

German News Flash



The new German Regulation on the Valuation of Real Property

On 1 July 2010, the new German Regulation on the Valuation of Real Property (*Immobilienwertermittlungsverordnung*) entered into force. It replaces the corresponding 1988 regulation which previously applied. The Regulation establishes the principles and approaches to the valuation of real property. Its rules are of practical importance in particular for the work of municipalities' valuation committees, real estate valuation experts, banks and insurance companies.

The update was necessary as real estate market conditions have changed significantly since the previous regulation was enacted in 1988. German unification, demographic and economic changes as well as the internationalization of the real estate market have all had an impact. In addition, real estate valuation practice has developed over the past 20 years.

Amendments include new provisions on how to reflect potential future developments when valuing real property. As future developments may have a significant influence on a property's market value, these need to be taken into account. However, in order to guard against the sort of crash in the real estate market experienced in the USA and other countries, the new German rules establish that any consideration given to future developments must be based on solid and verifiable data.

Furthermore, the Regulation now expressly provides that the energy efficiency of a building must be taken into account when assessing a property's value. Although some existing valuations already reflect energy considerations, the updated Regulation now emphasizes the increased importance attached to energy saving and climate protection.

GERMAN NEWS FLASH

EDITOR

Dr. Thomas Kaiser-Stockmann
(Berlin) tks@msa.se

EDITORIAL STAFF

Dr. Rebekka Hye-Knudsen
(Berlin) rhk@msa.se

MANNHEIMER SWARTLING BERLIN

Mauerstraße 83/84
10117 Berlin
Telefon: +49 30 22 66 99 0
Fax: +49 30 22 66 99 10

FRANKFURT

Bockenheimer Landstraße 51-53
60325 Frankfurt am Main
Telefon: +49 69 974 01 20
Fax: +49 69 974 01 210

**THIS NEWSLETTER IS
DISTRIBUTED SOLELY FOR
INFORMATIONAL PURPOSES
AND SHOULD NOT BE
REGARDED AS LEGAL ADVICE.
THE NEWSLETTER MAY
BE QUOTED AS LONG AS
THE SOURCE IS SPECIFIED.**



The Regulation retains existing approaches to valuation, that is, the sales comparison approach (*Vergleichswertverfahren*), cost approach (*Sachwertverfahren*) and income approach (*Ertragswertverfahren*), subject to certain modifications. Under the new regime, the income approach now incorporates the discounted cash flow approach in a form suitable for the valuation of real property. This will enhance the international comparability of German real estate valuations.



**BY MAREN ROPTER,
MRO@MSA.SE**

Criminal liability of bankers due to granting of loans?

The German Federal Court of Justice (*BGH*) has on several occasions dealt with the question whether bankers can be held criminally liable for a breach of fiduciary duties (*Untreue*) towards the bank they work for by granting loans which eventually cannot be repaid. In a decision handed down in 2009, the court further specified the conditions for behaviour that may lead to criminal liability (file number 3 StR 576/08).

The judgment concerned a case in which a bank had granted a rather large loan for the purpose of financing a merger. Due to a deterioration of market conditions in the relevant market, the borrower became insolvent, which resulted in a considerable loss for the financing bank. The question at issue was whether the management of the bank had deliberately breached its duty to look after the bank's pecuniary interests (*Vermögensbetreuungspflicht*) by granting the loan. The court held that a breach of duties in the sense of the German penal code is generally to be assumed, if the risks and chances of the granting of the loan were not thoroughly balanced on the basis of comprehensive information. Even though the bankers may have wide discretion as to how the risk analysis is conducted, such discretion is exceeded if the information and auditing duties customary in banking are not fulfilled. However, the extent and depth of the risk assessment required depends on the circumstances of each individual case.

According to section 18 of the German Banking Act (*Gesetz über das Kreditwesen*), banks must in principle assess the economic situation of the borrower by examining the annual accounts and act in accordance with the minimum standards for risk management (*Mindestanforderungen an das Risikomanagement, MaRisk*) published by the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin*). A violation of these provisions may indicate a breach of duties. This rather general guideline is further specified by the *BGH* in its ruling. In complex cases, the bank may not merely rely on figures that have been provided by the borrower, but must itself collect and analyse all relevant information. The latter can to a certain extent be the case if the bank mandated an accounting firm to audit the borrower's figures. In case of a change of the business strategy or other relevant circumstances in the course of the risk analysis process, it may be necessary to react to such changes and repeat the entire evaluation process. Furthermore, the bank is in principle required to conduct an analysis of the relevant

market. It can furthermore be gathered from the court's ruling that the bank must conduct a particularly thorough risk analysis, if different opinions exist within the bank as to the credit risk related to the respective credit commitment. A speedy credit decision may indicate a breach of the described duties, as it can imply that necessary reviews and tests were not done. It follows from the above that it is essential to sufficiently document the various steps taken as part of the risk management process, as well as to thoroughly motivate decisions which might be arguable.

The *BGH* ruled furthermore that – as far as criminal liability is concerned – an economic loss (*Vermögensnachteil*) caused by the breach of duties has occurred if the financial decrease following the disbursement of the loan is not fully balanced by a fully valuable claim for repayment or sufficient collateral that can be easily enforced. The existence of such a balance needs to be determined as at the time of disbursement of the loan applying the International Accounting Standards (IAS), i.e. the value of the repayment claim needs to be reduced by the amount of the default risk.

A fundamental breach of information and examination duties, the awareness of an extraordinary risk that the claim for repayment may be worthless as well as the fact that the bank is unable to control the loan commitment may indicate that the relevant individuals acted – as is necessary to establish criminal liability – intentionally, i.e. by extending the loan despite being aware of the substantial possibility that the bank may suffer a loss. Short-term economic losses may be permitted as long as the decision makers are able to demonstrate that such losses were accepted in order to achieve long-term profits. The latter may be the case in particular for restructuring loans (*Sanierungsdarlehen*), which are by nature susceptible to initial losses.

Notwithstanding the fact that the *BGH* has further specified the conditions for criminal liability following the granting of loans, much depends on the circumstances of each individual case, which of course always leaves an unpleasant amount of uncertainty with the decision makers. Some of the above mentioned measures may not have to be taken in certain circumstances, whereas in other cases, e.g. when entering into a new market, the decision makers may have to apply enhanced diligence, or may even have to implement additional measures in order to fulfill their fiduciary duties vis-à-vis the bank.



**BY MORTEN SIMM,
MOS@MSA.SE**

Planned Changes to the Act on the Transformation of Companies

The German government intends to amend the German Act on the Transformation of Companies (*Umwandlungsgesetz*) in order to meet the requirements set by a recent European Union directive on the reporting and documentation requirements in the case of mergers and divisions (2009/109/EC).



For this purpose, the German Ministry of Justice (*Bundesjustizministerium*) has prepared a draft law, which aims at facilitating mergers (*Verschmelzung*) and divisions (*Spaltung*) involving German stock corporations (*Aktiengesellschaft, AG*). Corporate restructurings that involve other types of companies will not be materially affected by the law.

The proposed changes focus on reducing the administrative burdens and costs related to mergers and divisions. For example, it is supposed to be possible to electronically submit documents required in connection with the preparation of general meetings that decide on a transformation. In certain cases, transformation requirements can be met without the preparation of separate interim accounts. In the event of an upstream merger between an AG (or a partnership limited by shares, *KGaA*) as acquiring company and a subsidiary (regardless of its form of incorporation), a resolution by the general meeting of the merged company will not be necessary, if 100 per cent of the merged company are owned by the acquiring company. Hence, the merger will become a mere management activity of the merged company's board of directors or managing directors. Furthermore, it will be possible to squeeze-out minority shareholders of a subsidiary, if the majority shareholder owns at least 90 per cent of the shares in the subsidiary (instead of 95 per cent as generally required for a squeeze-out) and if the squeeze-out is

implemented in connection with the merger of the subsidiary with the majority shareholder. Parallel audits required by the rules of the German Act on Stock Corporations (*Aktiengesetz*) and the Act on the Transformation of Companies can in the future be prepared by the same auditor, i.e. it will no longer be necessary to appoint two independent auditors. Material possible savings are finally also envisaged as regards a division or spin-off aimed at the incorporation of a new legal entity with a shareholding structure equal to the shareholding structure of the transferring company (*verhältnismäßige Aufspaltung or Abspaltung zur Neugründung*). Reporting and auditing of such division/spin-off as well as the establishment of interim accounts will be redundant.

The outlined changes must be implemented by 30 June 2011. The draft law was recently accepted by the German government, and the ordinary legislative procedure in the German parliament (*Bundestag*) has been initiated.



**BY NELLI SCHIEBELER,
NSC@MSA.SE**



Inside Mannheimer Swartling

EMPLOYMENT LAW SEMINAR IN FRANKFURT ON 29 SEPTEMBER 2010

On 29 September 2010, Mannheimer Swartling will host its annual "Employment Law Seminar" in our Frankfurt office. At the seminar, there will be a presentation of current developments in individual and collective employment law as well as a talk on "Low Performers in Employment Law". Please register for the event (2 PM to 6 PM) by sending an e-mail to: mannheimerswartlingarbeitsrechts-news@msa.se.

NORDIC BUSINESS BREAKFAST AT EXPO REAL ON 5 OCTOBER 2010

Mannheimer Swartling's real estate practice group will take part in the Expo Real 2010 trade fair for commercial real estate in Munich from 4 to 6 October 2010 with lawyers from our Swedish, Russian and German offices. On 5 October, we will be hosting a "Nordic Business Breakfast" with a round table discussion on how purchase price expectations are affecting deal-making in corporate real estate.

MSA AT REAL ESTATE NORTH IN HAMBURG

Mannheimer Swartling's real estate practice group participated in the newly established commercial real estate fair "Real Estate North",

which took place on 2 and 3 June at Hamburg Airport. Dr Thomas Kaiser-Stockmann participated as a panelist in one of the fair's "First Class Discussions" and illustrated perspectives for "green buildings" with examples from Mannheimer Swartling's practice. More than 1,000 participants and 107 exhibitors made the fair, which was initiated by Deutsche Messe AG and the Hamburg Metropolitan Region, a great success. It is focused on commercial real estate markets and logistics properties in Northern Europe. Recently, Deutsche Messe AG and the Hamburg based trade fair agency Deltacom have agreed to merge the two local property fairs "Real Estate North" and "Expansion" into a bigger "Real Estate North" fair, providing a broader basis of exhibitors, which will make the fair even more attractive for visitors. Mannheimer Swartling will also participate in the accordingly expanded next "Real Estate North" on 14 and 15 June 2011 at the Hamburg Messe and Congress Center.

MSA AT THE IBA ANNUAL CONFERENCE IN VANCOUVER

Several partners of Mannheimer Swartling will be attending the International Bar Association's annual conference in Vancouver from 3 to 8 October 2010. From the German offices, Dr Thomas Kaiser-Stockmann (M&A/Real Estate) and Alexander Foerster (Dispute Resolution) will participate.

Mannheimer Swartling is the leading Nordic commercial law firm. Our clients range from many of Sweden's and the world's leading companies to medium-sized businesses and organizations. Common to all our clients is that the law plays an integral role in their commercial success. This drives us to continuously maintain our position at the forefront of our industry and attuned to the needs of our clients.

Mannheimer Swartling has offices in Stockholm, Gothenburg, Malmö, Helsingborg, Frankfurt, Berlin, Moscow, St. Petersburg, Shanghai, Hong Kong, Brussels and New York.