# KILCHES - Legal advising & Litigation

## Newsletter 2016 – 4

**SUBJECT AREAS:**

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

## Civil law

### A. Commercial law

**GmbH & Co KG – Liability of the director of the partner GmbH:** In accordance with § 25 GmbHG by analogy, the manager is directly responsible toward the "Komplementär-GmbH", if the "Komplementär-GmbH" acts exclusively in performance of the KG's management duties. In order to affirm the liability of the manager, he must actually work for the KG. The capital maintenance rules in § 82cc GmbHG apply analogously for a KG if none of its unlimited liability partners is a natural person. Consequently, it is prohibited to provide any payments to the unlimited liable GmbH or to its partners except appropriation of earnings. By granting a loan to the only partner of the unlimited liable GmbH, the manager violates the prohibition on returning contributions. On the conditions cited above, the manager is liable for damages towards the KG. In the present case, there have been paid off excessively high rental prices. [OGH *(Austrian Supreme Court)* 26.04.2016, 6 Ob 79/16k].

→ *["GmbH" is an Austrian company with limited liability; "GmbH & Co KG" is an Austrian limited commercial partnership consisting of a general partner (GmbH) and at least one limited partner; "GmbHG" is the Austrian Law on limited liability companies]*

**Immoral Compensation clause in the articles of association:** In case the memorandum of a GmbH does not contain any compensation clause for departing shareholders, a retiring shareholder is entitled to demand the current market value of his share. In the case decided the articles of association contained a clause which provided for a compensation lower than the market value of the participator's share in case an insolvency proceeding has been opened over the shareholder. The Austrian Supreme Court declared this clause void and consequently invalid because it places the company's creditors to a disadvantage. [OGH 23.10.2015, 6 Ob 65/15z]

### B. Labour Law

**New law to fight wage and social dumping – LSD-BG:** In Austrian Federal Law Gazette I 44/2016 new provisions were introduced to fight wage and social dumping. This new law (LSD-BG) is in force since 01.01.2017. In the future, all employees working in Austria will be controlled. The most important innovations involve the introduction of a formally new law with a clearer and more explicit structure and the harmonisation of the former laws AVRAG and AÜG. Furthermore, the creation of a purchaser's liability in the construction sector in order to secure the wage entitlements of cross-border posted and leased workers; exemptions for certain short-time employments in affiliated groups. [BGBl I 2016/44]

**Termination of a fixed-term employment contract:** A fixed-term employment contract ends automatically upon expiry even if originally intended to be extended. It is not necessary to make an explicit termination declaration. This may constitute a forbidden discrimination against a female worker whose term of employment has not been extended, although the employment was originally intended to be extended. This is the case if there is a connection between the non-extension and the worker's sex and the worker can make this fact creditable. [OGH 27.04.2016, 8 ObA 30/16v]

**Acquisition of an overpayment in good faith:** If an employee (in the case decided: a caretaker) receives an overpayment over a longer period by mistake, she is not obligated to pay back the surplus provided that she has already spent the money in good faith. Good faith is assumed, when the employee repeatedly asked her employer whether the remuneration is correct. The employee could rely on the correctness of the payroll, because she was assured that the payment was accurate. [OGH 27.04.2016, 8 ObA 9/16f]

### C. Customer protection

**Consent to telephone and e-mail advertisement:** A consumer's declaration of consent to telephone and e-mail advertising for the purpose of free participation in a competition is void, if this consent concerns a large number of companies. Furthermore, the business sectors of at least some of these advertising companies have to be formulated so precisely that it is clear, for which products and services the consumer will receive the advertisements. [OLG Frankfurt 28.07.2016, 6 U 93/15]

## Arbitration

**Arbitration agreements with Indian parties:** It is particularly difficult to achieve the enforcement of a foreign arbitral award in India, if the arbitration agreement has been concluded prior to the *"Baltico-*

*Judgement"* of 07.09.2012. In this judgement, the Indian Supreme Court confirmed the content-related verifiability of foreign arbitral awards and the power of the Indian courts to nullify such an award. Thus, the Indian arbitration law is divided in two: The Indian courts have to interpret arbitration agreements concluded prior to the *"Baltico-Judgement"* differently from those stipulated after this decision. Since the Arbitration Amendment Act 2015 of 23.10.2015 is in force, the public policy (ordre public) exception regarding the annulations of arbitral awards is interpreted more restrictively. But this is only the case, if the arbitrational proceeding was initiated after this day. Therefore, it is recommended to conclude a new arbitration agreement with Indian parties. [Arbitration and Conciliation Amendment Ordinance 2015, 23.10.2015]

**Right to a compulsory portion – effectiveness of an arbitration clause:** The legal right to a compulsory portion cannot be made subject of arbitrational proceedings by manifesting an arbitration clause in the last will. The arbitration clause exceeds the testator's authority of disposition in respect to substantive law. [OLG München *(Higher Regional Court Munich)* 25.04.2016, 34 Sch 13/15]

**New procedural rules at ICC:** On 01.03.2017 new procedural rules for ICC arbitration came into force. In the future, the reasons for a decision regarding the challenge of an arbitrator will have to be announced. The appointment of arbitrators for proceedings with state-affiliated businesses will happen at the suggestion of the court of arbitration and not by the proposal of a national committee. In order to speed up the procedure the terms of reference will have to be submitted within 30 days. The most important innovation is the introduction of a fast-track procedure for claims of a disputed value up to USD 2 Mio. Such cases shall be decided by a single judge. After the appointment of the arbitrator it will no longer be possible to submit new claims and counterclaims, unless the court of arbitration grants them. Within 15 days after the handover of the files a case management conference with the parties will take place. Requests for issuing a certificate can be rejected; the extent and the amount of written pleadings as well as the extent of written witness statements can be limited. Witness hearings can be held by video conference or telephone. The arbitration award should be passed within 6 months after the case management conference.

## Construction & real estate

**Warranty in the event of incorrect creation of condominium?:** Generally, a creation of condominium free of faults in every respect is not the subject of performance of a sales contract with an owner who sells his apartment. The question, if the typical practical problems concerning the effective creation of condominium on ancillary rooms and on accessory are qualified as a defect of title, remains unanswered, because they are in any case covered by the waiver of warranty. For the scope of a generally formulated waiver it is necessary to differentiate between usually required and specifically agreed characteristics. While the first case group is covered by the general waiver, the seller is liable in case he explicitly guarantees certain characteristics he cannot perform. [OGH 16.03.2016, 7 Ob 4/16p]

**Commitment period of a timeshare contract:** In case a consumer concludes a timeshare contract with an entrepreneur it is considered inadmissible to stipulate a long-term commitment without the possibility of ordinary termination for the consumer. A clause, which contains an excessively long commitment period (in the case decided: 30 years) has to be reduced to its legally permitted core, therefore, to the legally permitted commitment period. The reduction of invalid provisions to preserve their validity does not violate the Unfair Terms in consumer contracts Directive 93/13/EWG, because an appropriate commitment period is a main component of a timeshare contract and therefore excluded from the above-mentioned directive's scope of application. A commitment of 15 years is regarded as justified in case the company's business model is based on advance services, the right of use of holiday time and location can be exercised flexibly and almost the whole fee is paid in advance. [OGH 20.01.2016, 3 Ob 132/15f]

**Limitation of actions for consequential damages:** In the case decided, the debtor is in default with the construction of a hall since several years. For that reason, the creditor sues for damages because of lost rental income. There is a continued damage in the sense of repeated breaches of duty. This is all the more true if the debtor repeatedly commits to correct the defects on the hall. The damage for loss of rent must be qualified as consequential damage, for which the limitation period begins in each case to run anew. In the case decided, the occurrence of the damage is caused by the debtor, who would be able to fulfil the contract. Therefore, the damage is unpredictable and a declaratory action is not necessary. [OGH 30.03.2016, 6 Ob 232/15]

## Competition

**Action against the lessor of a stand in case of trademark infringement at the market place:** In order to enforce intellectual property rights the member states of the European Union have to ensure, that a rightholder can also force an *"intermediary"* to take measures against the infringement of rights and to prevent renewed violations. A tenant of market halls who sublets the various sales areas in these halls to traders, some of which use their stands to sell counterfeits, is also regarded as a *"intermediary"* within the meaning of Directive 2004/48/EC. It cannot be required from the tenants of the market halls to constantly and generally monitor their customers, but to take measures to avoid a renew trademark infringement by the same trader. [ECJ 07.07.2016, C-494/15 – *Tommy Hilfiger Licensing*]

**Find friends on Facebook:** Invitation emails sent by Facebook to recipients, who are not members of this social network, must be qualified as unreasonable harassment in terms of § 7 (2) (3) of the German Fair Trade Practises Act (dUWG). If Facebook misleads its users about the way and the extent of the use of data, this must be qualified as a deception in terms of § 5 (1) dUWG. [BGH *(German Supreme Court)* 14.01.2016, I ZR 65/14]

## E-Commerce

**Liability of Amazon-retailers:** The activity as a supplier on the Amazon trading platform represents a risk-increasing behaviour. Anyone who permanently or after a temporal interruption offers products with an ASIN-number on Amazon, has to examine and monitor these offers. This also applies to changes in the product description on the Amazon market place made by third parties (interference liability). This obligation to examine and monitor exists independently from any prior reference to the infringement of rights by a certain offer. Traders, who do not make any inspections for nearly two weeks, violate their obligations to examine and monitor in any case. The attachment to a foreign ASIN-number constitutes a trademark infringement and a deception over the origin of the goods, as far as the trademark of a third party is used for own offers with other products. [BGH 03.03.2016, I ZR 140/14]

**Responsibility for postings on Facebook:** The owner of a Facebook-account whose membership account has been used by a third party, is liable on the principles of the so-called *„Halzband"*-decision issued by the German Supreme Court (there, the wife of the accountholder had advertised a non-genuine piece of jewellery as *"Cartier"* on eBay. Although the husband was unaware of his wife's activities on his account, he has been sentenced by the court as the accountholder). The holder of a membership account who has not sufficiently protected his access data against third-party access must be treated as if he was responsible for the infringement of protective rights and of competition rules caused by a third party via this access. The careless storage of access data for the member account constitutes a breach of duty, which (in addition to the principles of interference liability) forms an independent ground for attribution. [OLG Frankfurt *(Higher Regional Court Frankfurt)* 21.07.2016, 16 U 233/15]

## Copyright law

**Duplicate of a piece of furniture in a hotel:** By setting up reproductions of copyrighted pieces of furniture in a publicly accessible hotel lobby, the originator's right of distribution is not violated. According to the case law of the ECJ an act of distribution within the meaning § 16 (1) UrhG (Austrian Fair Trade Practices Act) requires a transfer of ownership on the object. On the other hand, publishing a photograph on the Internet, which shows the reproduction of copyrighted pieces of furniture, interferes with the originator's right to make his work available pursuant to § 18a UrhG. [OGH 20.04.2016, 4 Ob 61/16y]

## Banking law

### A. General overview

**Obligation to minimize damages in case a loan was unjustly declared due and payable?:** In the case decided, a bank unjustly declared the loan earlier due and payable, whereupon the borrower demanded the costs of the debt restructuring from the bank as compensation for damages. The fact that the borrower has not denied his obligation to repay cannot be qualified as a breach of his obligation to mitigate damages. The borrower did not recognise the due date of the credit claim but the open balance. [OGH 27.01.2016, 4 Ob 167/15k]

### B. Capital market, bonds

**Prospectus information and final conditions:** Issuers of bonds must publish important information in the offering programme in a basic prospectus. This information in the basic prospectus must include data about the issuer as well as potential general information relating to the various types of bonds and *"underlyings"* (e.g. general conditions of the bonds). The final terms are supplementary details, which relate to the emission-specific information of a bond, but not to the information about the issuer. Despite the high level of information and its importance as basis of an investment

decision of the investor, an inadequate publication of the final conditions will not lead to a right of withdrawal as a sanction. [OGH 13.09.2016, 3 Ob 212/15w]

## Tax law

**Depreciation of misinvestments:** In case a taxpayer wishes to do a current-value depreciation, he has to provide evidence, that there actually is a reduction in value. He may also use an expert opinion furnished by the tax authority as *"his"* evidence. Furthermore, value-impairing factors, which were already present at the time of acquisition, cannot be left out, as far as they still existed at the balance sheet date and as far as the taxpayer until then acquires knowledge thereof. Thus, a lower partial value as a result of a bad investment has to be disclosed on the balance sheet date if the entrepreneur knew or had to know about it at the time the balance sheet was created. The nature of a misinvestment lies specifically in the fact that an originally wrong measure turns out to be a mistake at a later time. [VwGH *(Austrian Administrative Court)* 21.04.2016, 2013/15/0100]

**Deductibility of losses from a foreign currency loan:** The Austrian Fiscal Court qualifies losses resulting from the conversion of a foreign currency loan as negative income from capital assets. When a taxpayer preserves an operating income only half of the losses were accepted as tax deduction (with effect from 01.01.2016 at 55%). In the sense of § 27 (3) EStG (Austrian Income Tax Act) the decisive factor is whether an asset is according to its design aimed to generate income from the surrender of capital. [BFG *[Austrian Fiscal Court]* 25.04.2016, RV/2101137/2015]

**Input tax deduction – also for invoices without taxnumber and VAT ID:** Following an external audit, the tax authority rejected the input tax deduction for commission statements for the commercial agents. The company then complemented the invoices by adding the tax and VAT numbers. A correction is permissible and has the effect that the right of deduction is not restricted and cannot be refused. A sanction with the effect that the input tax deduction will only be due in the year of correction does not comply with EU law (Directive 2006/112). [ECJ 15.09.2016, C-518/14 vom 15.09.2016 - Senatex]

## Health law

**Exceptional strain of an alternative method of cancer therapy:** In the case decided, a taxpayer suffering from cancer has consulted an alternative practitioner in Germany who has not been licensed in Austria. The treatment mainly involved an immune-system-enhancing therapy. The taxpayer claimed the treatment as an extraordinary burden. An extraordinary burden is accepted in case one can prove by a medical report that the treatment is necessary for medical reasons to cure or alleviate a disease. To prove this a subsequent confirmation is enough. [BFG 06.05.2016, RV/1100626]

## Reference