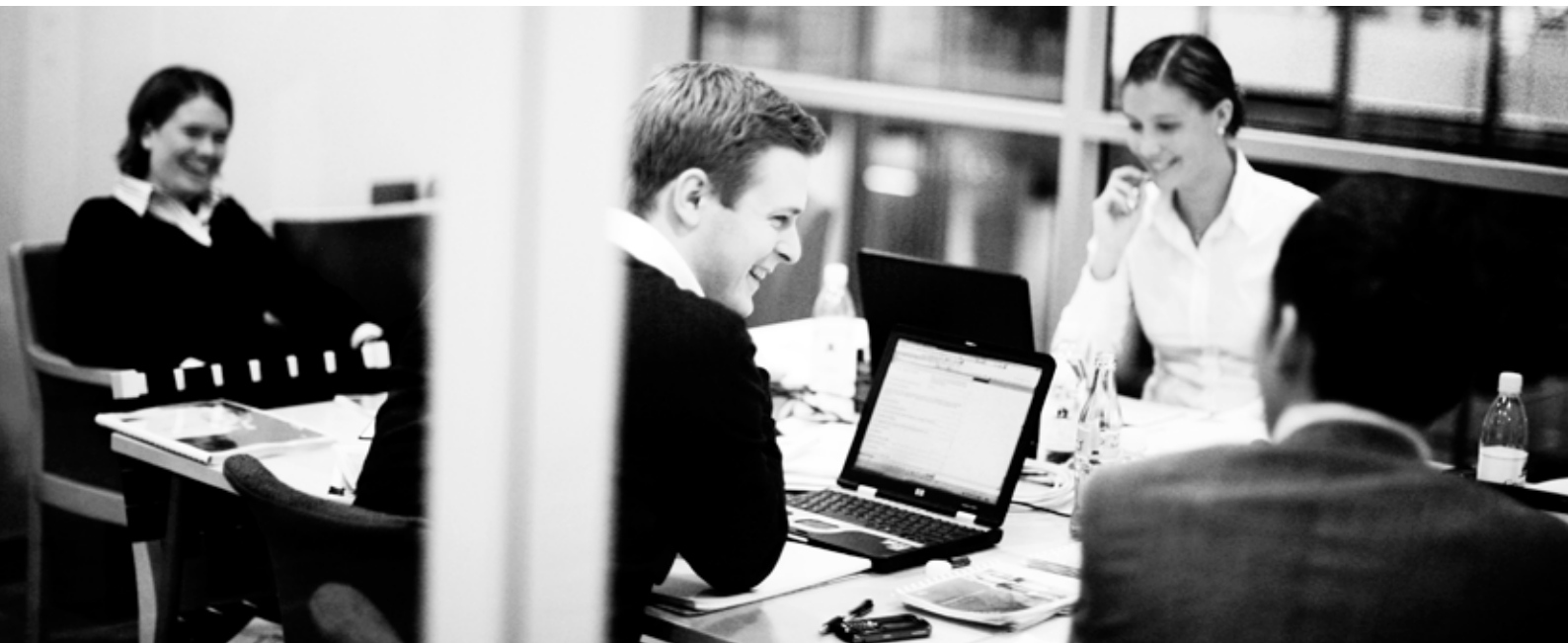
Real Estate

AWARDING OF PUBLIC CONSTRUCTION CONTRACTS – EUROPEAN COURT OF JUSTICE RENDERS SO-CALLED “TARIFF LOYALTY OBLIGATION” INVALID

In a recent judgment, the European Court of Justice has rendered invalid a provision in the state of Niedersachsen’s Act on the Awarding of Public Contracts, according to which the awarded party must undertake to pay tariff wages to its employees and must further obligate its subcontractors to in their turn pay tariff wages to their employees. According to the court, the provision in question is in violation of EC-directive 96/71 concerning the posting of workers in the framework of the provision of services (*Arbeitnehmerentsenderichtlinie*). Under the directive, employers are merely obliged to adhere to such collective bargaining agreements that have been declared generally applicable. Exceeding regulations, such as the obligation to pay tariff wages irrespective of whether or not such wages were regulated in a generally applicable agreement, constitute an inadmissible limitation of the freedom of services.

NEW JUDGMENT ON CREDIT INSTITUTIONS’ OBLIGATIONS TO INFORM REAL ESTATE INVESTORS

The Higher Regional Court Karlsruhe (*Oberlandesgericht Karlsruhe*) has ruled that a bank acting both as loan creditor and vendor in connection with a real estate project is obliged to provide investors with extensive risk disclosure regarding occupancy, profitability and the expected development of the object. A breach against this obligation can trigger damage claims of the investor. This applies even in cases where the bank has entrusted a distribution partner with the marketing of the project and it was this distribution partner who insufficiently informed investors.



Real Estate

CLAUSES FOR DECORATIVE REPAIRS SCRUTINIZED ONCE AGAIN BY THE GERMAN FEDERAL COURT OF JUSTICE

Decorative repairs (*Schönheitsreparaturen*) are certainly one of the most discussed topics in German landlord and tenant law.

In the past, the problem of drafting legally valid clauses, which oblige the tenant to conduct a final renovation at the end of the tenancy term, have led to provisions obliging the tenant to pay proportional compensation (*Quotenabgeltungsklauseln*) instead of conducting a full renovation when moving out. Such a clause obliges the tenant to bear proportionate costs at the end of the contract in case decorative repairs are not yet due based on the agreed upon time schedule. The amount of the proportionate costs the tenant has to bear is normally determined on the basis of the schedule and the time period that has passed since the last time decorative repairs were carried out or the rental agreement was concluded.

The Federal Court of Justice (*Bundesgerichtshof*) now held in a recent ruling that a clause in a residential rental agreement stating that commenced renovation intervals have to be compensated by the tenant on a pro rata basis is void because it is not transparent: The court considers this clause to be not sufficiently clear and comprehensible, because the tenant cannot determine the exact meaning of the term “commenced renovation interval” and how the relevant interval for the concrete calculation of the proportional compensation is to be determined. This question is closely linked to the previous rulings of the court regarding fixed time intervals for decorative repairs during the tenancy term.

Certainly, this will not be the last judgment of the Federal Court of Justice regarding decorative repairs and the issue will continue to be important for due diligence processes and also after transfer of acquired property.

Intellectual Property, Marketing & Media

NEW ACT ON THE IMPROVED PROTECTION OF INTELLECTUAL PROPERTY

The German Parliament (*Bundestag*) has recently passed a bill on the improvement of the protection of intellectual property. The adopted act provides for amendments in various fields of IP law, mainly aiming at facilitating IP owners’ combat against counterfeiting. Inter alia, the act allows for the immediate destruction of goods seized in accordance with the EC regulation no. 1383/2003 on customs action against goods suspected of infringing intellectual property rights. Further, the possibilities of IP owners to trace infringers are to be broadened. Up until now, IP owners have not been entitled to force third parties, such as Internet access providers, to provide them with information on the identity of infringers. The consequence was that such IP owners regularly filed criminal complaints in order to obtain the desired data from public prosecutors. The adopted act introduces direct claims of IP owners against third parties, provided that the infringer acted on a regular and organised basis. Finally, if an infringement of trademarks or patents is acknowledged by a court, the owner can have the court decision published. This possibility was previously reserved to copyright and design right owners.

Banking & Finance

DEALING WITH THE CREDIT CRUNCH – CAN BANKS UNILATERALLY ADJUST EXISTING CREDIT TERMS?

Due to the current crisis in the financial markets, the terms of many credit agreements do not longer correspond to the current money lending conditions in the interbank market. Thus, some German banks have been and may still be tempted to terminate or amend existing credit agreements, thereby considering one or more of the following options. *Firstly*, banks might refer to a so-called MAC (material adverse change) clause, as it is regularly contained in London Market Association loan agreements for international financing. However, this type of clause usually does not cover the general risk of a market disruption, and it is very likely that German courts will interpret respective provisions in favour of the borrower. *Secondly*, some banks might previously have included a provision in their (standard) credit agreements, which allows for them to adapt the interest rate to changed market conditions. Under German law on general terms and conditions, such a clause is generally considered valid, provided that it refers to a flexible interest rate and obliges the bank to also lower the interest rate in case of corresponding changes of circumstances. If, however, a fixed interest rate has been agreed, a unilateral right of the bank to adapt the rate in its favour only will be rendered invalid by a German court. *Thirdly*, German statutory law provides for a right to terminate a contract for the performance of a continuing obligation without notice period in case the terminating party, taking into account all the circumstances of the specific case and balancing the interests of both parties, cannot reasonably be expected to continue the contractual relationship until the agreed end or until the expiry of a notice period. However, the terminating party may have to pay damages to the other party in this case, so that the advantages for the bank invoking such termination right are somewhat limited. *Finally*, the banks may refer to the *bona fide* provision of German civil law, which under certain circumstances allows for an adjustment of a contract in case of a material change of circumstances. But since the banks regularly possess superior bargaining power and are professional money traders, the risk for the change of market conditions generally lies in their own sphere, so that it is hardly possible for banks to prove the hardship on their side as required by the *bona fide* provision. *Summarising* the above, the possibilities for banks to unilaterally amend credit terms or terminate credit agreements with regard to changed market conditions are rather limited. Borrowers may therefore generally invoke the principle of *pacta sunt servanda*.

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For more information, see www.mannheimerswartling.se

Inside Mannheimer Swartling

MANNHEIMER SWARTLING'S FRANKFURT OFFICE HAS MOVED

After having resided nearly ten years in the pictorial quarter of Bockenheim nearby the old university campus, Mannheimer Swartling's Frankfurt office and its staff of some 30 people have recently moved to the heart of the town's commercial and banking district. The new office is located at Bockenheimer Landstraße 51-53, with conference rooms at the 21st floor providing a view over Frankfurt's unique skyline and surroundings. The Honorary Consulate of Sweden, headed by Dr. Christian Bloth, consul and partner at Mannheimer Swartling, has moved to the new premises as well, and the Frankfurt branch of the Swedish Trade Council (*Exportrådet*) will also follow soon.



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