



FORUM JURIS

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Rechtsanwalts-gesellschaft mbH

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FORUM JURIS

Law coming to you.

Ladies and Gentlemen,
Dear Clients,

We are pleased to provide you with the first issue of our *Forum Juris* Newsletter in 2012 which deals with the following current legal topics and latest developments in legislation and court decisions:

Two articles in this edition of our Forum Juris comment on important rulings by the Federal Court of Justice (*Bundesgerichtshof – BGH*) which deal yet again with the liability of the board of management and supervisory board and document the ever rising demands court decisions make on management. The first decision concerns the liability of the board of management and supervisory board for erroneously informing the capital market by means of a press release and/or more precisely the liability for an ad hoc announcement which was not made after the press release. The second decision concerns the question how far the board of management and supervisory board can absolve themselves from liability in their function by utilizing external or even in-house legal advice.

We wish to draw your particular attention to the article on the so-called "ESUG", the act to facilitate restructuring insolvent companies, which came into force on March 1, 2012, and includes extensive modifications of the Insolvency Code (*Insolvenzordnung – InsO*). Creditors are now more increasingly involved in the restructuring process at an earlier stage, access

to self-administration (*Eigenverwaltung*) is facilitated and implementing an insolvency plan within the regular insolvency proceeding (*Insolvenzplanverfahren*) is made easier. A new rescue facility (*Schutzschirmverfahren*) is also introduced.

We also wish to show you that the new regulations for hiring out employees have a high practical relevance leading to an urgent need for action by lending and hiring companies.

In addition, we highlight the New ICC Rules of Arbitration which were recently introduced.

We hope that the aforementioned topics arouse your interest. Should you have any questions on the individual articles in this edition or indeed any other suggestions for our *Forum Juris* Newsletter, please do not hesitate to get in touch with your contact persons.

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Editors

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Partial Release of Performance Obligations by Settlement Agreements

Pursuant to § 66 German Stock Corporation Act (*Aktiengesetz* – *AktG*) shareholders cannot generally be released from their performance obligations nor is it generally permitted to offset with a claim by the company. It was debatable whether at least a partial waiver in a settlement agreement regarding the payment of the initial contribution existed (and was thus inadmissible). The second senate for civil matters of the Federal Court of Justice (*Bundesgerichtshof* – *BGH*) which is responsible for corporate law had to decide whether a German stock corporation (*Aktiengesellschaft* – *AG*) can conclude a settlement agreement with its shareholder on the claim for payment of the difference between the obligation to pay the initial contribution accepted during a capital increase by contribution in kind and the actual value of the contribution in kind rendered to fulfill the initial contribution (a so-called differential liability claim) and whether other agreed payment obligations of the shareholder can subsequently be offset with claims towards the company in the settlement agreement. The BGH affirmed this. Although the shareholder cannot be released from its obligation to pay the initial contribution pursuant to the German Stock Corporation Act, such a settlement agreement is permitted if actual or legal uncertainty exists regarding the existence or extent of the claim. However, another agreed payment obligation by the shareholder can only be offset subsequently with claims towards the AG if they are due, of full value and liquid.

Source: Press Office of the Federal Court of Justice, Case No. BGH II ZR 149/10a.

Special Reason Required to Extend Anniversary Discount Sales

If fixed time limits, for example, are stated in advertisements for discount sales which a company announces on the occasion of a corporate anniversary, they must generally be adhered to. The economic success of discount sales is not considered a reason which can suggest extending such sales according to generally accepted standards. Furthermore discount sales can be misleading if they are continued beyond the stated period.

The statements are generally misleading if the company already intends to extend the discount sales at the time when the advertisement appears but does not express this clearly enough in the advertisement. If the discount sales are extended based on circumstances which occur after the advertisement appeared, a distinction should be made whether the company could have foreseen such circumstances taking professional diligence into account and could thus have taken the circumstances into consideration when planning the fixed-term discount sales and devising the advertisement campaign. In the case to be decided by the BGH two furniture shops were in dispute over the legality of a discount sales campaign.

The plaintiff celebrated its 180th anniversary in 2008. For this reason it sent out a mailshot in the 39th calendar week (September 22 through 28) advertising "permanently low prices" and an additional "10% anniversary discount on everything, without exceptions!" at its furniture shops in Lingen and

Rheine. The period of the special discount sale was stated in the advertisement as: "Valid immediately until Saturday, October 4, 2008!" Advertisements by the plaintiff appeared on October 2, 2008, again advertising "permanently low prices" and an additional "10% anniversary discount on everything" with the information "extended until Saturday, October 11, 2008". On October 8, 2008, the plaintiff advertised a further extension of its discount sale with the statement "Due to the hugely successful sale: EXTENDED FOR THE LAST TIME – only until October 18, 2008!" Declaring them to be anti-competitive the defendant objected to the plaintiff's advertisements with "permanently low prices" and the extensions of the anniversary discount sale. The plaintiff's legal action for a declaratory judgment on this aspect was unsuccessful.

Source: BGH, Ruling dated July 7, 2011 – Case No. I ZR 173/09

Claim to Pay-Scale Wages Through Company Practice? Validity of Reservation of Voluntariness Clauses

Simply amending the wage to pay scales on a repeated basis does not justify a claim to future amendments through Company Practice (*betriebliche Übung*). An employer which is not bound by collective bargaining agreement must furthermore make it clear here that it intends to adhere permanently to the pay scale.

The Federal Labor Court (*Bundesarbeitsgericht – BAG*) confirms its established opinion where simply adopting pay scales and other wage conditions for the employment relationships of employers which are not bound by collective bargaining agreement does not generally allow claims by employees to be created based on Company Practice. Company Practice is understood as the regular repetition of certain actions by the employer where the employees can conclude that they are to be granted payment (remuneration). Amending the wage to pay scales is, however, a different situation from "normal" Company Practice where the employer itself makes a commitment passively and is not determined extrinsically and dynamically.



If employers which are bound by collective bargaining agreement apply pay scale rises to employees who are not trade union members, they normally wish to achieve equal treatment. This is also true for the employer which is not bound by collective bargaining agreement because it would otherwise be in a worse position than those which are bound by collective bargaining agreement. For a claim to future pay-scale amendments to be created based on Company Practice there must therefore be additional indications instead of simply adjusting the wages to the pay scales on a regular basis. Nor does the employee have a claim to pay scale wages simply because a

"pay scale wage" is shown on his/her pay slip. Pay slips are simply declarations of knowledge and not of intent. In the instant case the BAG does not identify that the employer made "additional indications" apart from simply amending the wage to the respective pay scale which could have suggested to the employee that the employer wishes to adhere to every pay scale rise in the future. It is important for the employer, however, to emphasize that adopting new wage conditions is on a voluntary basis and without any future legal intent and without any intention to be committed in the future.

Nevertheless:

Contractual Reservation of Voluntariness Clause Covering All Future Payments Irrespective of Type and Reason for Existence Regularly Penalizes Employee Disproportionately

In the underlying case which the BAG had to decide the employer had paid a 13th monthly wage to the employee for 20 years although such payment was not explicitly agreed in the employment agreement. It was specified here that other "payments by the employer to the employee which were not agreed" were made "on a voluntary basis and could be revoked at any time". The employee filed legal action for payment when the employer stopped making the payment. The BAG considered the legal action to be justified.



It can remain unanswered in the instant case whether the claim was created based on Company Practice or exclusively by implicit actions within the relationship of the opposing parties. With the repeated payment the employer had at any rate made an offer to the employee which the employee had accepted by conclusive action pursuant to § 151 German Civil Code (*Bürgerliches Gesetzbuch – BGB*). The reservation agreed in the employment agreement does not exclude the claim. On the one hand it infringes the requirement of transparency pursuant to § 307 Subsection 1 2 BGB since the chosen combination of reservation of voluntariness and reservation of revocation does not make it clearly determinable for the employee under what preconditions the payment can be stopped in the future. Since it is precisely the nontransparency which results from the combination of two different parts of a clause, a permitted part (i.e. either the reservation of voluntariness or the reservation of revocation) cannot be maintained. Furthermore the reservation also penalizes the employee disproportionately since it is intended to cover all future payments by the employer irrespective of type and reason for their existence. Even if it is assumed that it is sufficient if the employer declares the reservation of voluntariness once in the employment agreement for certain future payments, this possibility requires a restriction in cases where such reservation is to cover all payments which are not contractually agreed. Such wording does not make a distinction whether the payments are ongoing or single special payments nor does it specify the legal reason underlying the payment, i.e. collective promise or individual contractual agreement. The reservation would thus also cover ongoing payments, such as allowances which the employer pays with

the monthly salary payments. A reservation of voluntariness clause cannot be agreed for such payments pursuant to the established opinion of the Federal Labor Court. Finally the agreed regulation infringes the general "pacta sunt servanda" principle since additional contractual obligations could no longer practically be created apart from the claims specified in the employment agreement.

The decision shows that employers can only rely to a limited extent on reservation of voluntariness clauses agreed in employment agreements for future payments. The justification for a legal claim to payments which are not contractually agreed can only be avoided with legal certainty if the reservation of voluntariness is clearly declared to the payment recipient together with the respective payment – and in the event of a repeated payment on the occasion of each such payment.

Source: Beck-Rechtsprechung (Beck Periodical of Court Decisions) 2011, 78747/Beck-Rechtsprechung 2011, 79051

Liability of Board of Management and Supervisory Board for Erroneously Informing the Capital Market

Particularly the stock exchange segment "Neuer Markt" (New Market) where young technological companies were listed made exceedingly negative headlines at the beginning of the millennium. As a reaction the former federal government passed the so-called ten-point program to improve investor protection. An important issue at the time was extensive legislative regulation for erroneous capital market information. The Federal Ministry of Finance (*Bundesfinanzministerium*) then presented a bill of the law on liability for capital market information (*Kapitalmarktinformationshaftungsgesetz – KapInHaG*) in 2004. The bill included very wide-ranging personal liability provisions for the executive bodies of stock corporations listed on a stock exchange. However, this bill was no longer pursued after strong protests from these companies.

The Federal Court of Justice (*Bundesgerichtshof – BGH*) now had the opportunity to hand down a fundamental ruling on the liability for erroneous capital market information based on existing laws. This ruling was awaited with great anticipation since there was concern in many cases that this ruling might allow extensive liability for erroneous capital market information "through the back door". The background behind the decision was an erroneous press release by IKB Deutsche Industriebank where the bank had put a fine gloss on its situation in July 2007 and in particular kept quiet about the fact that it was about to collapse due to the crisis on the American real estate market. Shortly afterwards it could only be rescued with an investment of EURO 1.5 billion. In 2010 the Regional Court (*Landgericht – LG*) in Dusseldorf sentenced the chairman of the board of management to a suspended sentence of ten months due to the erroneous press release which was considered deliberate market manipulation (§ 20 a German Securities Trading Act (*Wertpapierhandelsgesetz – WpHG*)).

A shareholder who had bought shares in IKB for approx. EURO 24,000 a week after the erroneous press release then demanded damages from the bank based on breach of the prohibition of market manipulation.

After the earlier instances had dismissed the shareholder's complaint, the BGH affirmed the bank's liability in principle in December 2011 (Case No. XI ZR 51/10). It rejected liability based on deliberate market manipulation because the corresponding regulation did not serve to protect individual investors but generally served the functional capability of the security market and this regulation was not therefore a protective law in the sense of § 823 Subsection 2 German Civil Code (*Bürgerliches Gesetzbuch – BGB*). Nevertheless the BGH saw bank

liability in the fact that it did not publish an ad hoc announcement on its activities on the US real estate market without undue delay when it issued the press release. The press release at least showed that the bank had recognized the significance of its commitment in US sub-primes for the capital market. This failure to publish insider information led to a claim for damages. The shareholder still needed to prove, however, that he would not have bought the securities if the commitment of IKB in the US sub-primes had been published. The matter was therefore referred back to the court of appeal for further clarification.

It was not therefore the bank's erroneous press release which provided the grounds for liability but rather it was the fact that the publication was not made without undue delay of IKB's commitment in US sub-primes by means of an ad hoc announcement.

Contrary to initial fears the BGH has thus made only a slight extension of the liability towards shareholders based on erroneous capital market information. On the other hand, if it had considered the market manipulation to be a fact constituting investor protection, it would have resulted in very wide-ranging personal liability for executive bodies. There is namely already market manipulation if somebody makes erroneous statements on circumstances affecting stock exchange prices or if he/she conceals information contrary to a duty of disclosure when he/she knew or should have known that the information would affect stock exchange prices. There is therefore no requirement of intent to influence the stock exchange price.

If the high court had considered market manipulation to be a fact constituting investor protection, any public statement by executive bodies of a company which is listed on a stock exchange – even erroneous or incomplete statements made under certain circumstances in a private meeting – could have led to personal liability for the executive bodies.

Rechtsanwalt Dr. Peter Maser, Stuttgart

Liability of Board of Management and Supervisory Board Despite External Legal Advice



Impossible to Rely on Legal Advice and Attorneys?

The Federal Court of Justice (*Bundesgerichtshof – BGH*) has continued a series of decisions specifying the principles of responsibility for the board of management and supervisory board. It is already well-known that high demands are placed on the decisions by both the board of management and supervisory board. It therefore appears obvious from the perspective of the corporate decision-makers that they must protect themselves personally, either by obtaining advice from their colleagues in the in-house legal department or by obtaining external legal advice. In the past this seemed to be a suitable precaution to minimize their own risk and protect themselves against personal liability.

With its ruling dated September 20, 2011, the BGH again set forth high demands for this form of protection and thus continues to cause great concern in practice. The BGH initially ascertained that a higher obligation to exercise due care applies in this area to a member of the supervisory board or board of management who has professionally obtained specialized knowledge in corporate or tax law, for example. The member of the executive body must utilize his specialist knowledge for the benefit of the company and he must allow himself to be measured stringently by his own prior knowledge. The person responsible for actions of the board must also recognize based upon this expertise situations in which it is necessary to obtain external legal advice or the expert knowledge of the in-house legal department should his own expertise no longer be sufficient. The BGH does not allow a simple telephone call with a colleague or an external attorney to be adequate here. Instead the member of the executive body must carefully choose the advisor who is consulted for assistance, describe the pertinent facts of the case in detail and, above all, be sure that he is assisted by an impartial advisor who is professionally qualified for the relevant issue.

Alone this selection process and briefing of the advisor constitute a considerable obstacle to the otherwise apparently simple absolution from liability through consultation with an advisor. When the external advisor has ultimately supplied the results of the advice, the member of the executive body may not simply accept them as such! A careful plausibility check must be carried out as to whether the external advice is indeed reliable, particularly if the member of the executive body possesses specialist knowledge. The external advice must be given in accordance with the extent and complexity of the issue. Advice on difficult matters cannot be given over the telephone. The BGH has increased the demands yet again with the criterion that the advice has to be impartial. The impartiality is doubted if a member of the supervisory board is also the partner of a law firm which is supposed to provide the external advice. The requirement for impartiality has an even more critical effect on the advice from the in-house legal department. Pursuant to the BGH ruling the corporate attorneys who work there may be suspected of providing advice which is not impartial simply because members of the board of management are also their superiors and they cannot develop real impartiality in their advice within this hierarchical relationship.

The BGH sentenced the supervisory board and board of management to pay damages because both had relied on telephone advice by a partner attorney who was a member of the supervisory board. The high demands stated above on absolution from liability by means of external advice could therefore not be satisfied. The BGH thus continues a trend demonstrated in earlier decisions on D&O liability. Similar aspects also apply regarding the requirements for external professional tax advice. In order to avoid personal liability for members of executive bodies based on tax evasion, for example, the Federal Finance Court (*Bundesfinanzhof*) only accepts external tax advice if the advisor was chosen carefully, he is competent, and the results of the advice appear plausible to the member of the executive body.

Practical Tip: Complex issues require that serious attempts must be made to obtain competent external expert knowledge, choose the external advisor carefully, and inform him adequately. The result of the advice must be supplied in an appropriate form and subjected to a subsequent internal plausibility check. A second opinion often helps here, which not only repeats the contents of the first opinion but reviews precisely the preconditions for absolution from liability and confirms to the member of the executive body that he chose and supervised the first advisor carefully, just as the BGH expects would happen in an ideal world.

Rechtsanwalt Dr. Gregor Bender, Dusseldorf



New Regulations for Hiring Out Employees – Urgent Need for Action by Lending and Hiring Companies

German legislation already modified the Law on Temporary Employment (*Arbeitnehmerüberlassungsgesetz – AÜG*) at the end of April 2011 with the "First Law to Amend the Law on Temporary Employment – Preventing Abuse of Temporary Employment" (*Erste Gesetz zur Änderung des Arbeitnehmerüberlassungsgesetzes – Verhinderung von Missbrauch der Arbeitnehmerüberlassung*). The new regulations affect various aspects of temporary employment. More detail is given below regarding the newly introduced restrictions on hiring out employees on a long-term basis (Cipher I). An overview of the major new modifications of AÜG then follows (Cipher II).

I. Time Limit for Hiring Out Employees – Important Questions Remain Unanswered

A major modification came into force as of December 1, 2011. The newly introduced § 1 Subsection 2 Sentence 2 AÜG is worded as follows: "Employees are hired out to hiring companies on a temporary basis" (*die Überlassung von Arbeitnehmern an Entleiher erfolgt vorübergehend*). The requirement of hiring out employees on a temporary basis thus no longer only covers employees hired out between group companies. However, the legislation leaves the question totally unanswered as to the meaning of the word "temporary".

The reasons for the law only bring elucidation insofar as it is stated that the word "temporary" does not mean a fixed maximum period for hiring out employees but constitutes a "flexible time component".

There are differing opinions in legal literature as to how to interpret the word "temporary". Some legal literature considers it to be sufficient to interpret the word and the requirements



resulting thereof in a way that it must at any rate be clear when the employee is hired out that he/she will only cover a work requirement in the hiring company which has a fixed term (even over several years if necessary). There is also the opposing opinion, however, that there should be a link between the word "temporary" and the definition of a factual reason for a fixed-term employment relationship in the sense of § 14 Subsection 1 Sentence 2 Law on Part-Time Employment and Employment Limited in Time (*Teilzeit- und Befristungsgesetz – TzBfG*). The hiring out of employees would thus be "temporary" if it was justified pursuant to § 14 Subsection 1 Sentence 2 TzBfG to employ the company's own employee with a fixed term based on a "factual reason" at the workplace to be filled by the employee who is hired out.

If future legislation does not clarify how the word "temporary" is to be interpreted, it will only be possible to interpret the meaning on the basis of reliable criteria when rulings by higher labor courts provide direction.

Irrespective of the above interpretation issues the consequences in connection with employees who are not simply hired out on a "temporary" basis also remain unanswered. The new AÜG does not envisage any legal consequences in this respect. Some legal literature concludes from this that the quoted new regulation in § 1 Subsection 1 Sentence 2 AÜG should only be understood as a sentence to indicate to the legal practitioner that employees are not typically hired out on a long-term basis. This would mean that there would be no legal consequences for not complying with the restriction of hiring out employees on a "temporary" basis.

This rather carefree approach is opposed by the fact that an infringement of the "temporary" characteristic could entitle the approval authorities to revoke or deny the permit to hire out employees. This legal consequence appears at first glance to strike the lending company only; but since it would therefore lack the required permit pursuant to § 1 AÜG, the agreements between the lending and hiring companies as well as between the lending company and the employee who is hired out would be invalid pursuant to § 9 CIPHER 1 AÜG. However, a serious legal consequence of such invalidity is that an employment relationship between the hiring company and the employee who is hired out is assumed by operation of law (§ 10 Subsection 1 AÜG).

All this shows that the legislation has not made life easier for all the companies which are involved in hiring out employees – be they hiring or lending companies. It is therefore recommended that both hiring and lending companies check carefully how to arrange future employment relationships for hiring out employees. Alternative possibilities must be considered particularly in cases where there is a long-term requirement for employees.

As a precaution, we recommend to include in every specific employment agreement for hiring out employees a reason why the specific requirement for employment is only of a temporary nature.

II. Further Important Modifications

Other major legal modifications are in particular:

• Extending the Permit Requirement

The past AÜG only covered the "commercial" hiring out of employees which was thus subject to authorization. Now any type of hiring out employees which the employer carries out in the scope of its "economic activities" (i.e. also on a self-cost basis) is subject to authorization. The primary purpose of the new regulation is also to include personnel recruitment services within a corporate group. Exceptions are now only possible "if the employee is not employed for the purpose of being hired out" and therefore evidently only cases where employees are only occasionally (not systematically) hired out to other (group) companies are given.

• Newly Introduced "Revolving Door Clause"

The so-called "revolving door clause" regulates that employees who leave the employment relationship with the hiring company or an employer forming a corporate group with the hiring company in the sense of § 18 German Stock Corporation Act (*Aktiengesetz – AktG*) in the last six months before subsequently being hired out to the hiring company must be placed on an equal footing with the permanent employees. This is supposed to prevent employees from being dismissed for the only purpose of being hired out in the near future to their former employer or to another company of the same corporate group (which may even have been newly established for this purpose) at poorer working conditions (than the remaining employees of the hiring company).

• Introducing a Minimum Wage Level

Regulations have been introduced allowing a minimum wage which is determined by collective bargaining to be specified as the absolute minimum wage level for employees who are hired out. The "decree on a minimum wage level in temporary

employment“ (*Erlass über eine Lohnuntergrenze in der Arbeitnehmerüberlassung*) which was resolved in December 2011 makes use of this and a binding minimum wage level for temporary workers now applies for the first time. As of January 1, 2012, the minimum hourly rate amounts to EURO 7.01 for the federal states of Berlin, Brandenburg, Mecklenburg-West Pomerania, Saxony, Saxony-Anhalt and Thuringia until October 31, 2013, and EURO 7.89 for the other federal states. As of November 1, 2012, the minimum hourly rate increases to EURO 7.50 for the federal states of Berlin, Brandenburg, Mecklenburg-West Pomerania, Saxony, Saxony-Anhalt and Thuringia and EURO 8.19 for the other federal states.

• **Hiring Company's Duty to Inform and Equal Treatment**

Employees who are hired out now have more rights in the company where they work. The following is imposed on the hiring companies:

- To grant the employees who are hired out to work in their companies access to the communal facilities or services (e.g. company crèches, canteens, sports programs, staff promotions); and
- To inform them about vacant positions in the company.

• **Prohibition to Request Brokerage Fee**

It is now clarified that lending companies may not request a brokerage fee from employees who are hired out.

• **Abolishing the Invalidity of the Principle of Equal Treatment for the Unemployed**

Finally the invalidity of the principle of equal treatment for the unemployed who could hitherto be employed for the duration of up to six weeks for a wage equal to the unemployment benefit was abolished.

III. Conclusion and Recommendation

The new regulation of AÜG brings a multitude of significant modifications for lending and hiring companies. All companies who use employees who are hired out are therefore urgently recommended to analyze the current situation of the individual case groups stated above and to implement any necessary suitable measures to eliminate risks. A review should particularly be made of the provision of temporary labor and cases of posting workers within corporate groups with regard to whether a permit is now required pursuant to AÜG. It may be recommendable to obtain a corresponding permit from the Employment Agency (*Agentur für Arbeit*) as a precaution. If the latter is not appropriate, avoidance strategies (e.g. changing to agreements for work and services which as such do not require a permit) should be considered if they can be implemented with regard to the work to be provided.

Rechtsanwältin Yvonne Gemmel, Düsseldorf

ESUG – Act to Facilitate Restructuring Insolvent Companies

Introduction

The Act to Further Facilitate Restructuring Companies (*Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen – ESUG*) came into force on March 1, 2012. The law includes extensive modifications of the Insolvency Code (*Insolvenzordnung – InsO*) to restructure and reorganize insolvent companies. Creditors are more increasingly involved in the restructuring process at an earlier stage, access to self-administration (*Eigenverwaltung*) is facilitated and implementing an insolvency plan within the regular insolvency proceeding (*Insolvenzplanverfahren*) is made easier. A new so-called rescue facility (*Schutzschirmverfahren*) is also introduced.

Furthermore the ESUG legislation intends to counter a development to transfer insolvency proceedings to other European countries, particularly England, in order to utilize assumed procedural advantages there. The major amendments in the new law are described below:

I. Strengthening Creditor Influence

A preliminary creditor committee (*vorläufiger Gläubigerausschuss*) must be created for companies where two of the three following criteria are fulfilled: (i) EURO 4.84 million balance sheet amount, (ii) EURO 9.68 million turnover and (iii) at least 50 employees annual average. A preliminary creditor committee can be created for smaller companies unless business operations are already halted or it makes no economic sense to create a preliminary creditor committee.

The secured creditors, the largest unsecured creditors, the small creditors and the employees should be represented in the preliminary creditor committee just like in the creditor committee for an insolvency proceeding which has already commenced.

The tasks of the preliminary and final creditor committee are the same. They primarily consist of assisting and supervising the (temporary) insolvency administrator in his/her management activities. The (compulsory) creation of a preliminary creditor committee allows the creditors to be involved as early as possible in the (preliminary) insolvency proceeding and thus in possible restructuring and reorganization processes.



The successful restructuring of companies in insolvency depends strongly on the individual insolvency administrator. ESUG allows the creditors to be involved in selecting the (temporary) insolvency administrator. If there is a preliminary creditor committee, the insolvency court must hear its opinion on the profile of requirements and on the individual of the temporary insolvency administrator. If the preliminary creditor committee submits an undisputed proposal here, the insolvency court must adhere to this proposal unless it is obvious that the proposed individual is unsuited to take on the position of the (temporary) insolvency administrator.

In future the debtor or any creditor can submit proposals regarding the individual of the (temporary) insolvency administrator. It is explicitly standardized in the law that such proposals may not lead to the proposed individual being considered from the beginning to be unsuited to take on the position as was often previously prevalent practice. This also applies if the proposed individual advised the debtor in a general manner about the course of an insolvency proceeding and its consequences.

II. Facilitating the Insolvency Plan Within the Regular Insolvency Proceeding

The main points of criticism of the insolvency plan within the regular insolvency proceeding (*Insolvenzplanverfahren*) in its previous form were its awkwardness and the lack of possibilities to intervene in the rights of the shareholders and in membership rights. Improvements have been made in both areas with ESUG.

Any regulation which is permitted under corporate law can now be made in the insolvency plan, particularly the continuation of a dissolved company or the transfer of shareholder or membership rights. Debt-to-Equity Swaps, i.e. the conversion of creditor liabilities into shareholder or membership rights in the debtor company, can also be foreseen in the insolvency plan just like capital reductions or capital increases (by contribution in kind), even excluding subscription rights.

If the shareholder or membership rights in the debtor company are included in the plan, the shareholders form their own group when the rights of involved parties are determined in the insolvency plan. The shareholders must accept the insolvency plan both with a numerical majority and with the majority of the shares of the capital in their group. The vote on the insolvency plan replaces the approval of the shareholder meeting or Annual General Meeting (AGM) under corporate law.

ESUG places strong restrictions on the possibilities for objecting to the insolvency plan. ESUG also offers procedural improvements, such as restricting the protection of minorities in the case of financial compensation or restricting the immediate obligation to satisfy preferential liabilities, for example.



III. Facilitated Access to Self-Administration

The administrative power and the power of disposal over the assets of the insolvent company are transferred to the insolvency administrator when the insolvency proceeding is commenced. An order of self-administration results in the fact after the insolvency proceeding has been commenced that the debtor company remains entitled to administer and dispose over the assets of the insolvent company under the supervision of a trustee (*Sachwalter*). The previous management thus retains the possibility even after the insolvency proceeding has commenced to make major entrepreneurial decisions.

Self-administration has recently only played a major role in large proceedings. An order of self-administration assumed in practice that the applicant could credibly promise a higher rate of settling claims in the case of self-administration.

ESUG reverses this principle. The application of self-administration is generally to be allowed unless it is apparent that an order of self-administration would lead to disadvantages for the creditors. If the application is supported by a unanimous resolution of a preliminary creditor committee, the order of self-administration is not considered disadvantageous for the creditors. The insolvency court must generally state its grounds for dismissing an application for self-administration.

IV. Rescue Facility

The newly introduced rescue facility (*Schutzschirmverfahren*) already creates the possibility of self-administration in a temporary insolvency proceeding. The debtor company is allowed here to devise an insolvency plan with the creditors within a maximum period of three months. During the rescue facility the debtor company retains entitlement to administrative powers and the power of disposal over the assets of the insolvent company but is subject to the supervision of a temporary trustee (*Sachwalter*).

An order for the rescue facility is only given if there is imminent insolvency or over-indebtedness but not if insolvency already exists. If insolvency occurs while the insolvency plan is being devised, the insolvency court must be informed without undue delay.

Upon application the court must order temporary self-administration and appoint the individual proposed by the debtor company as the trustee unless the intended reorganization is obviously futile. The proposed individual may not be appointed if they are obviously unsuited as a temporary trustee. A further precondition of the rescue facility is the presentation of a statement by an individual who is experienced in insolvency matters (tax consultant, auditor or attorney) that the debtor company is suffering from imminent insolvency or over-indebtedness and that insolvency does not already exist and the intended reorganization is not obviously futile.

V. Outlook

It remains to be seen when restructuring companies whether the now modified insolvency plan within the regular insolvency proceeding (*Insolvenzplanverfahren*) will gain ground compared with the restructuring business asset deal (*übertragende Sanierung*). Aspects to be welcomed are the early involvement of creditors in the restructuring process and in the selection of the insolvency administrator.

An attractive feature is the rescue facility where the debtor company can fulfill its possibly existing obligation to apply for insolvency at an early stage without having to be supervised by a temporary insolvency administrator. However, the success of the rescue facility will depend on the actions of the financing creditor banks since if they were to terminate the business relationship with the debtor company while being aware of the rescue facility, the debtor company will generally become insolvent. This would lead to the rescue facility being terminated and an order given for a temporary insolvency proceeding without self-administration. The creditor banks should therefore be informed early about the restructuring measures being prepared by means of the rescue facility.

ESUG makes no comment on whether the current time limit on the term "over-indebtedness" (*Überschuldung*) will be extended beyond December 31, 2012 or abolished.

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The New ICC Rules of Arbitration

The new Rules of Arbitration of the International Chamber of Commerce (ICC) came into force on January 1, 2012. The ICC Rules of Arbitration belong to the most important rules of arbitration in international business law. Their practical significance is also important in Germany. German companies often agree to adhere to the ICC Rules of Arbitration in cross-border agreements. Approximately 7% of the parties in ICC arbitration proceedings are from Germany.

The ICC with its headquarters in Paris was established in 1919 to support and promote international trade. The first ICC Rules of Arbitration date from 1923. The version which is now in force replaces the version from January 1, 1998. Irrespective of whether the arbitration agreement was concluded before or after January 1, 2012, the new rules apply to all arbitration proceedings which commence after January 1, 2012, unless the parties agreed in arbitration agreements concluded before January 1, 2012, that the ICC Rules of Arbitration applicable at the time of the conclusion of the agreement would apply.

The reform of the ICC Rules of Arbitration was aimed at reducing costs and increasing the efficiency of proceedings. Furthermore the opportunity was taken to formulate comprehensive regulations for issues surrounding proceedings with more than two involved parties. The ICC Rules of Arbitration were also updated with respect to the technological progress.

The reform of the ICC Rules of Arbitration left the most important characteristics and particularities of ICC arbitration untouched. The close administrative supervision of ICC arbitration proceedings still remains unchanged after the reform. Nor do the new ICC Rules of Arbitration dispense with the existing ICC International Court of Arbitration which itself does not decide the cases but together with the assistance of the court's secretariat carries out the administration for the decision by the respectively constituted arbitral tribunal. The Terms of Reference also still remain an integral component of every ICC arbitration proceeding. The arbitral tribunal must compose the Terms of Reference following its constitution. The procedural law relationship is specified here. The Terms of Reference generally include a summary of the case in dispute and the matter of dispute. The procedural provisions which are to be applied must also be stipulated as well as the place of the arbitration proceeding.



Unlike previously the introductory writs to the proceeding (Request for Arbitration, Answer to the Request) should already include not only a statement of the facts but the claimant and defendant should also make statements regarding the legal basis for the claim. If a party does not submit an Answer (to the Request) or if it raises objections with respect to the existence, validity or scope of application of the arbitration agreement, the arbitral tribunal is the competent authority to decide. Although the preliminary ruling by the Court of Arbitration was the rule until now, it is now the exception which should contribute to expediting the proceedings.

Several new regulations pursue the same aim with regard to the constitution of the arbitral tribunal and the role of the Court of Arbitration. Although these regulations should be helpful, they will not change the fact that it still takes longer to constitute the arbitral tribunal pursuant to the new ICC Rules of Arbitration than pursuant to the rules of other arbitration institutions. This is due to the fact that it is still generally necessary to obtain the proposal of an ICC National Committee and/or Group of the ICC before the Court of Arbitration appoints an arbitrator (Art. 13.3).

The new ICC Rules of Arbitration include a series of new regulations which should contribute to faster and more efficient proceedings after the arbitral tribunal has been constituted. Thus, the arbitral tribunal is thus explicitly authorized to adopt appropriate procedural measures to ensure effective case management (Art. 22.2). Furthermore in making decisions as to costs it can also take the extent into account to which each

party has conducted the arbitration in an expeditious and cost-effective manner (Art. 37.5). Apart from the timetable which already exists in the old ICC Rules of Arbitration and which is also included in the new ICC Rules of Arbitration (Procedural Timetable) and which the arbitral tribunal must draw up as soon as possible, the Case Management Conference has been introduced as a new procedural instrument (Art. 24). The Case Management Conference must be conducted as soon as possible (several times, if necessary) with the participation of the arbitral tribunal and the parties and does not only have to be conducted as a meeting in person but may also be conducted by video conference, telephone or similar means of communication. Appendix IV of the ICC Rules of Arbitration also includes examples of a number of Case Management Techniques that can be used by the arbitral tribunal and the parties for controlling time and costs. Although the regulations on the Case Management Conference and Techniques already codify known methods in international arbitration, that does not at all impair the significance of the new regulations.

With the introduction of the emergency arbitrator (Art. 29 ICC Rules of Arbitration, Appendix V) the new ICC Rules of Arbitration attempt to create a remedy for the cases where the constitution of the arbitral tribunal cannot be awaited because immediate measures are necessary. The existing Pre-Arbitral Referee Proceeding was hitherto unable to fulfill its function because it required an explicit pertinent agreement and this was generally lacking in practice. The application for ordering preliminary injunction measures do not even require a Request for Arbitration but merely that there is an ICC arbitration agreement between the parties. However, an arbitration agreement which was concluded before January 1, 2012, is not sufficient. However, the enforceability problems associated with preliminary injunctions by means of arbitration decisions also make the institution of the emergency arbitrator rather impractical in many cases.

The new ICC Rules of Arbitration attempt a big strike with the extensive regulation of arbitration with multiple parties. Although the authors of the regulations generally only wished to codify what was practiced anyway so far, the relevant

regulations are extremely significant due to the associated clarification. They are certainly relevant in practice when it is contemplated that there are more than two parties in every third ICC case. There are now regulations for situations with multiple parties as well as multiple contracts (between entirely or partially the same parties). It is generally possible pursuant to the new ICC Rules of Arbitration to join additional parties (Art. 7), assert claims in a proceeding arising out of or in connection with more than one (main) contract irrespective of whether such claims fall under one or several arbitration agreements (Art. 9; dismissing the autonomy of each individual arbitration agreement) and to consolidate arbitration proceedings which are running in parallel (Art. 10). In situations with multiple parties any party can make claims against any other (Art. 8; dismissing the two-party principle). If the parties on the claimant and/or defendant side in a multiple party situation cannot agree on an arbitrator, the Court of Arbitration can appoint all the arbitrators. The Court of Arbitration thus has it in its control to avoid grounds for contestation against the subsequent award by appointing the arbitrator on a neutral basis.

In conclusion, it should be noted that the new ICC Rules of Arbitration comprehensively implement the developments of arbitration and practical experience in the past two decades without modifying the nature of ICC arbitration. With the reform the ICC reacted to current international practical requirements. Whether the reform is successful will ultimately be shown by the application of the ICC Rules of Arbitration in practice.

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