Newsletter

International Briefing

May 2018

Editorial

Dear reader,

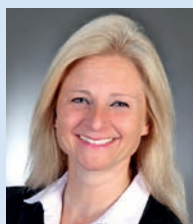
Welcome to our May 2018 edition of our International Briefing.

We have compiled a broad array of topics of interest to international business, with contributions from many of our practice groups, ranging from Corporate Law to IP/IT to Real Estate.

We hope that you will find the information provided helpful in your daily business. For many of us, international business and international trade is of major importance; we need to remember this in times, when the term "international" sometimes draws ire and criticism.

With summer and the World Cup (the most important sports event for the world of football/soccer) around the corner, we wish you the opportunity to enjoy at least a few moments of leisure and a couple of good games! We already look forward to seeing many of you at the IBA Conference in Rome!

Best regards,



Regine Nuckel,
Head of the Dutch Desk

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I. Know-how Directive: Now is the time to actively protect trade secrets

The deadline for implementing the Directive on the protection of trade secrets (Directive (EU) 2016/943) into national law expires on 9 June 2018. The aim of the Directive is to establish a common minimum level of protection in the EU for undisclosed know-how and business information. This uniform standard of protection should increase competition and innovation EU-wide.

Along with the definition of trade secrets, the most important elements of the Directive include the conditions under which the acquisition, use and disclosure of a trade secret are permissible and when they are unlawful, as well as the establishment of standards of protection in the case of infringement.

New definition of trade secrets introduced by the Directive

The starting assumption is that trade secrets are sensitive and can completely lose their value once they have been disclosed.

Current jurisprudence recognises four conditions that must be satisfied in order to classify information as a business or trade secret: (i) the information must be related to the company, (ii) the information may not be obvious, (iii) it must be the proprietor's intention to keep the information confidential and (iv) there must be a legitimate interest in maintaining confidentiality.

In contrast, under the new Directive, trade secrets are all information, which (i) are neither in their entirety nor in the precise configuration and assembly of its components generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (ii) has commercial value because it is secret; and (iii) has been subject to reasonable steps to keep the information secret.

As the Directive only establishes minimum standards Member States are allowed to impose a different, more extensive definition. However, it seems more likely that Member States will adopt the definition from the Directive.

To this extent, the term "business and trade secrets", as defined in the Directive, differs significantly from the definition established in the German case law. This new definition no longer requires an objective interest in maintaining the confidentiality of the information or an intention to maintain that confidentiality. Instead, new features of the definition include the steps taken to maintain the confidentiality and the commercial value of the information.

Suitable measures to maintain confidentiality

Although the Directive does not determine in more detail the measures taken to maintain confidentiality, the result will be that the person in control of the information will have to show that the company has taken adequate technical, physical and contractual steps, internally and externally, to maintain the confidentiality in light of the significance of the information in question for the company.

"Suitable measures" could include the restriction of access for specific groups of people, or confidentiality agreements. Practical measures, such as spatial separation of different departments, could also play a role. Regardless of the control measures put in place, these should be adjusted over time in line with new developments, e.g. new encryption technologies.

It should be kept in mind that the person who wishes to rely on the secret nature of specific information bears the burden of proof that the information in question fulfils the criteria of trade secrets. When assessing the measures taken to keep the information secret, it should nevertheless be noted that smaller companies, in particular, often do not have the power to impose particularly wide-reaching protective measures on their contracting partners.

The Directive also does not deal with the distinction between industrial and commercial secrets. There should not be any doubt, however, that the rules contained in the Directive apply to both technical and commercial information.

The protection provided by the Directive does not apply to "trivial information" or "experience and skills gained by employees in the normal course of their employment," nor does it apply to "information, which is generally known among, or is readily accessible to persons within the circles that normally deal with the kind of information in question".

The current German case law recognises that there is also a negative interest in the non-dissemination of information, which is also protected. Accordingly, a trade secret did not need to have a specific asset value. It was sufficient if the dissemination of the information could have negative effects for the company, particularly if third parties, such as competitors, were to gain access to this information.

This approach cannot easily be maintained under the Directive. It seems at least that "commercial value" and an "interest in the non-dissemination" are not always congruent. Under the Directive it will be necessary for the protected information to embody a real or potential commercial value. The information will not necessarily have such a value if only negative effects of dissemination are concerned. Such information does not have productive asset values.

Certainly, it could be argued that the commercial value lies in the impact of the information on the competitive position. This argument is not very convincing, however, in light of the approach taken by the Directive. Naturally, all information (e.g. a risqué political relationship) can have a monetary value. Within the framework of the Directive, however, the question is whether the information itself has a commercial value because it is secret. Information without any commercial value are not covered by the Directive, even if the proprietor has an interest in keeping such information secret.

Regardless of these considerations, even after the Directive has been transposed, it will not grant any subjective rights to trade secrets that would put the proprietor in a similar position to that of the owner of a patent or other intellectual property right. The Directive cannot create such a right because as soon as the information is disclosed, it is no longer a secret and therefore no longer falls within the protective scope of the Directive. The question of "ownership of information", which is becoming even more pressing with the move towards Industry 4.0, also remains unanswered. The rules established in the Directive remain at the level of protection against access.

Challenges for legal enforcement

One of the core problems of the protection of confidential information often is the legal enforcement of such rights. The main difficulty often lies in sufficiently describing the infringing act in a claim, without actually revealing the secret. Demonstrating monetary damages is also difficult.

On this issue, the Directive requires Member States to ensure that those involved in such proceedings may not use or disclose any trade secrets, which the courts have identified as confidential and of which the person has only become aware as a result of the court proceedings. This rule, however, only applies where a trade secret is also the direct subject matter of the proceedings in question. The Directive expressly does not apply to legal proceedings, which have a different subject matter and in which the trade secret is, for example, only disclosed as part of the presentation of the case and evidence.

Conclusion

In summary, it remains to be said that the Directive does not create any additional exclusive intellectual property right. Even after the Directive has been transposed, the proprietor of information will remain primarily responsible for its protection. He must take active measures to protect against disclosure. Should he fail to do so, he cannot expect any protection from the Directive. There is, however, a close relationship between the obligation to take reasonable steps to keep the information secret and the requirements of data protection and IT security. For companies, a coherent approach made up of contractual, technical and organisational measures is therefore advisable. This minimises risks and significantly reduces the costs of implementation.

Helen Trimbusch, LL.M.,
Lawyer,
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH,
Dusseldorf

Mathias Zimmer-Goertz,
Lawyer,
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH,
Dusseldorf

II. For greater efficiency – New DIS Arbitration Rules entered into force on 1 March 2018

Some areas of life, such as M&A agreements and international trade, are difficult to imagine without arbitration agreements. In many cases, the parties have agreed to use the arbitration rules of the German Arbitration Institute (*Deutsche Institution für Schiedsgerichtsbarkeit e.V. or DIS*). The DIS has now modernised its twenty-year-old arbitration rules and adopted new rules, which entered into force on 1 March 2018. The new DIS Arbitration Rules apply to all arbitration proceedings initiated after 28 February 2018. They contain numerous changes including: (i) shorter time limits, (ii) obligatory case management conferences, (iii) the so-called Arbitration Council and (iv) changes to the costs. In other areas, the rules have been modified to bring them into line with international standards (multi-party arbitration, joinder, consolidation of proceedings) and to transcribe the prevailing practice into written rules. The main objective of the new rules is to expedite proceedings through efficient procedures.

Shorter time limits for efficient proceedings

In order to streamline administrative proceedings carried out by the DIS, the new 2018 DIS Arbitration Rules contain shorter time limits:

- The time limit for nomination of both a co-arbitrator by the respondent and the chairman of the arbitral tribunal was reduced from 30 to 21 days.
- The deadline of 45 days for filing the answer to the request for arbitration starts with the date of transmission of the request. This deadline can be extended upon request only once for a maximum of 30 days. Unlike under the old rules, where the deadline did not start until after the complete appointment of the tribunal – which could sometimes take several months – the new rules necessitate that the respondent immediately begins with the response to the request for arbitration. It is no longer possible to defer the response.
- The final award shall be submitted to the DIS for review within three months after the last oral hearing or the last authorised submission. Until now, the final award had to be issued within "*reasonable time*".

At the same time, the 2018 DIS Arbitration Rules rely on monetary incentives to encourage parties and arbitral tribunals to maintain efficient proceedings. The arbitral tribunal can take the conduct of the parties into account in its costs decision. It is not the arbitral tribunal but the DIS Arbitration Council, which decides on the arbitrator's fees when the arbitration proceedings are terminated prior to the making of a final award. To encourage compliance with the three-month deadline for the submission of the final award to the DIS, the DIS Arbitration Council has been given the power to reduce the fees received by the arbitrators when the Council is of the view that – in light of the circumstances of the case – the arbitral tribunal took too long.

Compulsory early case management conference

While many arbitrators already regularly used it, it is now expressly regulated under the 2018 DIS Arbitration Rules and compulsory: an early case management conference. This must be held no more than 21 days after the tribunal has been constituted. In addition, the 2018 DIS Arbitration Rules specify a "*binding agenda*" for these conferences. For example, the tribunal must discuss with the parties whether and to what extent measures can be applied to increase procedural efficiency (Annex 3 to the 2018 DIS Arbitration Rules) or whether the expedited proceedings (Annex 4 of the 2018 DIS Arbitration Rules) should be used, and whether other alternative dispute resolution procedures could be utilised to reach an amicable settlement. In addition, a special feature has been retained, which requires DIS arbitral tribunals – like every German judge – to promote amicable solutions for the whole or part of the dispute at all phases of the proceedings. However, an arbitral tribunal may only provide a preliminary assessment of the factual and legal positions of the parties so as to encourage such solutions if there are no objections from the parties. The DIS seeks to use mandatory case management conferences and binding agenda to avoid the reflexive use of time-consuming and costly instruments and instead to ensure that all parties take informed decisions in favour of the arbitration process and thereby better manage the time and costs of the arbitration. It is for this reason that not only the representatives of the parties but also the parties themselves should take part in case management conferences.

DIS Arbitration Council: expert council for procedural questions

The 2018 DIS Arbitration Rules introduce a new body with wide-ranging institutional responsibilities: the DIS Arbitration Council.

The DIS Arbitration Council shall consist of at least 15 members, who have practical experience in national and international arbitration and, as a group, are of at least five nationalities. Evidently the DIS Arbitration Council also serves to promote the internationalisation of the DIS. The members are appointed by the DIS Board of Directors for a term of four years. The DIS Arbitration Council has been given a number of administrative duties, which were previously assigned to arbitral tribunals. To this end, the new arbitration rules give the DIS Arbitration Council wide-ranging duties.

The DIS Arbitration Council not only decides challenges to arbitrators and on the removal of arbitrators from office, but it also plays a significant role in the question of fees for arbitrators. The DIS Arbitration Council is responsible for setting the level of fees for the arbitrators when the arbitration proceedings are terminated prior to the making of a final award, and can reduce the fees of any arbitrators at its own discretion, when it considers that these arbitrators delayed proceedings. In contrast to original intentions, the DIS Arbitration Council has not assumed the duties of the DIS Appointing Committee, which remain unchanged.

Costs

There are a number of changes to costs as well: the administrative fees have been increased. The minimum fees are now EUR 750 instead of EUR 350. The maximum amount that the administrative fees can be increased where there are more than two parties has been increased from EUR 15,000 to EUR 20,000. At the same time, the percentage that the administrative fees can increase for each additional party has been reduced from 20 percent to 10 percent. In many cases, multi-party arbitration should therefore be cheaper under the 2018 DIS Arbitration Rules.

Arbitrators' fees were also adjusted. Where the amount in dispute is less than EUR 100,000, the arbitrators will receive less than under the old rules. Where the amount in dispute exceeds this level, the fees essentially remain unchanged. The exception: like administrative fees, the arbitrators' fees for multi-party proceedings have been decreased from 20 percent to 10 percent for each additional party.

The DIS, rather than the tribunal, requests the deposits for fees and administers them.

Multi-contract arbitration, multi-party arbitration and joinder of additional parties

Due to the increasing complexity of legal disputes over the last twenty years, the DIS felt compelled to introduce rules for the first time to address multi-contract and multi-party arbitration and the joinder of additional parties. These are some of the most difficult and most complex subjects of arbitration law. The new rules are based on three basic principles:

- The arbitral tribunal shall only decide disputes. In contrast to other institutions, the DIS does not make *prima facie* decisions on jurisdiction.
- Considerations of expediency do not play a role in the decision.
- The basis is always and only the arbitration agreement between the parties, the content and scope of which may require interpretation.

Third party notices of an action, as are recognised under the German Code of Civil Procedure (*Zivilprozessordnung*) and which are often necessary, still may not be used in arbitration proceedings; it is a short time frame for the joinder of additional parties: a party only has time until the arbitrator has been appointed to file a request for arbitration against an additional party. Unless there are clear rules in an arbitration agreement, the 2018 Arbitration Rules are unlikely to offer the parties much assistance in this respect.

Conclusion

Despite numerous changes, the 2018 DIS Arbitration Rules are still breathing in the spirit of their predecessors in various aspects: even if they have not been adopted word-for-word, they have been adopted in substance. The 2018 DIS Arbitration Rules are modern and flexible rules of procedure. In this respect, the DIS refused to follow the zeitgeist and made a conscious and appropriate decision e.g. against the adoption of measures for procedural efficiency based on the value in dispute, and against emergency arbitrators. The latter decision reflects the desire of the DIS to wait for the reform of the German arbitration law (10th Book of the German Civil Code), which has been in preparation for some time now.

Both proficient and inexperienced users will soon become familiar with the 2018 DIS Arbitration Rules: they are similar to the rules of arbitration of other arbitration institutions. However, only time will tell whether the new rules achieve their intended aims of attracting a greater number of international cases for the DIS and making arbitration more expedient and less expensive than before.

Dr Ralf Hafner, M.Sc.,*
Lawyer,
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH,
Munich

Katharina Hoffmann,
Lawyer,
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH,
Munich

* Dr Ralf Hafner was a Member of the DIS Expert Committee for the Reform of the DIS Arbitration Rules. He is regularly acting as party-representative in arbitration proceedings or nominated as an arbitrator.

III. The new German competition law in a nutshell

The reform of the German Act against Restraints of Competition entered into force in 2017. It adapts German competition law to the digital era, implements the EU cartel damages directive and introduces liability for parent companies for competition law violations carried out by subsidiaries.

Tighter regulation of the digital economy

On the internet, competition is one click away – or is it? At least, market shares are not as conclusive for the assessment of market power as they are elsewhere. That's why German authorities and courts will rely less on them and more on switching costs, network effects, multi-homing, data access and competitive pressure from innovation. These criteria are now explicitly enshrined in German competition law. This should make it easier to investigate and sanction abusive practices in two-sided markets, such as social networks, dating sites and booking services.

Two-sided markets often use two-sided pricing: one side of the market, typically the user side, is not charged fees for using the platform; instead, the platform is financed by revenue from e.g. advertisers or hotel commission fees. The German Federal Cartel Office and German courts have scrutinised platform markets in the past. However, there was some debate in Germany as to whether a market without any direct monetary consideration is a market at all. The amendment's answer is a resounding, "Yes, a market without direct monetary considerations is still a market for competition law purposes." This clarification strengthens the legal basis for investigating abusive practices in platform markets. The German Federal Cartel Office can therefore be expected to step up its enforcement activities regarding internet platforms.

From competition authority to consumer protection authority: The German Federal Cartel Office may now initiate sector investigations to examine significant, continuous or repeated violations of consumer protection laws (e.g. in terms and conditions). This new power targets wide-spread interference with consumer laws in the digital economy but may be utilised for any industry. The German Federal Cartel Office has already set up a new dedicated division and launched sector inquiries into online price comparison websites and into how smart TVs handle user data.

New merger control obligations

The legislative reform introduces an additional merger control threshold based on the transaction value. In the digital age, turnover alone sometimes no longer reflects the competitive significance of a company. This may be the case, for example, where the business model is based on attracting a critical mass of users first and only then starting to sell "freemium" products or customer data. Facebook's acquisition of WhatsApp – which did not require notification under German merger control rules – was a wake-up call in this respect. This amendment, however, applies to all industries, not just the digital economy.

A transaction now needs to be notified to the German Federal Cartel Office if:

- the combined worldwide turnover of all companies exceeds EUR 500 million;
- at least one company has a turnover in Germany exceeding EUR 25 million; and
- (a) at least one further company has a turnover in Germany exceeding EUR 5 million, or (b) the transaction value (i.e. the purchase price plus liabilities) amounts to more than EUR 400 million and the target company has significant activities in Germany.

The conditions of the transaction value threshold (i.e. a transaction value of more than EUR 400 million and significant activities of the target company in Germany) are open to interpretation. On 14 May 2018, the German Federal Cartel Office published a draft guidance paper to address the main interpretation issues. According to the guidance paper, the transaction value threshold is not met if the target company's "turnover adequately reflects its market position and competitive potential. This is likely to be the case if the company's products generate significant turnover abroad but not in Germany, for instance, because the company has not (yet) established a sales structure in Germany." In contrast, a high number of active users in Germany (for digital products) or research & development activities in Germany (for pharmaceuticals or (bio-) chemicals) can indicate "significant activities in Germany" and can, in turn, trigger a merger control notification obligation. The guidance paper is available in German and English and can be downloaded from the German Federal Cartel Office's website.

Extended liability for cartel fines

A radical change for corporate liability in Germany: parent companies are now liable for the competition law violations of their subsidiaries. Forget traditional German separation of legal entities doctrine and welcome the EU concept of a single economic entity. What's more, a company's legal or economic successor is liable for the payment of the antitrust fine. Over the past few years, some companies have tried – in at least four cases successfully – to use corporate restructuring to avoid paying a cartel fine. This perceived "gap" in the law has been identified and closed. Parental liability and successor liability are also part of the Commission's proposed ECN+ Directive, which is intended to empower national competition authorities. Both concepts may therefore soon apply in all EU Member States.

For a company found to be involved in a cartel, cartel damages claims may be more expensive than the cartel fine itself. So what about parental liability for cartel damages claims? German lawmakers recognised the issue but decided not to address it. It is now up for the courts to decide. It is not clear, however, if courts really have any leeway for interpretation. In order to comply with the EU Cartel Damages Directive, courts will probably need to apply the EU concept of a single economic entity.

Facilitated cartel damages claims

A claim without enforcement is like a king without a crown. In the past, it has too often been practically impossible to enforce cartel damages claims. This will change. While German lawmakers are sometimes hesitant to give full effect to EU directives, the same cannot be said about the (belated) implementation of the EU Cartel Damages Directive: Germany has not only completed its work in this respect but has put in extra hours to help plaintiffs seeking damages from cartel offenders.

Until now, plaintiffs in Germany have had very limited access to the internal documents of companies involved in cartels. Unlike in the US or UK, discovery proceedings are unknown to German law. The reform introduces explicit rights to demand disclosure of the relevant infor-

mation and documents from the other party and third parties. These rights can be enforced within the context of the action for damages, or on an expedited stand-alone basis.

Costs are the number one problem for plaintiffs seeking cartel damages. The new law comes to their aid – at least in cases where the defendant drags other cartel members into the proceedings. To date, the German loser-pays-all rule has exposed the plaintiff to the risk of having to cover statutory attorney fees for several interveners. These cost risks are now capped.

Further changes: It is now presumed that cartels cause damage. Indirect purchasers benefit from a rebuttable presumption that cartel overcharges were passed on to them. Settlements are encouraged. Liability is allocated. Limitation periods are extended. Limitation periods are suspended for one year after antitrust investigations.

Naming and shaming

The German Federal Cartel Office will publish a detailed decision on its website when fines are imposed for competition law violations; it may also constantly report on its activities. These inconspicuous changes could be mere clarifications, or they could kick-start a more active role of Germany's antitrust watchdog in naming and shaming cartel members and in laying the foundations for successful follow-on claims.

Christoph Heinrich,
Lawyer,
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH,
Munich

IV. Bombshell in commercial tenancy law: Written form curing provisions are invalid and cannot alone prevent written termination!

The judgment of 27 September 2017 of the highest German civil court, the Federal Court of Justice *(Bundesgerichtshof)*, is a bombshell. The effectiveness of so-called written form curing provisions (*Schriftformheilungsklauseln*) had been a topic of much debate in both case law and literature in Germany for many years. In its judgment, the Federal Court of Justice established the general invalidity of written form curing provisions, thus creating greater legal certainty. As a rule, written form curing provisions cannot on their own protect the parties to a lease agreement from receiving written notice of termination – regardless of whether they are the original parties or became a party to the contract at a later date.

Facts of the case

The plaintiff is lessor and the defendant tenant of an office space, which is the subject of a lease agreement dated 8 December 1998. Since the lease agreement was signed, the property was sold by the original lessor to a third party, and then by that third party to the plaintiff through notarised contract of sale dated 8 December 2009; the plaintiff was registered as owner in the lands title registry on 16 December 2009. On 16 December 2009, an Addendum to the lease agreement was signed together with the previous owner, which, among other things, extended the term of the lease until 31 May 2020. In addition, section 7 of the Addendum established the following written form curing provision:

"*The Parties mutually undertake [...] at all times to take all such actions and provide all such declarations as are necessary to meet the statutory written form requirement under § 550 German Civil Code (Bürgerliches Gesetzbuch, BGB) in particular in connection with the conclusion of this Addendum and further addenda, and cannot rely on the failure to comply with the written form requirement in order to prematurely terminate the lease agreement.*"

By letter of 15 January 2011, the plaintiff sought a change to the agreed indexation clause, whereby the 10 percent threshold, which had to be reached in order for there to be an adjustment of the rent, would be reduced so that a rent index of just 5 percent would result in an adjustment of the rent. Upon receipt of the letter, the defendant wrote, "6 percent agreed" on the letter, countersigned it and sent it back to the plaintiff. Based on this amended agreement, the rent was adjusted in May 2011 and the defendant paid the revised amount in full. By letter of 20 June 2014, the plaintiff gave written notice of ordinary premature termination of the lease agreement as of 31 December 2014, contrary to the agreed fixed term of the lease of 31 May 2020. Moreover, the termination relied on an infringement of the written form requirement.

At the first instance, the claim to vacate and surrender the property was dismissed; the appeal was also not successful. The court held that an agreement of a new rule on rent adjustments was a fundamental change that therefore fell under the written form requirement of § 550 BGB. The exchange of the letter failed to fulfil this written form requirement, so that an ordinary and premature termination of the lease agreement could be considered. However, the written form curing provision in section 7 of the Addendum prevented the plaintiff from relying on an infringement of the written form requirement in good faith in order to terminate the lease agreement because the acquirer had brought about the infringement of the written form requirement with knowledge of the written form curing provision that bound the parties.

Judgment

The Plaintiff lost the appeal; though the Federal Court of Justice reached the same conclusion as the Court of Appeal, the reasoning of the two courts differed.

The Federal Court of Justice confirmed the Court of Appeal's view that the amendment to the rent adjustment provision in 2011 infringed the written form requirement of § 550 BGB. As a result, the Court of Appeal was also right in holding that the plaintiff was barred from relying on this infringement in good faith. However, such an act of bad faith would not arise from the written form curing provision found in section 7 of the Addendum.

Instead, the Federal Court of Justice held that any general obligation on a lessor and tenant, such as that used in the dispute in question, is illegal if it would prevent the use of an infringement of the written form requirement of any nature as grounds for termination of a lease contract, regardless of whether the obligation in question is part of an individual contract or is found in general terms and conditions. The written form requirement in § 550 BGB is mandatory law. According to established jurisprudence of the highest courts, the purpose of this provision is not only to ensure that a subsequent purchaser, who becomes a party to the lease agreement by act of law, can see the conditions of the lease from the written lease agreement. On the contrary, § 550 BGB also serves to ensure that long-term understandings can be proven, even when they are between the original contractual parties, and to protect the parties against entering into long-term commitments without being aware of all the facts.

So-called written form curing provisions are therefore incompatible with non-negotiable § 550 BGB and, as a result, are invalid. Such provisions would otherwise have the result that the contracting parties would be bound by an agreement that is not in writing. This would undermine the protection against blindly entering into agreements, which § 550 BGB also aims to provide, and largely drain § 550 BGB of its effectiveness as an important warning function.

Nevertheless, the Court held that the earlier instances had reached the correct result in the case because the plaintiff's reliance on an infringement of the written form requirement lacks good faith. It must be assumed that it is an act of bad faith when one contracting party – as is this case – uses the form of an agreement, which was later reached and was in that party's favour, as an opportunity to prematurely terminate a lease agreement which is no longer convenient for the party.

Practical hints

The judgment of the Federal Court of Justice confirms the axiom that maximum care is required with long-term lease agreements and with any subsequent amendments. Material agreements and significant amendments must always be set out in writing in compliance with § 550 BGB. The question of whether the agreement is material is to be assessed objectively and not subjectively on a case-by-case basis. Contracting parties should therefore not rely on a court finding that a specific contractual amendment is immaterial.

Florian Baumann,
Lawyer,
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH,
Munich

V. Update – The new Transparency Register in practice

In our December newsletter, we explained the basic principles of the transparency register in Germany, which was instituted on the basis of the Fourth EU Laundering Directive. Since then, we have gained practical experience of these registers in Germany and in other European countries, where there are often called ultimate beneficial owner register, and a number of further new features have been introduced. Time for an update:

Who has to report?

Amendments to the German money laundering law, which implemented the Fourth EU Money Laundering Directive in Germany, failed to regulate numerous questions about reporting obligations. The Federal Office of Administration (*Bundesverwaltungsamt*) has since published general guidance on Frequently Asked Questions on its website (see www.bva.bund.de-> Themen-> Verwaltungsdienstleistungen-> Transparenzregister-> FAQ). Even if there is still some uncertainty, the general principles about who has to report can be summarised as follows:

Basically, there is a double reporting obligation: one reporting obligation on the shareholder of the company as the beneficial owner and another reporting obligation or obligation to provide information about the beneficial owner on the company itself.

The reporting obligation affects all those, who are established in Germany and who are:

- legal persons under civil law:
  stock corporations (*AGs*), limited liability companies (*GmbHs*), limited liability entrepreneurial companies (*Unternehmergesellschaft*), cooperatives, foundations, *Societas Europaea* (*SE*), partnerships limited by shares (*KGaA*) or associations;
- registered partnerships:
  general commercial partnerships (*OHGs*), limited partner-

ships (*KGs*), limited partner-ship with a limited liability company as the general partner (*GmbH & Co. KG*), partner companies, or;

- trusts or trustees and other legal forms, which resemble trusts or trustees in their structure and function.

Under certain circumstances, foreign shareholders can also be subject to reporting obligations and also the company itself must seek the necessary information from such shareholders.

What information has to be provided?

The following information must be provided about beneficial owners for the transparency register – via the internet platform of the Federal Gazette (*Bundesanzeiger*, under www.transparenzregister.de): family and given names, date of birth, residential address, nature and extent of the beneficial owner's economic interest.

The nature and extent of an economic interest normally relate to the number of shares held, the extent of voting rights, the ability to exercise control by other means (e.g. on a contractual basis) or any function as legal representative, managing director or managing partner.

Trusts, certain unincorporated foundations and similar legal forms must also report the nationality of the beneficial owners to the transparency register.

Who can access the register?

Until now, certain authorities, such as law enforcement agencies or federal tax authorities, could access the transparency register without any further requirements. In addition, "anyone" who could show that they have a "legitimate interest" could access the register. In the future, it will no longer be necessary to show a "legitimate interest". In accordance with the new Fifth EU Money Laundering Directive, which should soon enter into force because the European Parliament gave its assent on 19 April 2018, the EU Member States are required to allow access to the transparency register to anyone who seeks it. At least the name, month and year of birth, country of residence and nationality of any beneficial owners, as well as the nature and extent of the economic interests of those beneficial owners should soon be accessible to any person.

What exceptions are there to the reporting obligation?

The reporting obligation does not apply where the information is already electronically available in other public registers and sources, e.g. in Germany in the commercial register, partnership register, the register of cooperatives, the register of associations or the business register.

However, registering a foundation in one of the existing foundation registers at regional level will not release the foundation from the obligation to register in the transparency register, as there is still no foundation register at federal level.

In principle, companies, which are listed on a regulated market or which must publicly disclose their voting rights under EU law (e.g. companies listed on a stock exchange), are not subject to the reporting obligation.

If a current list of the shareholders of a limited liability company and all necessary information is available in an electronic form in the commercial register, it is not necessary to make an additional report to the transparency register.

What fines can be imposed for infringements?

Infringements of the reporting obligation are administrative offences and a fine of up to EUR 100,000 can be imposed for simple violations, while fines of up to EUR one million or up to twice the amount of the economic advantage gained from the violation can be imposed for serious, repeated violations.

At the end of February 2018, the Federal Office of Administration provided more information on this general framework when it published on its website a detailed catalogue of fines for violations in connection with the transparency register (see www.bund.de-> Themen-> Verwaltungsdienstleistungen-> Transparenzregister-> Bußgeldkatalog). According to this catalogue, the calculation of fines will be based on various multiplying factors (including the financial circumstances of the company and the gravity of the infringement) and is at the discretion of the competent authority. In the meantime, we have heard reports of the first decisions imposing six figure fines, some of which were imposed without the party concerned first being heard.

There are still a number of open questions in relation to fines, e.g. how numerous infringements will be handled or the question of a prior warning and/or hearing, etc.

How was the Fourth EU Money Laundering Directive transposed in other EU Member States?

Like Germany, most EU Member States have already established their own central register (transparency register or ultimate beneficial owner register) or have at least gotten their register off the ground. Beneficial owners had to register, e.g. until 1 December 2017 in Denmark, until 19 January 2018 in Slovenia, until 1 February 2018 in Sweden and until 1 April 2018 in France. In Austria, there is an obligation to register by 1 June 2018, in the Czech Republic by 1 January 2019 and in Finland by 30 June 2019 at the latest. The UK already introduced a central beneficial ownership register in 2016.

Just as there are major differences in the timing of the implementation of the Fourth EU Money Laundering Directive, there are also some differences in content and some special features of the implementation in certain EU Member States. In each case, the specific registration obligations in each relevant Member State should be checked, together with the question of whether registering in other registers is deemed as a release from any additional notification requirement– as is the case in Germany – or whether there are explicit obligations

to make inquiries. In Belgium and Sweden, for example, company management must collect internal documents detailing the gathering of information about the existence of beneficial owners, and must provide this documentation upon request from the national authorities.

It could also be interesting to follow the developments in online registration under the newly established transparency register (the so-called *UBO Register*) of the Dutch Chamber of Commerce (*kamer van koophandel* – kvk). In contrast to Germany, there was no obligation under Dutch law to release lists of shareholders until recently. This often made it difficult or cumbersome to identify the persons or companies behind a Dutch (holding) B.V. The introduction of the UBO Register should make accessing such information significantly easier in the future.

Conclusion

As the EU Member States have implemented the Fourth EU Money Laundering Directive at different speeds and the content has not been transposed identically, it is recommended that the legal position in each relevant country is always be checked when a shareholder with a registered address in Germany is the beneficial owner or board member of a company in another EU Member State and, vice versa, when a shareholder or board member of a company in Germany has his registered address in another EU Member State. In light of the significant fines that can also be imposed against members of governing boards of companies, and the fact that in some countries, such as France, prison sentences of up to six months can even be imposed, we recommend that you seek legal advice early on. BEITEN BURKHARDT's team of experts is ready to assist you, should you have any questions.

Regine Nuckel,
Lawyer, Licensed Specialist for Tax Law
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH,
Dusseldorf

VI. BEITEN BURKHARDT continues Start-up/Venture Capital Workshop Series in Germany

After the positive feedback received last year, BEITEN BURKHARDT has decided to hold its Start-up and Venture Capital series of workshops again in 2018. With two additional topics, the workshops will be held in Berlin, Dusseldorf, Frankfurt, Hamburg and Munich – the German cities where we have our offices. The first series of workshops, which was held in March, dealt with preparing for a financing round from the perspective of a start-up and the significant steps and things to consider in advance – from integrated budgetary accounting to valuation issues and the essential elements of a term sheet. This workshop included a realistic case study, which was simulated in a small, select group. The next series of workshops will be held in June and will focus on the negotiation of a participation agreement. As part of the live workshop, the participants will face off against one or two representatives of venture capital firms to negotiate the most important provisions of a term sheet in a realistic atmosphere. Participants will receive a short introduction and individual coaching on each term sheet provision in preparation for these live negotiations.

BEITEN BURKHARDT's multi-disciplinary Start-up and Venture Capital group spans our network and provides advice and support to start-ups, venture capital firms, business angels and corporations throughout start-up, participation and investment rounds, during roll-outs, and exits, and with various other projects. Our Venture Capital Team can always rely on the specialist knowledge of BEITEN BURKHARDT colleagues in related fields of law and expertise.

VII. About the Dutch Desk

The economic relations with The Netherlands are at the centre of our "Dutch Desk" in Dusseldorf, where we manage the cases also in Dutch. Our support goes well beyond pure legal advice, as we also provide contacts to politics and economy. Dutch enterprises who want to be active in Germany receive comprehensive advice on all stages of their business activities, with a particular focus on corporate and employment law. Projects in the Netherlands are being managed in cooperation with our colleagues in Dutch partner firms.

In order to support our clients in general economic issues and in establishing contacts, we network with chambers of commerce, business associations and the Consulate General.

Our "Dutch Legal Day" is another special tool we have established for our Dutch and German clients enabling them to share their experiences, and to meet with lawyers from the Dutch partner firms and well-known personalities and deciders from politics and economy.

VII. About the Corporate / M&A practice group

Corporate

BEITEN BURKHARDT has been at the forefront of some fundamental corporate law developments, such as delistings and squeeze-outs. Our practical advice takes into account the economic aspects and provides creative solutions, without compromising on legal standards. BEITEN BURKHARDT advises listed corporations, companies and groups that are active on the international stage, medium-sized companies and family-owned partnerships. We establish and restructure companies and groups, develop stock option programmes, and provide support both during shareholders' meetings and in the case of disputes.

M&A

Mergers & Acquisitions has been a core area of expertise for BEITEN BURKHARDT since the establishment of the firm. We advise well-known listed companies, large and medium-sized companies and the public sector, as well as financial investors, on national and international mergers, public takeovers, company acquisitions or sales from private investors.

Please note

This publication cannot replace consultation with a trained legal professional.

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Editor in charge

Thomas Seipel

Your Contacts

Beijing • Suite 3130, 31st floor • South Office Tower • Beijing Kerry Centre • 1 Guang Hua Road • Chao Yang District • Beijing 100020
Susanne Rademacher
Tel.: +86 10 8529-8110 • Susanne.Rademacher@bblaw.com

Berlin • Kurfuerstenstrasse 72-74 • 10787 Berlin
Dr Christian von Wistinghausen
Tel.: +49 30 26471-351 • Christian.Wistinghausen@bblaw.com

Brussels • Avenue Louise 489 • 1050 Brussels
Dietmar O. Reich
Tel.: +32 2 6390000 • Dietmar.Reich@bblaw.com

Dusseldorf • Cecilienallee 7 • 40474 Dusseldorf
Regine Nuckel
Tel.: +49 211 518989-114 • Regine.Nuckel@bblaw.com

Frankfurt am Main • Mainzer Landstrasse 36
60325 Frankfurt am Main
Dr Detlef Koch
Tel.: +49 69 756095-408 • Detlef.Koch@bblaw.com

Hamburg • Neuer Wall 72 • 20354 Hamburg
Oliver Köster
Tel.: +49 40 688745-118 • Oliver.Koester@bblaw.com

Moscow • Turchaninov Per. 6/2 • 119034 Moscow
Falk Tischendorf
Tel.: +7 495 2329635 • Falk.Tischendorf@bblaw.com

Munich • Ganghoferstrasse 33 • 80339 Munich
Dr Maximilian Emanuel Elspas
Tel.: +49 89 35065-1242 • Maximilian.Elspas@bblaw.com

St. Petersburg • Marata Str. 47-49, Lit. A, Office 402
191002 St. Petersburg
Natalia Wilke
Tel.: +7 812 4496000 • Natalia.Wilke@bblaw.com

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