



FORUM JURIS

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FORUM JURIS

Law coming to you.

Dear Clients,

We are happy to send you our second Forum Juris Newsletter in 2008 in which we have assembled current legal topics and important court decisions which we hope will be of interest to you.

The legal topics of this newsletter are:

- **The issue of advance payments and the notary's duty to provide advice in connection with a capital increase in a GmbH**

In a recent decision of the German Federal Court of Justice (BGH), the legal consequence of advance payments in relation to a share capital increase in a German GmbH, namely the obligation to actually effect the payment once more, were confirmed and further, the duties of a notary recording the share capital increase were concretized and extended, paving the way for the shareholder to claim damages against the notary in case of violation of his instruction duties.

- **A new ministerial draft of a law to transpose the directive on shareholders' rights**

The draft aims to achieve the further modernization and deregulation of stock corporation law by enhancing shareholder information for listed companies and facilitating the possibility of exercising cross-border shareholder rights as well as by further restricting inappropriate legal action by shareholders.

- **The new Nursing Time Act**

On July 1, 2008 the new Nursing Time Act ("Pflegezeitgesetz") entered into force by which the legislator aims to ease the decision of employees to personally take over nursing care for close relatives which entitles employees to take unpaid leave if they wish to look after close relatives in need of long-term home care.



- **Possibilities to reduce salaries following transfers of undertakings as a result of the extended options for acquiring parties**

The Federal Labor Court (BAG) recently clarified that the acquirer of an undertaking has a considerable scope in practice with regard to the immediate modification of working conditions even though the regulations on the transfer of an undertaking in sec. 613a German Civil Code are applicable.

The reform of the limited liability company law (GmbH-Gesetz) by the "German Act to Modernize Limited Liability Company Law and to Combat Abuse" (Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen – MoMiG) will presumably enter into force in October/November 2008. We will inform you about the final and relevant changes to the limited liability company law in Germany with a **Forum Juris Special Edition** in due time.

Should you have any questions on the articles in this edition, please do not hesitate to get in touch with your usual contact person.

Capital Increase in case of a GmbH – The issue of Advance Payment and the Notary’s Duty to Provide Advice

I. Introduction

There are various economic reasons for providing a company with equity. In general this is done throughout a capital increase in case of a GmbH (Gesellschaft mit beschränkter Haftung – German limited liability company). To record a capital increase is nearly an ordinary task for notaries. This does not change the fact that mistakes are often made leading to consequences which can be fatal both legally and financially.

II. Facts

Our law firm handled the following case with which the Federal Court of Justice (Bundesgerichtshof – BGH) had to deal with twice already:

The client had decided to increase the capital in cash for a GmbH where he was both the sole shareholder and the managing director. He instructed a notary public to prepare the necessary documentation and agreed a date for the deed to be recorded. Two days before the date of recording and in anticipatory fulfillment of his future duty, the client paid the amount of the capital increase (DM 1,000,000.00) into the company’s bank account which was currently overdrawn with the bank’s permission. There was absolutely no advice given during the subsequent recording of the deed with respect to the legal preconditions for a capital increase to be valid.

When the GmbH became insolvent three years later, the insolvency administrator asserted a claim against the client that the capital increase had not been valid because the client’s advance payment was not suited to fulfill the obligation to make a capital contribution on the basis of the resolution regarding the capital increase and the client was sued to make another payment of the amount of the capital increase.

III. Invalid Advance Payment

The BGH agreed with the insolvency administrator and passed a ruling for the client to make (another) payment of the amount of the capital increase as a contribution to the assets of the insolvent company (BGH, ruling dated March 15, 2004, Case No. II ZR 210/01, published in BGHZ 158 (collection of decisions by the BGH in civil law), page 283 et seq.). The reasoning was the following:

1. The following five steps are necessary for a capital increase to be valid by means of a cash contribution (sec. 53, sec. 55, sec. 56a, sec. 57, subsection 2, and sec. 54, subsection 3, German Law on Limited Liability Companies (GmbH-Gesetz – GmbHG)):

- (1) Resolution regarding the capital increase;
- (2) Declaration of assumption;
- (3) Ingoing payment;
- (4) Application to the commercial register together with an assurance that the contribution has been made;
- (5) Entry in the commercial register.

The resolution regarding the capital increase is to be recorded by a notary public and the declaration of assumption, i.e. the declaration by the party who is obliged to make the payment of the capital increase, must also be certified by a notary public. Furthermore the application to the commercial register must be certified by a notary public as well. The managing director of the GmbH must make an assurance in this application that the amount of the capital increase has been paid and that the management is conclusively able to freely dispose over it. The capital increase has been completed only when the corresponding entry has been made in the commercial register.

2. These steps for the capital increase are prescribed by law and are therefore compulsory; this is also generally true for adhering to the order of the individual steps. In practice, however, the resolution regarding the capital increase is recorded and the declaration of assumption and the application to the commercial register are all certified in one appointment with the notary public in order to save time and costs. Although this leads to the fact that the assurance, which is required for the application to the commercial register that the payment of the capital increase has been made and the company is able to freely dispose over it, is not true when the documents are certified. This does not matter as long as the assurance is true when the notary public sends the application to the commercial register at the court of registration, i.e. generally after the notary public has received evidence that the payment has indeed been made.

3. A necessary precondition for a capital increase to be valid is also, in particular, that the payment of the capital increase is only made after the resolution regarding the capital increase and the declaration of assumption have been recorded since the BGH’s established practice states that advance payments are generally not suited to fulfill a future obligation to make a

capital contribution (BGH, ruling dated February 20, 1995, Case No. II ZR 19/94, DStR 1995 (Deutsches Steuerrecht – German fiscal law), page 945; BGH, ruling dated June 10, 1996, Case No. II ZR 98/95, NJW-RR 1996 (Neue Juristische Wochenschrift-Rechtsprechungs-Report – new legal weekly magazine – report on high-court decisions), page 1249). An exception to this principle is only discussed in situations jeopardizing the very existence of the company where it must be immediately prevented from becoming overindebted by an advance payment (BGHZ 145, page 150 et seq.; 158, page 283 et seq.; 168, page 201 et seq.).

4. The anticipatory fulfillment of the client’s future duty therefore proved to be a boomerang; since his advance payment was not able to fulfill the obligation to make the capital contribution which resulted from the subsequent resolution regarding the capital increase, he had to make another payment of the amount of the capital increase.

IV. Notary’s Duty to Provide Advice

That, however, was not at all the end of the matter. The recording notary public was also held liable since he had not provided any advice during the recording of the deed on the steps which are prescribed by law for a capital increase and on the possible risks of an advance payment. The BGH has now made the following decision:

When recording a resolution regarding a capital increase the notary public must also regularly ascertain whether an advance payment has been made to the company and provide advice regarding the preconditions of a payment to fulfill the future obligation to make the capital contribution.

The following is stated unequivocally in the reasons for the ruling:

“Practical experience proves on the contrary that advance payments are often made in good faith but they cannot be accorded the effect of fulfilling the obligation to make a capital contribution due to the company’s bank account being overdrawn. In view of the widespread ignorance of the legal situation and the considerable risks which the party concerned may therefore suffer the notary public must ask as a rule whether an advance payment has been made and, if necessary, provide



advice regarding the fact that it may be invalid. This applies irrespective of whether particular circumstances in an individual case recommend making an anticipatory cash contribution.” (BGH, ruling dated April 24, 2008, Case No.: III ZR 223/06, published in DB 2008 (Der Betrieb – The Enterprise), page 1316 et seq.)

In our case the client will thus be able to obtain compensation from the recording notary public and/or his/her liability insurance.

V. Outlook

The current BGH decision means for the future that the problems of an invalid advance payment in the case of a capital increase will probably be considerably diminished since it is to be expected that in accordance with the quoted BGH decision notaries will from now on provide advice as a standard procedure in the case of a capital increase so that any advance payments are discovered in due time and can be remedied. This can be done, for example, by the fact that a capital increase in kind is recorded instead of a capital increase in cash by contributing the claim to repayment which results from the invalid advance payment or the payment which has already been made is retrieved from the bank in order to make another payment after the capital increase in cash has been recorded.

RA Wolfgang Albrecht, München

Ministerial Draft of a Law to Transpose the Directive on Shareholders' Rights

The draft aims to achieve the further modernization and deregulation of stock corporation law. The reason for the draft is the transposition of the so-called directive on shareholders' rights (Directive 2007/36/EC dated July 11, 2007). Said directive aims at enhancing shareholder information for listed companies and facilitating the possibility of exercising cross-border shareholder rights. Furthermore German legislation has taken the transposition of the directive as an opportunity to modernize stock corporation law in other points as well. The proxy voting rights of credit institutes, for example, will be further deregulated. Use is made of deregulation options arising from the amendment of the Second Company Law Directive (Directive 77/91/EEC amended by Directive 2006/68/EC) in the area of raising capital by means of contributions in kind. Finally, a special focus is placed on further restricting inappropriate legal action by shareholders. A summary of the major regulations included in the draft is given below.

1. Providing Information Prior to the AGM

The law to transpose the directive on shareholders' rights (Aktionärsrechterrichtlinie-Umsetzungsgesetz – ARUG) is supposed both to facilitate the access of shareholders to information prior to the annual general meeting (AGM) as well as their participation at the AGM irrespective of where the shareholders may reside. In future there will therefore be a compulsory regulation for listed companies to publish AGM-relevant documentation on their website as of when the AGM is convened (sec. 124a, German stock corporation bill (Aktiengesetz-Entwurf – AktG-E)). Furthermore the act of convening the AGM must also be forwarded to certain media in addition to the publication in the Federal Gazette. It should be possible to assume that the media will make certain that the information is distributed throughout the entire EU (sec. 121, subsection 4a, AktG-E). Moreover the content of the act of convening the AGM is extended in its scope for listed companies while non-listed companies are released from this obligation (sec. 121, subsection 3, AktG-E).

In order to facilitate the amount of administration required prior to an AGM the companies can in future stipulate in their articles of association that the shareholder claim to the credit institutes forwarding the notification that an AGM has been convened is restricted to the electronic form (sec. 128, subsection 1, AktG-E). The possibility to forgo sending such notification in paper form is supposed to result in potential savings of approx. EUR 50 million per annum. Furthermore the credit institutes only have to send the notification regarding the AGM to the shareholders in future if said shareholders make a request therefore (sec 128, subsection 1, sentence 2, AktG-E).

2. Additions to the Agenda

The previous regulations under stock corporation law will be modified for clarity's sake. In future additions to the agenda can be received up to the 21st day, at the latest, before the date of the company's AGM. Reasons for the addition or a draft resolution must be enclosed with each new agenda topic (sec. 122, subsection 2, AktG-E). The modified agenda must be announced on the third day, at the latest, after the end of the above deadline, whereby the announcement and subsequent publication must be done in the same manner as for the original agenda (sec. 124, subsection 1, AktG-E).

3. Authorization for Proxy Voting Rights

The authorization for proxy voting rights hitherto had to exist in written form if the articles of association did not foresee a simpler method. ARUG states that in future it will generally be sufficient to use the text form (sec. 134, subsection 3, AktG-E), i.e. this will also include electronic mail (e-mail), in particular.

4. Online AGMs and Postal Voting

In order to facilitate the possibility of shareholders who do not reside close enough to attend the AGM or who reside abroad to exercise their voting rights companies can in future make it possible with a corresponding regulation in the articles of association for their shareholders to participate in the AGM by electronic means as well as cast a postal vote (sec. 118, AktG-E). This opens up the possibility of a “two-way direct connection” where the shareholder is not only a passive observer but can indeed become active. The articles of association can stipulate here which shareholder rights can be exercised by means of online participation. The shareholder who is connected online to the AGM proceedings and is a full participant by law can also cast his/her vote in real time as well as ask questions and make verbal contributions. Voting rights can in particular be cast directly and not via the indirect route of a proxy. The Deutscher Notarverein (German association of notaries) views this amendment with great criticism since it cannot be excluded that a shareholder logs in and then goes to have a coffee while somebody else takes over the keyboard. Nor is it always technically possible to guarantee a real-time connection which could prove to be a problem for casting votes. The authority to make a contestation in sec. 245, AktG, is not affected by online participation since the draft accepts that the shareholder “appeared” at the AGM.

The articles of association can also foresee the possibility of a postal vote as an alternative or in addition. The shareholder who participates in the voting procedure by postal vote is, however, not deemed as having “appeared” at the AGM and is therefore not authorized to make a contestation in accordance with sec. 245, AktG. This constitutes a decisive distinction in comparison with the shareholder who is connected online.

5. Deregulation of Proxy Voting Rights

The draft deregulates and also makes the proxy voting rights of credit institutes more flexible (cf. sec. 135, AktG-E). Pursuant to the previous regulation if credit institutes wanted to offer proxy voting rights, they had to submit their own evaluated voting proposals to shareholders wishing to issue a proxy. If the shareholder had not given an individual instruction of how to vote, the votes had to be cast according to said voting proposals. In future it will be possible as an alternative to authorize the credit institute to vote in accordance with the proposals of a certain shareholders’ association (e.g. Deutsche Schutzvereinigung für Wertpapierbesitz e.V. – DSW, Schutzgemeinschaft der Kapitalanleger e.V. – SdK) or according to the proposals of the company’s management if the shareholder has not given an individual instruction of how to vote (cf. sec. 135, AktG-E). If an offer is made by the credit institute for a proxy vote to be cast in accordance with the proposals of the company’s management, an offer must also be made by the credit institute for a proxy vote to be cast according to the proposals of a shareholders’ association. This is supposed to allow the shareholder to make a conscious decision between a vote to be cast always in accordance with the proposals of the company’s management and one which is judiciously filtered by the shareholders’ association.

6. Simplifying the Procedure for Contributions in Kind and Capital increases in Kind

Pursuant to the German Stock Corporation Act (Aktiengesetz – AktG) an external impairment test hitherto had to be carried out for contributions in kind. In future it will be possible to forgo this if there are clear indications of the value of the assets to be contributed (cf. sec. 33a, sec. 183a, AktG-E). On the one hand, this will affect securities (particularly shares and bonds) which are traded on a regulated market whereby a precondition is that they are valued with the weighted average stock market price of the last three months and, on the other hand, this concerns assets which have been evaluated by a recognized independent expert pursuant to generally accepted principles of valuation. The valuation date may not predate the actual contribution of the assets by more than six months. The stated simplifications do not apply, however, if the average stock market price is considerably influenced by extraordinary circumstances (market abuse, stock price manipulation). This is also true if new circumstances render the value of the assets which have been evaluated by the expert considerably lower on the date of their actual contribution than the value assumed by the expert.

7. Minimum Issue Price for Convertible Bonds

A procedure for resolutions on issuing convertible bonds which has been in existence for a long time has been (1) to determine a minimum issue price or (2) to determine principles for ascertaining such a price. Since this is not explicitly stated in the wording of the AktG law, more recent court decisions have cast doubt on this procedure but sec. 193, subsection 2, No. 3, AktG-E, now clarifies that the previous procedure continues to remain possible.

8. Combating Inappropriate Legal Action by Shareholders (“Extortionate Shareholders”)

The draft assumes that the extortionate leverage does not lie in the legal action for the contestation itself but in the effect of the contestation preventing the entry in the commercial register and thus the implementation of the resolution. The release procedure (Freigabeverfahren) will therefore be supplemented and made more specific (cf. sec. 246a, sec. 319, AktG; sec. 16, German law regulating the conversion of companies (Umwandlungsgesetz – UmwG)). In future the attorney’s authorization for legal representation shall cover both the legal action for the contestation and the release procedure in order to prevent delays in the release procedure which is supposed to be an expedited procedure. Time-consuming deliveries made directly to the plaintiff who sometimes states residency in China or Dubai can therefore be avoided. Furthermore the balance of interests which the courts have to conduct in order to come to a decision in the release procedure will become stricter. A decision can only be handed down in the release procedure in the following cases:

- If the legal action is inadmissible or obviously unfounded;
- If the plaintiff of the contestation holds a nominal amount of less than EUR 100.00 as its interest in the company;
- If, as a brief explanation, it appears to be a priority that the AGM resolution becomes effective as soon as possible having taken both the interests of the plaintiff of the contestation and the interests of the company into account.

Rechtsanwalt Michael Hörtig



New Law on Time for Nursing Care

I. Introduction

The law on time for nursing care (Gesetz über die Pflegezeit – PflegeZG) was introduced as part of the 2008 healthcare reform after lively political discussions. It came into force on July 1 of this year and is intended, among other things, to create framework conditions in labor law to allow employees to care for close relatives in the home environment. The regulations are compulsory and cannot be modified to the employee's detriment. This law places a greater burden on employers:

II. Content of the Legal Stipulations

1. General Information

Employees are granted a right to be able to refuse to carry out their work duties as a result of a short inability to work due to having to care for a relative. They also have a claim to being released from their work duties for six months if they have to care for a close relative in the home environment. Relatives in the sense of the new law are grandparents, parents, parents-in-law, (common law) spouses, cohabitees, siblings, children – including the (common law) spouse's – as well as children-in-law and grandchildren. There is a need for nursing care in the sense of the law if the person concerned either has to actually or foreseeably rely on considerable assistance in order to carry out normal everyday activities based on an illness or disability for at least six months.

2. Short Inability to Work Due to Having to Care for Relatives

Each employee generally has the right to remain absent from work for a single period of up to ten days for each relative in need of nursing care if this is necessary in circumstances requiring acute nursing care to organize such care according to the requirements of the close relative in need of the nursing care or to insure such nursing care in this period. The need for nursing care must have come about suddenly and without warning. Furthermore another person may not yet have organized nursing care according to the requirements of the close relative in need of the nursing care and/or insured such nursing care.

It is not necessary for the employer to consent to the employee remaining absent from work for a short period. The employee's right exists irrespective of the size of the company. The employee is merely obliged to notify his/her inability to work and the foreseeable duration without undue delay. The employee does not need to comment on the type and cause of the need for nursing care. Only if requested by the employer does the employee have to submit a doctor's certificate regarding the need of the close relative for nursing care and the necessity to remain absent from work.

The employer does not have an obligation to continue to pay the employee's salary during his/her absence from work – unless it is based on other statutory regulations or provisions in wage agreements, works agreements or individual agreements. Such an obligation will usually result from sec. 616 German Civil Code (Bürgerliches Gesetzbuch – BGB), however, in the event of a short inability to work; pursuant to this regulation employees generally have a claim to the continued payment of their salary during a short inability to work although only for not more than five days as a rule.

3. Claim to Time for Nursing Care in the Home Environment

Apart from the employees' right as stated above to be able to refuse to carry out their work duties as a result of a short inability to work due to having to care for a close relative in need of nursing care, the employees of an employer with generally more than 15 employees also have a claim to being released from work either completely or partially in order to care for a close relative in need of nursing care for the maximum duration of six months.

The need for nursing care must already and actually exist and the employee must prove the need for nursing care by submitting a certificate from the public healthcare fund (Pflegekasse) or the medical review board of the statutory health insurance funds (Medizinischer Dienst der Krankenkassen). The claim to time for nursing care only exists if the employee intends to care for the close relative in need of nursing care in the home environment, i.e. in the household of the person in need of nursing care or in a household which now includes the person in need of nursing care.

If the employee intends to assert the claim to the time for nursing care, he/she must declare this in writing ten days at the latest before the start of the nursing care to his/her employer. The employee must state the period in which he/she would like to be released from work as well as the extent (partial or full release from work). Should he/she wish to be released from work on a partial basis only, i.e. to work on a part-time basis, he/she must also state the desired arrangement of the working hours to his/her employer. The employer and employee must then conclude a written agreement on the reduction and arrangement of the working hours. The employer must comply with the employee's requests unless there are urgent business interests which oppose such requests.

The employee's claim to his/her salary is lost during the time for nursing care in the same scope as the release from work. The employer is only obliged to continue to pay his/her salary if it results from other statutory regulations or is based on collective bargaining agreements or individual agreements. Sec. 616 BGB does not apply in the case of a prolonged inability to work.



If the close relative's need for nursing care no longer exists or if it becomes impossible or unreasonable to care for the relative in the home environment, the time for nursing care ends prematurely as an exception – namely four weeks after the change in circumstances occurred. The employee must notify the employer of such a change in the circumstances without undue delay. The time for nursing care otherwise only ends prematurely if the employer agrees to the employee returning to his/her workplace earlier than planned. If the employee did not make use of the maximum duration of the time for nursing care when the claim to such time was asserted, an extension up to the maximum duration is also generally only taken into consideration with the employer's consent. A claim to an extension up to the maximum duration of six months only exists if the foreseen change in the caring person cannot take place for good cause because the person who was supposed to take over the care has become seriously ill or has died, for example.

4. Special Protection Against Unfair Dismissal

The employer cannot generally terminate the employment relationship from the time when the employee notifies his/her foreseeable absence through to the end of the short inability to work or the end of the time for nursing care. A termination is only admissible as an exception if the most senior state authority which is responsible for the protection of employment declares it to be admissible. Protection against unfair dismissal always exists as of when the employee's notification is received by the employer, i.e. pursuant to the wording of the law irrespective of whether the employee observes the minimum statutory periods for the notification (cf. above) or makes the declaration already much earlier. The special protection against unfair dismissal benefits all employees without the existence of any further preconditions.

5. Fixed-Term Agreements with Replacement Employees

The employer can hire a replacement employee for a fixed term both during the employee's right to be able to refuse to carry out his/her work duties as a result of a short inability to work due to having to care for a relative and also during the time for nursing care. The fixed term can also extend beyond the period of the replaced employee's absence from work for the purposes of familiarization with the work duties. In the event of a premature end of the time for nursing care the employer has a special right of termination with a notice period of two weeks in order to terminate the fixed-term employment relationship with the replacement employee.

III. Practical Significance

It is not yet clear which practical significance the PflegeZG will have. The burdens on the employer which are created in the law are numerous: apart from the disruptions to business operations economic consequences for the employer, in particular, the obligation to continue to pay the employee's salary arising from sec. 616, BGB, for example, could be the result although it is possible to modify this obligation through an agreement. The special protection against unfair dismissal which the employees have as of the notification of the planned absence from work could also prove to be a problem, in particular, due to the lack of a time and factual definition. This will mean, among other things, that it will be impossible to terminate the employment relationships of the employees concerned for operational reasons – at least temporarily. Furthermore the special protection against unfair dismissal also benefits those employees who do not enjoy any general protection against unfair dismissal since they have not been with

the company for more than six months or they are employed in small businesses. Nor is there any waiting period for asserting a claim to the time for nursing care. This could mean apart from the immediate protection against unfair dismissal that it might be necessary depending on the circumstances of the individual case for the employee concerned to become familiarized with the work duties yet again due to the employee being released from work during the phase of familiarization with the work duties. Furthermore the 10-day period for asserting the claim to a release from work for up to six months is very short for the employer to make corresponding plans. The fact too that only "urgent" operational reasons can oppose the employee's request in the case of a partial release from work makes it very difficult at least for the employer to raise objections. It remains to be seen whether and to what extent court decisions will make corrections regarding the interpretation of the law. The next few months will also tell to what extent especially the claim to the six-month release from work will be asserted in view of the fact that a regulation on the continued payment of the employee's salary is lacking.

Rechtsanwältin Dr. Theresa Riegger

Possibilities to Reduce Salaries Following Transfers of Undertakings – Extended Options for Acquiring Parties

I. Introduction

If (part of) an undertaking is acquired by means of an asset deal, there is usually no way to avoid the application of the regulations on the transfer of an undertaking in sec. 613a German Civil Code (Bürgerliches Gesetzbuch – BGB). The acquiring party automatically enters into the rights and duties arising from the employment relationships as they existed at the time of the transfer of the undertaking. The acquiring party will frequently see a need to modify the working conditions in (the part of) the undertaking which has been transferred so that they are in accordance with the wishes of the acquiring party, be it in order to bring the working conditions in line with those in other business undertakings belonging to the acquiring party or simply for the purpose of reducing labor costs in the acquired undertaking.

The so-called “modification ban” in sec. 613a subsection 1 sentence 2 BGB is thus often considered to be a complex obstacle. It is a widespread misunderstanding in connection with this regulation that it is generally not possible to modify the working conditions or regulations on salaries during the first year after the transfer of the undertaking.. This only applies, however, if the working conditions which apply at the vendor are regulated by collective agreements or works agreements which do not continue to apply at the acquiring party or are replaced by other collective agreements which apply at the acquiring party.

The Federal Labor Court (Bundesarbeitsgericht – BAG) took the opportunity in its decision dated November 7, 2007, to correct the fact that the acquiring party does in fact retain considerable scope in practice with regard to the immediate modification of working conditions when an undertaking is acquired.

II. Ruling by the Federal Labor Court

The BAG decision dated November 7, 2007 (Case No. 5 AZR 1007/06) was based on the constellation that salaries which were above the general pay scale were hitherto paid in the acquired business which was not bound by a labor agreement, while a comparatively moderate labor agreement applied in the acquiring party's other business undertakings. The acquiring party had already pointed out in the letter of notification to the employees pursuant to sec. 613a subsection 5 BGB that the labor agreements agreed between the Konsum-Tarifgemeinschaft employers' association and the ver.di trade union apply in its businesses. Roughly two months after the planned transfer of the undertaking the acquiring party concluded an agreement entitled “Employment Modification (Personalveränderung)” with the plaintiff, a sales clerk. The plaintiff's basic monthly salary was to be reduced slightly pursuant to this agreement. The monthly allowance in the amount of EUR 270.98 which had hitherto been paid by the vendor was to be entirely discontinued in the future. The aim here was to modify the salary to that of the defendant's other employees. A one-off payment of EUR 3,900.00 was made to the plaintiff to make up for any loss. Roughly 14 months after this agreement regulating inferior working conditions was concluded, the plaintiff asserted via a trade union representative that the “Employment Modification” was invalid and should be rewound since a factual reason for the agreement was lacking. The plaintiff had been deceived regarding the legal consequences with respect to the pay scales in the event of a transfer of the undertaking. The difference compared to the plaintiff's previous salary was to be paid retroactively for the period since the transfer of the undertaking. The plaintiff contested the agreement based on having been deceived and having been incorrectly informed regarding the consequences of the transfer of the undertaking.

The labor court allowed the legal action. The appeal by the defendant acquiring party was also successful, however, and the plaintiff's appeal on a point of law led to the decision by the Higher Labor Court (Landesarbeitsgericht – LAG) being confirmed.

Since the plaintiff had missed the one-year period for contestation in sec. 124 BGB, the agreement entitled "Employment Modification" could not be declared null and void based on a contestation pursuant to sec. 142 BGB, as requested by the plaintiff.

Furthermore the BAG had no doubt regarding the validity of the "Employment Modification". In particular it did not require a factual reason to justify it based on the fact that sec 613a BGB may have been circumvented. The protective aim in sec. 613a subsection 1 BGB does not demand restricting the private autonomy of the parties to the employment agreement. The above agreement had not therefore circumvented the protective aim in an inadmissible manner. There is generally the same contractual freedom (i.e. regulations in collective agreements do not take effect) at the acquiring party as it had existed at the vendor. If a regulation which is transferred pursuant to sec. 613a subsection 1 sentence 1 BGB, but basically remains unmodified is subject to the disposition of the parties to the employment agreement, it can be modified amicably between such parties. This also corresponds to the view of the European Court of Justice in its decision dated February 10, 1988 (Case No. C 324/86 – "Foreningen"), according to which the EU directive on the Transfer of Undertakings does not contradict a modification of the employment relationship which is agreed with the new owner of the undertaking.

The BAG therefore focuses on the fact that the vendor would also have had the possibility based on contractual freedom to negotiate other and even inferior conditions with the employee at any time, as long as the particular working conditions were not prescribed by a collective agreement or by a works agreement. It is not possible to derive a regulation in sec. 613a BGB where the acquiring party could not also make use of contractual freedom in the same manner.

The BAG thus deviates from its previous court decisions which demanded in the event of a transfer of an undertaking that a particular factual reason existed for an amicable modification of working conditions which were inferior for the employee. A factual reason would be the preservation of jobs, for example, achieved through the modification of the working conditions leading to inferior conditions. The BAG explicitly left it open, however, whether it would continue to demand a factual reason in future if the foreseen deterioration affects the salary for the work already rendered by the employee. This is particularly relevant in the case of foreseen deterioration in the area of company pension schemes or when back-dated employee claims are annulled.

The acquiring party and employee can therefore easily and amicably modify working conditions which are agreed in individual agreements, particularly with regard to the salary, at any time, at least outside the area stated above. The one-year modification ban in sec. 613a subsection 1 sentence 2 only takes effect if the working conditions were regulated by collective agreements (labor agreement or works agreement) which applied normatively at the vendor and do not continue to apply at the acquiring party or are replaced by another collective bargaining agreement pursuant to sec. 613a subsection 1 sentence 3 BGB, which applies at the acquiring party. A closer look therefore proves that the one-year modification ban only has a relatively small scope of application.

III. Practical Significance

The decision makes it considerably easier for acquiring parties in numerous cases to reduce labor costs in the acquired undertaking and/or to bring them into line with those in other business undertakings belonging to the acquiring party. This is not only true for salaries but also for all regulations regarding the employment relationship which are agreed in individual agreements. It is not necessary to observe any waiting periods after the date of the transfer of the undertaking since inferior modifications can be agreed even shortly after the undertaking has been acquired if there is contractual freedom.

Negotiating new working conditions with each individual employee concerned on an individual basis will often be a long and difficult path if a large number of employees has been transferred. Replacing working conditions which are agreed in individual agreements with inferior works agreements or company labor agreements will, however, largely fail due to the application of the benefit-of-the-doubt principle. It should therefore be pointed out that exemption clauses for inferior works agreements or labor agreements can indeed be included in employment agreements.

IV. No Obligation to Improve Working Conditions

So how would it work if there were better working conditions at the acquiring party than at the vendor? The need for the acquiring party to bring the working conditions into line will probably be less common in such a case. The BAG decided on August 31, 2005, that the principle of equal treatment is not infringed in labor law if an acquiring party only continues to pay that salary to the transferred employees they received from their previous employer and not the higher wages which are typical in its own business undertaking. The employer is only executing the legal consequences resulting from sec. 613a subsection 1 BGB in such a case and not agreeing any independent regulation meaning that the factual preconditions for applying the principle of equal treatment are not given.



V. Letter of Notification Pursuant to sec. 613a subsection 5 BGB

The intention of an acquiring party to negotiate other working conditions with the employees as soon as is possible after the transfer of the undertaking does not need to be stated in the letter of notification to the employees. This only has to include the foreseen unilateral measures of the new employer. Since working conditions can only be modified amicably, they cannot in any event be modified against the wishes of the employee.

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