KILCHES-LEGAL

Newsletter 2018 – 1

SUBJECT AREAS:

- Civil Law
- Arbitration
- Construction & Real Estate Law
- Competition Law
- Copyright Law
- E-Commerce
- Banking Law
- Tax Law
- Health Law

Civil Law

A. Commercial Law

The use of subcontractors in a competitive tendering procedure: According to the Bundesvergabegesetz a distinction between *"essential"* and *"unessential"* subcontractors has to be made. An *"essential"* subcontractor is necessary for the tenderer to prove his capacity. If the subcontractor is not suitable, this will lead to the sort-out of the offer. The situation is different with *"unessential"* subcontractors: here, the tenderer can provide the proof of his own capacity but wants to pass on the order for other reasons. In this case, the ordering party may reject an unessential subcontractor, what has for consequence that the tenderer must provide the service himself. [VwGH 29.06.2017, Ra 2017/04/0055]

➔ *[“Bundesvergabegesetz” is the Austrian Procurement Act; “VwGH” is the Austrian Supreme Administrative Court.]*

Managing Director can also be held liable for a transgression of the scope of a trade license: The managing director is responsible for ensuring the compliance with the trade law regulations vis-à-vis both, the public authority and the business owner. This includes refraining from the unauthorized surpassing of the scope of the trade license. § 39 GewO establishes a civil liability of the managing director vis-à-vis the business owner. The purpose of the requirement to act within the business license is to provide the knowledge and skills necessary for the exercise of the trade, thereby avoiding damages due to the lack of expertise. The law thus serves the purpose of danger prevention and is intended to protect the group of people affected by the procurement of the business (ie the customers) from damage. For this reason, the managing director can also be held liable vis-à-vis third parties for damages caused by non-compliance with the trade license. [OGH 28.09.2017, 8 Ob 57/17s]

➔ *[“GewO” is the Austrian Trade Regulation Act; OGH is the Austrian Supreme Court]*

B. Labour Law

Registering a video surveillance is subject to approval: According to the Datenschutzgesetz, the installation of a video surveillance must be registered with the Datenschutzbehörde. In case that an agreement with the works council must be concluded according to the Arbeitsverfassungsgesetz, it has to be submitted during the registration procedure. Otherwise, the registration will be rejected as inproper. No approval from the Datenschutzbehörde is required, if the surveillance of the employees can be effectively ruled out and the monitoring is only necessary for reasons of *"own or property protection"*. [VwGH 23.10.2017, Ro 2016/04/0051]

➔ *[“Datenschutzgesetz” is the Austrian Data Protection Act; “Datenschutzbehörde” is the appropriate authority for data protection; “Arbeitsverfassungsgesetz” is the Austrian Labour Constitution Act.]*

Harmonisation of employees’ rights: The parliament has decided to broadly harmonise workers’ and employees’ rights. Most of the legal amendments will come into force in the course of 2018. Accordingly, workers and employees are entitled to a higher continued remuneration (sick pay) of up to 8 weeks already after an one-year (no longer 5-year) employment relationship. The same applies if the employment relationship is dissolved by mutual agreement during the sick leave or in regard to a sick leave. Furthermore, the continued remuneration in case of illness or accident of the employees will be adjusted to the system of workers: in particular, regulations relating to a relapse (recurrence of a disease) will be eliminated. In addition, all dismissal provisions were extended to employees, who work less than full-time. However, the harmonisation of notice periods and dates will come only into force in 2021. [BGBl. I Nr. 153/2017]

C. Consumer Protection

A charge of € 3.80 per litre for the refuelling of rental cars is legal: The OGH has stated that a clause according to which the renter has to reimburse missing fuel to the full tank with the amount of € 3.80/l when returning the car is lawful. Since 90% of all renters return the car with a full tank the additional refuelling causes major additional expenses for the lessor. Moreover, the clause does not pose a payment risk for the consumer that could not be assessed in advance. It only leads to a higher financial burden if the renter deviates from the contractually owed behaviour and is therefore suitable to strengthen the

contractual reliability of the renters. [OGH 24.08.2017, 4 Ob 143/17h]

Arbitration

Arbitration of final wills: The BGH ruled in two successive decisions that the arbitrability of a dispute depends on whether the jurisdiction of the arbitral tribunal is based on an agreement or a testamentary disposition. In the first case all financial disputes (including the right to legal portion [= Pflichtteil]) are arbitrable; in the second case, the arbitrability is valid only in so far as it is covered by the scope of the fee disposal of the testator. As the testator cannot freely dispose of legally irrevocable compulsory portions, any limitation on the enforceability of the compulsory portions – such as the exclusion of the state courts jurisdiction and the empowerment of an arbitral tribunal – is inadmissible. [BGH 16.03.2017, I ZB 50/16; BGH 16.03.2017, I ZB 49/16]

➔ *[“BGH” is the German Supreme Court.]*

New Rules of Arbitration of the DIS entered into force in March 2018: The new Rules of Arbitration of the DIS bring a number of significant changes aimed to increase the procedural efficiency and transparency as to reduce the duration and costs. Furthermore, new regulations regarding multi-contract and multi-party proceedings, simplified party involvement as well as the joinder of various arbitration proceedings which take into account the increasingly complex issues and complex cases were enacted. In addition, the *"DIS Rat"* was installed as a new body to disburden the Arbitral Tribunal being entrusted with administrative duties (such as deciding on applications for challenge, appointing a sole arbitrator and adjusting fees of the arbitral tribunal). In detail, there are following innovations: increased engagement of sole arbitrators, accelerated constitution of the arbitral tribunal, faster procedures, assignment of administrative powers to the DIS, introduction of provisions to strengthen procedural efficiency and for more stringent confidentiality. [http://www.disarb.org/upload/rules/2018-DIS-Arbitration-Rules.pdf]

➔ *[“DIS” is the German Institution for Arbitration.]*

Construction & Real Estate

Income tax deduction for indirect private use is possible: The owner of a property renovated the house and rented one of the apartments to a limited liability company, in which he himself is the managing director. The company provided the director with this apartment. The VwGH decided whether the costs of the apartment refurbishment can be deducted from income tax or whether these costs have to be treated as private household costs and are therefore not deductible. Household expenses, irrespective of their legal nature, are not subject to a deduction under tax law. It is decisive whether the taxpayer makes an expense that is economically related to his living needs or the living needs of his family members. In this case, however, the flat was not let directly to the person who ran his household there, but to a corporation. For this reason, the constellation is not comparable to that of the direct leave for use and the income tax deduction was decided as legitimate. [VwGH 26.07.2017, Ra 2016/13/0025]

Change of shareholders does not trigger the right of termination of an insurance contract: The change of all limited partners as well as the sole shareholder of the only general partner of a *"GmbH & Co KG"* is not equivalent to a sale of the *"insured object"* and thus does not trigger the right of termination under §§ 69f VersVG. The company in question ran a hotel and wanted to terminate the insurance contract after the change of the shareholders. The OGH ruled that due to the continuing existence of the corporation, the change of the shareholders can – neither in regard to the hotel (operated by the company) nor to the real estate – be considered as a change in the person of the owner; in particular as no change of personally liable partners took place. [OGH 21.09.2017, 7 Ob 74/17h]

➔ *[“GmbH & Co KG” is an Austrian limited partnership business entity; “VersVG” is the Austrian Insurance Contract Act.]*

Reference area for location bonus: In order to determine the bonus for the location of an accommodation, this location is neither to be set in relation to the entire Viennese urban area nor to the respective district, but instead in relation to those parts of the urban area that are *"in accordance with each other in their development characteristics and therefore represent a reasonably uniform residential area"*: Thus, a connection to the public transport network and the possibilities of local supply, which are common for the reference area (in this case the 5th district of the municipality), do not justify the assumption of an above-average location and thus of a location bonus. [OGH 20.11.2017, 5 Ob 74/17v]

Basement aboveground or underground: The question of when a basement is to be regarded as aboveground is decisive for the distance to be met to the adjoining property. Neighbours have a legal claim to a removal order only in case of distance violations on the side of the building facing the property. However, the assessment of whether a floor is to be classified as full floor or basement has to be made uniformly for the entire floor (that is to say, without distinction as to which adjacent property it is technically above or under ground level). The decisive factor is whether a floor extends more than 1m above the natural or newly created surface of the property with at least half of its (horizontal) surface. If a floor thus proves to be aboveground, the minimum distance must be observed to all neighbouring properties even if this aboveground floor lies predominantly or even completely below the ground level on the side facing an adjacent property. [VwGH 01.08.2017, Ra 2017/06/0041]

Costs for general maintenance works cannot be passed on to next tenant: If the tenant takes over the costs for a maintenance work, which was co-financed by the previous tenant through a rent increase in accordance with §§ 18ff MRG, this is to be rated as impermissible key money. Key money payments are prohibited unless there is a equivalent consideration (appropriate remuneration). Only the objective value of the benefits for the new tenant is decisive (determining). In this respect, in the present case, only the fair value of the equipment taken over is to be refunded. The previous tenant may demand a key money payment from the new tenant only if he gives the new tenant an equivalent asset that he has brought into the apartment himself or that he received from a third party (landlord, previous tenant) as a pecuniary advantage. However, it does not include the investments in the entire house, which were co-financed with the payments of the higher rent of the former tenant, even if also the apartment itself and thus its tenant benefit from it. In this case, the tenant neither voluntarily invested in the existing property nor has he taken over the investments due to an agreement with the landlord. For this reason, he cannot pass on the costs of the maintenance works, which he co-financed via the rent increase according to §§ 18ff MRG, to the new tenant. [OGH 20.11.2017, 5 Ob 198/17d]

➔ *[“MRG” is the Austrian Law of Tenancy.]*

E-Commerce

Access providers have to block BitTorrent platform: The OGH has held in accordance with the judicature of the ECJ that access providers (providers of internet service) are not allowed to offer access to BitTorrent websites. These websites allow users to offer so-called torrents, which are files that function as a guide to copyright-protected works of art. Even though the operators of these sites themselves do not provide the torrents, but only provide for the graphic illustration and clear layout of these data, they make a direct contribution to the copyright infringement of these works. As the copyright owner is entitled to an interim measure ordered by the court against the intermediary, he can additionally lodge a blocking order against the access providers. [OGH 24.10.2017, 4 Ob 121/17y]

Banking Law

Important consumer notifications are not allowed to be delivered via e-banking alone: The clause used by banks stating that notifications and statements that according to the law have to be *"provided on a durable medium"* are deemed to be delivered when they reach the e-banking mailbox of the consumer was held as inadmissible by the OGH. Since this type of communication is only used by the bank, a further notification to the consumer has to be made in a way – for example via email – that makes it probable that the consumer takes note of the notification. [OGH 28.09.2017, 8 Ob 14/17t]

Statute of limitations and contributory negligence in the event of investor losses: With regard to the beginning of the limitation period for investor losses the OGH held that the statutory beginning of the period of limitation has to be assessed separately for each incorrect investment advice, if each different risk results from a separate breach of duty to provide information. In case of an incorrect investment advice, the claimant already has suffered a damage when he acquired a risky asset, such as a limited partnership, that has other than the desired characteristics. When acquiring an (unwanted) limited partnership share, the damage already occurs at the time of the subscription. Even though the statutory period of limitation begins to run according to the law with the knowledge of the damage, a duty to inquire is assumed if there are clear indications or reasonable suspicion for the occurrence of damage. Contributory negligence on the part of the inves-

tor is assumed if the investor should have noticed the falsity of the advice either due to his own expertise or because he ignored explicit warnings and did not read the information. [OGH 18.05.2017, 10 Ob 58/16a]

Tax Law

Property income tax: The transfer of the primary residence in the second year after the sale is still tax-free: A couple sold the property they used as their permanent residence. As the construction work on the newly purchased house was delayed due to objections from the neighbours, they only changed their main residence one and a half years after the sale. The VwGH held that the exception from the income tax for main residences under § 30 (2) 1 EStG also applies in this case. The purpose of this provision is to be able to use the achieved sales proceeds undiminished for the acquisition of a new permanent residence. The fact that the change of the principal place of residence occurs after the sale does not constitute an obstacle to the applicability; on the contrary, a certain time period has to be granted for the establishment of a new place of residence. If, at the time of the sale, the intention to change the permanent residence is already given, the seller must be granted a reasonable period of time to give up his permanent residence. [VwGH 01.06.2017, Ro 2015/15/0006]

➔ *[“EStG” is the Austrian Income Tax Act.]*

No balance sheet correction despite an objective incorrectness: If the objective inaccuracy of the balance sheets is subsequently determined by an expert’s opinion, a retroactive correction is inevitable in case of a violation of the generally accepted accounting principles or of the mandatory provisions of the EStG. Provided that a balance sheet is prepared with due care and diligence of a proper entrepreneur, and that in application with the reasonable diligence the incorrectness could not have been detected, this balance sheet is consistent with the generally accepted accounting principles and therefore, even if subsequently found to be objectively wrong, must not be adjusted retroactively. [VwGH 27.04.2017, Ra 2015/15/0062]

Deduction of input tax leads to VAT liability for partly private use: A hotel operator exercised the deduction of input tax for the restructuring of the hotel in its entirety, even though his private living quarters were also in the building. The VwGH held that the input tax deduction for periods prior to 2011 (before the Art 168a VAT Directive came into force) is also possible for subordinate (i.e. less than 20%) privately used parts of the building. However, the input tax deduction leads to the qualification of the private use as taxable. Thus, the use of certain parts of a building as private living is an ongoing private use and consequently a taxable private consumption, accompanied by a corresponding obligation to pay tax. So the right to input tax deduction likewise leads to a VAT liability for private consumption. [VwGH 27.09.2017, Ra 2015/15/0045]

Health Law

Duty to inform in regard to a hand surgery by trauma surgeon: The 16-year-old claimant suffered from a rupture of a tendon of the thumb caused by an accident. Surgery was the only treatment option. However, the surgery was not performed by an appropriately specialized hand surgeon, but by a casualty surgeon, what was not communicated to the claimant. The claimant therefore argued that he should have been informed of the lack of specialization, as he only consented to the treatment on the basis of an erroneous assumption that he will be treated by a specialized hand surgeon. However, the OGH stated in an obscure manner and without a reference to an expert witness statement that the surgery was performed by a specialist in casualty surgery so consequently in the appropriate discipline and the lack of information about the non-specialization is not a breach of the duty to inform. [OGH 28.09.2017, 8 Ob 14/17t]

Disclaimer

The information in this newsletter is not meant to substitute a legal consulting. The information given does not explain all preconditions and details and/or simplifies the case. Any liability is excluded. Simple initial inquiries sent to the email-address sec@Kilches-LEGAL.eu will not be charged. A consultation will be only charged after appropriate and concise information is given as to the estimated amount involved for that specific legal advice.
Your personal data is processed only in order to serve you with the newsletter; the data is stored in adequate technical safety and will not be forwarded actively to anyone. You can demand that your data will be deleted at any time, respectively demand that the service of the newsletter will be stopped.
Web-page: www.Kilches-LEGAL.eu