KILCHES - LEGAL

Newsletter 2017 – 1

SUBJECT AREAS:

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

Civil law

A. Commercial Law

Disproportionate distribution of profit: Pursuant to § 82 (2) GmbHG, the profit is generally distributed in proportion to the capital invested. However, an resolution, according to which the shareholders can decide on a disproportionate distribution of profit by an unanimous shareholders' resolution is permissible. Such a distribution of the profit can be prevented with a dissenting vote or under the conditions of § 41 GmbHG by bringing an action. For a successful contestation pursuant to § 41 GmbHG, a shareholder must submit a objection and file a statement of claim within one month. An absent shareholder who has not been admitted or invited to the shareholder's meeting only has to file a claim within the deadline. The claim will be granted if the resolution violates the articles of association or mandatory legal provisions or if the resolution cannot be considered to be legally binding. [OGH 20.07.2016, 6 Ob 74/16z].

➔ *["GmbH" is an Austrian Limited Liability Company; "GmbHG" is the Austrian Limited Liability Companies Act.]*

B. Labour Law

Use of secrets by enticed former employees: The defendants did not unfairly procure customer data or use this data to recruit the employees of the claimant during their work for the claimant. Thus, there is no unfair restraint of competition in the meaning of § 1 (1) (1) UWG. Until this case decided the Austrian Supreme Court left the question open, whether the enticement of competitors' employees is unlawful because of the dissemination of objectively incorrect facts or if a subjective element is a necessary element. With the current decision for being unfair to hold the process the Supreme Court clarified the question for the first time: A subjective element is necessary and must be based on special immoral circumstances. The former employee must have gathered business and trade secrets without authorization and with a plan to exploit them after leaving the company for the purpose of competition. [OGH 22.11.2016, 4 Ob 118/16f]

➔ *["UWG" is the Austrian Law on unfair competition]*

C. Customer Protection

General Terms and Conditions: Limitation of liability to the amount of the rental charge: A limitation of liability clause *"In the event of slight negligence (except for personal injury), S *** is liable for the damage up to the amount of the agreed rental charge"* provided in the general terms and conditions of a car rental company is valid. § 6 (1) (6) KSchG is not violated because neither the liability for personal injury nor the liability for grossly negligent or deliberately caused material damage is limited. In addition, the exclusion of liability for slightly negligently caused material damage is not a major disadvantage in the sense of § 879 (3) ABGB because the diluted freedom of the consumer is not so relevant in such a case as for example, against large banks or telecom operators. [OGH (07.06.2016, 10 Ob 74/15b]

➔ *[„KSchG" is the Austrian Law on customer protection; "ABGB" is the Austrian Civil Code]*

D. Miscellaneous

Claim for damages against former chairman of an association: § 8 VerG provides for the (incurable) inadmissibility of a legal claim for damages by an association against its former chairman for alleged misconduct. The statutes of the association are to be interpreted in the light of the fact that the tribunal of the association must be consulted first. Only in exceptional cases, for example, because of the prejudice of the members of the tribunal the case can be directly referred to state courts . The fact that the tribunal of the association consists only of members of the association is a reason of bias. [OGH 18.05.2016, 5 Ob 251/15w]

➔ *["VerG" is the Austrian Law on associations]*

EU regulation makes it easier to take security measures against debtors: To date, in cross-border claims a creditor is confronted with an unknown enforcement procedure. He often has to pay high costs for obtaining security measures abroad. With the entry into force on 18 January 2017 of the EU-regulation No. 655/2014 (Regulation establishing an European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters) in all EU Member States except Great Britain and Denmark, the EU provides a new set of instruments to creditors in civil and commercial matters. It is intended to simplify the access to foreign bank accounts of the debtors by freezing their accounts. The claim must be filed at the court competent for the

insolvency proceedings if no judgment or other enforceable title exists. If the applicant is a consumer, the claim can be filed at a court in his home country. Accounts of non-EU citizens and of Danish as well as English consumers cannot be blocked, even if the accounts are held in another EU Member State. If a judgment has already been delivered, the court which rendered the judgment is competent. The banks of the debtors must ensure that the blockages are properly implemented in order not to be liable. However, cross-border restructuring of companies can now be more difficult because they could be obstructed by a creditor blocking the accounts.

Arbitration

Interpretation of a foreign arbitration award: The successful party to an arbitration procedure before the Chamber of Agriculture Poland applied for the enforcement of the arbitration award at the OLG Brandenburg. The court rejected the debtor's defence of set-off. The BGH, on the other hand, made it clear that the obligated party's right to be heard was violated because it was held that the arbitration award, which stated that the conditions for set-off were not met, is binding. The arbitration award must be interpreted without recourse to the applicable foreign law, since the sole question is whether the foreign arbitral tribunal has made actual findings on the existence of the set-off conditions which will preclude the set-off in Germany. [BGH 31.05.2016, I ZB 76/15]

➔ *["OLG Brandenburg" is the German Higher Regional Appellate Court Brandenburg; "BGH" is the German Supreme Court]*

Construction & Real Estate

Investigation duties of the real estate agent: If there is no indication of inaccuracy, a real estate broker acting as a double broker may hand over the seller's information to the buyer without verifying it. In principle, the real estate broker does not have any special investigation obligations. When arranging a condominium for sale, however, the broker is obliged to examine at least the condominium contract and the land register (§ 3 MaklerG). Any special features regarding the right of use or costs to be born must be clarified. If the real estate agent fails to inform the buyer about divergences between the condominium agreement and the land register entry, he is liable for the consequential damage if it turns out that a right of use is merely a *"Prekarium"* (revocable usage). [OGH 11.07.2016, 5 Ob 93/16m]

➔ *[„MaklerG" is the Austrian Law on the activity of real estate and other agents]*

Brokerage contract in distance selling: If a real estate broker submits an exposé to a prospective buyer with a clear demand for a commission fee, this is deemed as an offer for the conclusion of a brokerage contract. Such an offer is accepted by the purchaser with a request for an appointment to visit the site. If the exposé was sent by email and the purchase date was agreed by telephone and the broker also uses a sales and service system organized for remote sales, the right of withdrawal pursuant to § 312d (1) (1) BGB old version is applicable. For contracts concluded before 13.06.2014 the right of withdrawal expires by the end of 27.06.2015 if the broker has informed the consumer about this right properly. If the broker has not pointed out to the consumer that he must pay a compensation for services already rendered before the right of withdrawal ends, the broker is not entitled to such a compensation pursuant to § 312e (2) (1) BGB old version. [BGH 07.07.2016, I ZR 30/15]

➔ German Law! In Austria, the results may be similar, depending on the circumstances of the case.
➔ *["BGB" is the German Civil Code]*

Competition

Advertising with a five year guarantee: Advertising with a 5-year guarantee in an online shop or on an online trading platform without specification of the guarantee conditions is a violation of competition law. Since Article 246a § 1 (1) (9) EGBGB does not distinguish between advertising with a guarantee and a guarantee bond, the guarantee conditions must also be stated in the case of a mere advertisement with a guarantee. [OLG (Higher Court of Appeal) Hamm 25.08.2016, 4 U 1/16]

➔ German Law! In Austria, the results may be similar, depending on the circumstances of the case.
➔ *["EGBGB" is the Introductory Law to the German Civil Code]*

Misleading announcement: "20% VAT free" for voucher instead of discount: A *"20% VAT"* discount announcement triggers with the consumer the assumption that a discount in the value of the VAT is included in the gross price and that it is granted immediately upon purchase. In the case of an advertisement of a company for low-cost furniture which are usually purchased spontaneously the court assumes that the consumers do not pay any particular attention to the advertisement or that the consumers do not do any intensive preparation before the purchase. The announcement therefore infringes the prohibition of misleading descriptions. [OGH 24.05.2016, 4 Ob 95/16y]

Misleading advertising with an office *"located in Vienna"*: A lawyer has his law firm based in Vorarlberg. He advertises on his homepage with an office *"located in Vienna"* and states an address and telephone number in Vienna. In fact, he rents a meeting room in Vienna only occasionally. The calls to the Viennese telephone number

are forwarded to Vorarlberg. Such statements give rise to the false impression of a minimum office organization. This is anti-competitive and misleading. Local proximity and short-term availability are a decisive criterion for potential clients when choosing a lawyer. [OGH 30.08.2016, 4 Ob 172/16x]

➔ Generally applicable to any company.

Copyright

Digital copying of protected books only with the consent of the copyright owner: Two authors of literary works applied to the French constitutional Court for the annulment of a decree which allowed the commercial use of *"out-of-print books"* in digital form. The ECJ ruled that the interpretation of the Directive 2001/29/EC on The Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society prohibits a national collecting society from exercising the right to reproduce and publicly display out-of-print books in digital form. The authors must be able to object to such an exercising or terminate it. [ECJ 16.11.2016, C-301/15, Marc Soulier and Sara Doke v Prime Minister and Minister for Culture and Communication]

Product-key distribution: Microsoft asserted copyright claims against the defendant on the grounds of the infringement of its trademark rights due to the transfer of a product key to third parties. This product key allows the reproduction of different versions of the computer program *"Microsoft Windows 7"*. The defendant acted on the Internet platform *"eBay"* with Microsoft computer programs and distributed its products in its own web shop. This can be a competition law violation but not a copyright infringement. The mere sending of a product key for a computer program is not a copyright infringement and does not constitute any right to information or claim for damages. [OLG (Higher Court of Appeal) Munich 22.09.2016, 29 U 3449/16]

E-Commerce

Phone bill over € 10,000 due to hacker attacks: The telecommunications operator must take the necessary measures to prevent hacker attacks as part of his due diligence obligations. The risk of such an attack is controllable by the telecommunications service provider. It would have been easy to set up a fee monitoring system and a corresponding warning system for the customers. The defendant customer, on the other hand, did not have any opportunity to prevent the risk of a hacker attack. Consequently, he has not to pay the service rendered under the breach of due diligence obligations. [OGH 15.06.2016, 4 Ob 30/16i]

Obligation of a web shop to integrate a link to the ODR platform: Entrepreneurs can use an alternative dispute resolution procedure in accordance with the EU Directive on *Alternative Dispute Resolution in Consumer Affairs* to resolve their disputes with customers. With effect from 09.01.2016 web shop operators and other online sales platforms must incorporate a link to the ODR platform (Online Dispute Resolution), set up by the European Commission on their website. The obligation under Article 14 (1) (1) Regulation No. 524/2013 *to publish actively the existence of the European ODR platform* is, however, also infringed if, for a certain time, no online dispute settlement in Germany could be offered via this platform. [OLG (Higher Court of Appeal) Munich 22.09.2016, 29 U 2498/16]

Liability of the search engine operator for search results? While liability of host providers has already been decided by BGH and OGH, the question of the conditions under which Google & Co are liable for illegal content on linked pages has not yet been decided. A direct liability of the search machine operator was denied because it is not the search engine's own unlawful content. The defendants are only liable indirectly, if the applicants have duly informed them of the infringement and the search engine continues to show the illegal content. [OLG (Higher Court of Appeal) Köln 13.10.2016, 15 U 173/15 (not legally binding)]

➔ *[„BGH" is the German Supreme Court; "OGH" is the Austrian Supreme Court.]*

Banking Law

Interest clause and refusal of disbursement and cost allocation in the GTC: The clause of the calculation of the interest rate is based on the calculation method *"ACT / 360"* is legal. This standard method of calculation is based on the assumption that one year has a period of 360 days and that one month has a period of 30 days resulting in slightly higher interest rates. § 32 (7) BWG stipulates the 30/360 calculation method for the interest on savings deposits. Since the OGH considers that this provision can be generalised, such a clause is permitted in the GTC also. On the other hand, the creditor's right to refuse the payment for *"objectively justified reasons"* was regarded as not transparent and therefore inadmissible: The clause suggests that the creditor always has the right to refuse the payment. The real legal situation is thus concealed from the consumer. In addition, the reference to the *"currently valid notices"* for a *"possible"* setting of costs for amendments to the contract or *"other services caused by the consumer" "if necessary"* violates § 6 (1) (5) KSchG. This gives the bank an unilateral right

to change prices. [OGH 27.06.2016, 6 Ob 17/16t]

➔ *[„BWG" is the Austrian Banking Act; "KSchG" is the Austrian Act on Consumer Protection.]*

Restrictions for the offset by the borrower in the GTC: According to a provision stipulated in the GTC the bank can offset all claims against the borrower but the latter can only offset claims against the bank that are linked to the liabilities arising from the credit relationship, or which have been judicially awarded or recognized by the credit institution. This reduction of compensation is objectively justified for the protection of the credit institution and thus permissible. [OGH 20.07.2016, 6 Ob 120/15p]

Tax Law

Share buyback as a business transaction: If the buyback of own shares by the AG is at least partially in its own operational interest, then the subsequent reissue of these shares by sale is a taxable transaction. The AG treated the capital gain as tax-free on the ground that the buyback was a deposit repayment within the meaning of § 4 (12) EStG and a mere investment in the case of resale. But the VwGH followed in its decision the view of the tax authority and the UFS: Since the share repurchase program aims to avoid damage to the company it is also in the operational interest of the company and is therefore subject to income tax. [VwGH (Highest Austrian Administrative Court) 21.09.2016, 2013/13/0120]

➔ *[„AG" is an Austrian public limited company; "VwGH" is the Austrian Supreme Administrative Court; "UFS" is an Austrian Independent Tax Tribunal; "EStG" is the Austrian Income Tax Act.]*

Allocation of the losses of a tax-exempt foreign subsidiary to the *"group leader"*: The fact that a foreign group member is tax-exempt in his home country [in the case decided: limited liability company in the United Arab Emirates] does not prevent the allocation of the losses to the "group leader" in accordance with § 9 (1) KStG 1988. [VwGH (Highest Austrian Administrative Court) 20.10.2016, Ro 2014/13/0029]

➔ *[„GmbH" is a Austrian limited liability company; "KStG" is the Austrian Corporate Income Tax Act]*

Health Law

No contributory negligence on the part of the patient due to the culpable causation of his need for treatment: According to established jurisprudence and prevailing academic doctrine contributory negligence on the part of the killed relative is taken account in the survivors' claims for damages (§ 1327 ABGB) against the injuring party per analogy to § 7 (2) EKHG. A mere carelessness against one's own goods is enough; culpability or unlawful conduct is not required. Under medical malpractice law only such conduct of the patient can be taken into account as co-responsibility which leads to an increased damage caused by a treatment error or incorrect medical advice of the physician or which had prevented a reduction in the damage. However, the patient's own negligence causing his or her need for treatment, for example, causation of an accident does not constitute any contributory negligence on the part of the patient vis-à-vis the doctor. [OGH 05.02.2016, 9 Ob 76/15i]

➔ *["ABGB" is the Austrian Civil Code; "EKHG" is the Austrian law on CivilLliability Act on Motor Vehicles and Railway Plants;*

No obligation of the physician to inform or to warn about the costs of the treatment: After a ski accident the defendant was transported to the claiments private hospital. Although the defendant confirmed that she had a private health insurance, it turned out later that the insurance was only a statutory health insurance covering only a part of the treatment costs. The defendant argued the opinion that the claiment unduly did not inform her about the costs coverage by her medical insurance. The OGH did not follow this line of argumentation because the physician's obligation to inform results from the intervention in the physical integrity of the patient which is typical for a medical treatment and not from the remuneration of the treatment contract. [OGH (Austrian Supreme Court) 21.04.2016, 9 Ob 19/16h]

Reference