KILCHES - LEGAL

Newsletter 2019 – 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

Damages resulting from manipulated software in diesel cars: The damage in case of purchasing a car with manipulated software results either from the fact that the deceived party has concluded an unfavourable contract as a result of fraud or in therein that the buyer has not entered into another advantageous contract. If it turns out that the buyer would have purchased the car under the same conditions, even if he had known about the software, he is not entitled to any compensation. [OGH 18.07.2018, 5 Ob 62/18f]

Selective distribution system for luxury products allowed: The agreement between the distributor of branded (cosmetic) products and retailers that the *"luxury character of the products must be preserved"* when the goods are offered does not violate European competition law. The distributor can prohibit the offer of the products on *"amazon.de"*. This is a qualitative selective distribution system which is permissible if the selection of resellers is based on objective criteria; this is the case if the characteristics of the products require such a distribution network in order to maintain the brand image. The safeguarding of the luxury image of goods, whose quality is not solely based on their physical characteristics, justifies the establishment of a selective distribution system. Furthermore, high-quality presentation may be necessary in order to be able to protect the quality of the luxury products. In any event, such an agreement is exempt from the strict antitrust rules under the exceptional provisions of the Vertical Block Exemption Regulation. [ECJ 06.12.2017, C-230/16; OLG Frankfurt 12.07.2018, 11 U 96/14]

B. Labour Law

Dismissal for extended lunch break: A worker may be dismissed summarily if he *"has left work without authorisation"*. The absence must be substantial and without a legitimate reason. Working breaks can only be used as a reason for dismissal if they last a significant amount of time and have an impact on normal work performance. The employer has the onus of proofing the relevant significance. If the company has a long-standing practice of extending breaks, the employer must draw the employee's attention to the fact that the behaviour is inadmissible and unsustainable by giving an expressive warning and can effect the dismissal in the event of renewed infringement than. [OGH 29.05.2018, 8 ObA 7/18i]

C. Customer Protection

Telecom providers may unilaterally amend general terms and conditions and terms of payment: Telecommunications providers are allowed to unilaterally modify general terms and conditions and terms for service prices on the basis of the statutory provisions of § 25 TKG without a contractual agreement in this respect. This only requires a two-month pre-announcement. In the case that the service prices are not changed in favour of the customers only, a personal notification is necessary. In revenge customers are granted a free extraordinary right of termination. Individually negotiated tariffs and fee guarantees cannot be changed by means of a general announcement. [OGH 17.07.2018, 4 Ob 113/18y]

➔ *["TKG" is the Austrian Act on Telecommunications]*

Reimbursement of commission in the event of flight cancellation: If the flight is cancelled, the commission collected from the passenger by a brokerage company on the purchase of a flight ticket must also be refunded as part of the total price. This does not apply if the commission has been fixed entirely without the knowledge of the airline. [ECJ, 12.09.2018, C-601/17]

D. Miscellaneous

Parents damages in case of delayed education start of the child following an accident: Because of the injuries suffered in a traffic accident, the plaintiff's daughter was unable to take the entrance examination for medical studies. As a result, the start of the education was delayed

by one year. This qualifies not as a third-party damage, but a transfer of damage. The tortfeasor is liable either for the additional expenses of the parents' maintenance or for the daughter's loss of earnings due to the delayed entry into professional life. [OGH 25.04.2018, 2 Ob 18/18p]

On the (in)validity of allographic wills: According to the latest decision of the Supreme Court, testamentary decrees not handwritten by the testator are only valid if the testamentary witnesses themselves sign on the deed. Loose sheets must be in a contextual connection. Allographic wills are invalid if the testament witnesses have not placed their signature on the sheet (or sheets) containing the last will, but on another loose (or empty) sheets. [OGH 26.06.2018, 2 Ob 192/17z]

➔ Attention: Change by law of the number of necessary, not favoured witnesses from two to three, since 01.01.2017.

Tacit order placement of real estate agent: An implied order placement is to be assumed if the interested party tolerates the activity of the commercial real estate agent or makes use of it profitably. If the real estate agent is already recognizably acting for a client, such as the seller of the property, a tacit order is only to be assumed if the broker clearly indicates that he also expects to receive a commission from the negotiating partner for his services. The reference to the commission expectation is sufficient. [OGH 26.06.2018, 10 Ob 46/18i]

Arbitration

Decisions of the SCAI on the constitution of an arbitral tribunal and the appointment of an arbitrator are not subject to separate appeal: According of the Swiss Code of Civil Procedure, only the final arbitral awards by which an arbitral tribunal upholds, dismisses or rejects a claim in whole or in part, as well as partial arbitral awards by which a quantitative part is adjudicated and interim arbitral awards by which a preliminary question is decided may be challenged the Federal Supreme Court. However, no appeal may be lodged against procedural decisions, such as the prescribing of an advance on costs or a temporary suspension of the proceedings. Furthermore, the appointed of an arbitrator by private bodies on behalf of the parties (e.g. within the framework of the agreed rules of the ICC or SCAI) cannot be challenged. An irregular appointment or constitution can only be asserted with an appeal against the arbitral award. The Arbitration Court of the SCAI itself is not an arbitral tribunal, but an organ of this association which offers the administration of arbitration proceedings. Accordingly, decisions regarding the constitution of an arbitral tribunal are not arbitral awards and therefore cannot be challenged separately. [BGer 27.01.2018, 4A_546/2016]

Bias of an arbitrator due to a *"Facebook friendship"*: Art 6 ECHR provides for the general right to assert the bias of a judge if his independence and impartiality are not undoubtedly certain. An exclusion is required if the objective appearance of impartiality is not clearly given, whereby subjective impressions are irrelevant. Friendship or antagonism can create the appearance of bias if they are of a certain intensity. On the other hand, joint studies, military service or regular professional contacts are generally insufficient. However, the term *"friend"*, which is used to refer to people who are connected on Facebook, is different from that in the traditional sense, since there is not necessarily a mutual sense of appropriation and sympathy or intimate knowledge that signals a certain proximity and goes beyond the mere fact of knowing someone. In the absence of additional factors, *"friendship"* on Facebook alone is not enough to cast doubt on the appearance of impartiality. However, it can be an indication of a broader relationship. [BGer 14.05.2018, 5A_701/2017].

Construction & Real Estate

The co-tenant may not demand payment for the abandonment of his rental rights: According to the Tenancy Law, it is considered as an inadmissible one-off payment if the new tenant has to render a service to the previous tenant or the landlord without equivalent consideration. The purpose of this provision is to prevent the tenant from trading the apartment as an asset, as there is no objective equivalent exchange of services. The same applies to the relationship of several (co-) tenants. If two (co-)tenants agree on a payment for the case of moving out of or not moving into an apartment and leaving the (sole) rental rights to the other tenant, this is

considered as a prohibited one-off payment. The contract is therefore void. [OGH 29.05.2018, 4 Ob 79/18y]

Sub-letting on Internet platform is ground for termination: The main tenants of an apartment in the center of Vienna offered its rental on a daily, weekly or monthly basis on an online booking platform directed to international users. They liked to charge an average of € 240.00 per day, € 1.540,00 per week or € 6.600,00 per month, with additional charges per person per night. Their total expenses amounted to around € 120,00 per day. For the subtenancy the main tenants received up to € 400,00 per day and thus more than 200% they had to spend themselves. This constitues a valid reason for termination of the use of the apartment for disproportionately high consideration pursuant to § 30 (2) Z 4 MRG. Even a single daily rental can be considered as utilisation, if it happens more than once or temporarily and is intended to create a source of income. The apartment must not be sublet at the time of the declaration of the termination, it is sufficient that it is offered. Disproportionality is fulfilled if the daily rental income exceeds the expenses per day by more than 100%; the comparison of monthly expenses of the apartment is not decisive. [OGH 29.08.2018, 7 Ob 189/ 17w]

➔ *["MRG" is the Austrian Act on Tenancy Law.]*

Competition Law

Offering SIM cards with pre-installed, active services is unlawful without explanation: If a telecommunications provider markets SIM cards on which certain chargeable services, such as Internet access or mailbox services are pre-installed and already activated without adequately informing consumers about the existence of the services and the costs incurred, this constitutes a violation of competition law. These are unsolicited products *("inertia selling")* within the meaning of Annex I No. 29 to Directive 2005/29/EC. These are therefore unlawful commercial practices. [ECJ 13.09.2018, C-54/17 and C-55/17y]

E-Commerce

The legal consequences of the digital estate: The German Federal Supreme Court ruled that heirs fully enter into all legal relationships of the testator due to the general applicable universal succession. This applies equally to all digital contracts with operators. Therefore, heirs are granted the same rights as the testator himself, in particular for access, surrender and deletion of data. The testator may dispose of the digital estate and make deviating orders. The provision contained in the General Terms and Conditions of Facebook according to which the profile of the deceased changes to a *"commemorative status"* is invalid because it deviates too grossly from the legal principle of the transfer of all assets and it is not possible to exclude inheritability in the General Terms and Conditions. Furthermore, there is also no personal legal relationship here, which would preclude a compatibility. [BGH 12.07.2018, Az. III ZR 183/17]

The German Network Enforcement Act (NetzDG) can be enforced by removing content and blocking: Social network operators can enforce compliance with the Code of Conduct both by removing the illegal content and by blocking the user account concerned. However, the contract concluded between the operator and the user on registration includes protection obligations of the operator. Pursuant to § 241 (2) BGB, this leads to an indirect third-party execution of the fundamental rights. Consequently, the platform operator may only remove and block the content if it is objectively justified and not arbitrary. Statements covered by freedom of expression can therefore not lead to suspension or deletion. [LG Frankfurt 14.05.2018, 2-03 O 172/48]

Banking Law

Chargeable bank statement unlawful: The fee of € 2,00 for a transmission of account statements by mail, which is provided in the terms and conditions of a bank, is not legal. According to § 33 and § 53 of the Payment Service Act 2018, the provision of information must be made free of charge if this is done in accordance with a framework agreement within the meaning of the ZaDiG. Therefore, the information must be made available free of charge, regardless of the type of transmission chosen (including on paper). [OGH 24.04.2018, 9 Ob 11/18k]

➔ *["ZaDiG" is the Austrian Payment Service Act]*

Account charges may only be increased under certain condi-

tions: The transparency requirement of the KSchG stipulates that the consumer must be informed about the significant influencing factors of a fee increase in order to understand the effects of a clause. The wording *"changes in the legal and regulatory framework"* is in any case non-transparent and therefore not suitable as a basis for an increase in remuneration as its scope is utterly unclear to the consumer. [OGH 25.04.2018, 9 Ob 73 / 17a]

➔ *["KSchG" is the Austrian Comsumer Protection Act.]*

The clauses *"manual rework"* and *"third-party charges"* are void: the clause *"manual rework of transactions € 2,90/3,90"* contained in a bank's general terms and conditions, according to which consumers must pay the specified fees even if the manual rework of their transaction is necessary solely for reasons attributable to the credit institution (such as computer errors), is grossly disadvantageous and therefore ineffective. The clause *"third-party charges are passed on"* gives the impression that the customers also have to bear the costs of third parties but does not contain any restrictions or specifications and is therefore also ineffective due to the lack of transparency. [OGH 29.05.2018, 1 Ob 57/18s]

Tax Law

Tax reduction for pension compensation of a shareholder director: The sole shareholder and managing director of a limited liability company, which received income from independent work for its activity, entered into a contract with the company in 1995 for a company retirement pension. After his dismissal, he made use of the agreed option instead to receive the present value of the pension as a one-time compensation. The VwGH stated that leaving the company as a director, since there was a operating income, constituted an operating task and the payment thus constituted a task profit, which is to be determined according to § 4 Abs 1 EStG. The retirement arrangement is thus a transitional profit part of the extraordinary income pursuant to § 37 (1) EStG, for which the tax rate is reduced to half the average rate. [VwGH 19.04.2018, Ro 2016/15/0017]

➔ *["VwGH" is the Austrian Supreme Administrative Court; "EStG" is the Austrian Income Tax Act]*

Taxation of pension settlement for shareholder directors: The sole shareholder and managing director of a limited liability company, who received income from independent work for his activities, concluded a contract with the company in 1995 on a company retirement pension. After his dismissal, he made use of the agreed option of receiving the present value of the pension as a lump-sum settlement. The VwGH stated that the resignation as managing director represents an termination of business and the payment thereby is a profit from abandonment, which is to be determined according to § 4 (1) EStG. The claim is thus a transitional profit part of the extraordinary income pursuant to § 37 (1) EStG, for which the tax rate is reduced to half of the average rate. [VwGH 19.04.2018, Ro 2016/15/0017]

Health Law

Prohibition of reimbursement of Nursing home costs (*"Pflegeregess")* that occurred before 01.01.2018: The *"Pflegeregress"*, which has been waved since 01.01.2018, had for consequence that assets of the person who admitted to care facilities and as well their heirs had to contribution to the care costs. The Supreme Court ruled that the waver also applies to time periods of care which were effected before 01.01.2018. This is also to be considered ex officio in appeal proceedings. [OGH 30.04.2018, 1 Ob 62/18a]

Limitation period does not begin until knowledge of the circumstances: The period of limitation begins in the case of medical malpractice only with knowledge that such had occured. If expertise is required to detect the link between the damage suffered and the causal behaviour, the deadline expires only when the injured party becomes aware of this fact. The appraisal of a report is usually not required. [OGH 18.07.2017, 10 at 39 / 17h]

Disclaimer