CLIFFORD
CHANCE

Autumn 2009

Real Estate Newsletter

Contents:

Introduction	1
Factory Outlet Center: A catch-up race begins in Germany	2
Restructuring of securitised real estate loans from the borrower's perspective	5
Offshore Windparks – recent changes in German permit law	6
"End of the lease" Problems and risks faced by lessors at the end of the lease relationship	8
Law regarding electronic data trans-mission systems and elec-tronic files in land register matters	11
Liability of vendors of real estate for asbestos contamination: New Federal Supreme Court decision	12
New developments regarding mandatory Europe-wide tenders for urban development contracts	13
Attachment	16

Welcome to the Autumn 2009 edition of the Clifford Chance Real Estate Newsletters. In the lead up to the opening of the EXPO REAL Munich 2009, this issue will once again bring you up to speed with the latest developments and news on real estate-related and real estate financing issues.

Outlet Centers – The perfect investment in this time of crisis? A guest article co-authored by Dr. Will and Jan Schwarze from ecostra addresses the latest developments in the Outlet Centers market and points out that Germany has considerable ground to make up in this market which offers attractive investment opportunities for investors. Another guest article co-authored by Oliver Kronat and Fabian Marschall deals with the issue of the restructuring of securitised real estate loans from the borrower's perspective. In many cases, parties using securitisation structures only recognise that decision-making processes and restructurings are far more complex than conventional financing that still appears "in the bank's books" once the crisis has already begun. Offshore wind farms are currently at the forefront of attention amongst energy generating companies and investors. Ferdinand Kuchler and Martin Spieler outline the approval process in Germany as well as the latest developments. Barbara Rybka and Christian Trenkel cite a recent German Federal Supreme Court ruling to illustrate the problems and risks faced by lessors at the end of a lease.

Especially in times of crisis, lessors should be alert to the possible pitfalls during the settlement process and potential damage. Gerold Jaeger and Henning Aufderhaar discuss recent advances in the field of electronic Land Registry processing systems. As of 1 October 2009, numerous Land Registry transactions which have hitherto been paper-based will also able to be conducted in electronic form. Klaus Minuth and Gerold Jaeger Recent also provide an overview of recent case law of the German Federal Supreme Court regarding

This Newsletter is for general information purposes only and is no substitute for legal advice. If you would like to know more about the subjects covered in this publication or our services, please contact your usual Clifford Chance contact or:

Dr. Oliver Kronat +49 69 7199 4575

Prof. Dr. Ferdinand Kuchler +49 89 21632 8436

Dr. Klaus Minuth +49 69 7199 1591

Christian Trenkel +49 89 21632 8314

Steffen Amelung +49 69 7199 1593

Henning Aufderhaar, LL.M. +49 69 7199 1377

Larissa Hartmann +49 69 7199 1368

Dr. Gerold M. Jaeger +49 69 7199 1539

Fabian Marschall +49 69 7199 3308

Barbara Rybka +49 89 21632 8379

Dr. Martin Spieler +49 89 21632 8439

To email one of the above, please use firstname.lastname@cliffordchance.com

Clifford Chance, Mainzer Landstraße 46, 60325 Frankfurt am Main, Germany
www.cliffordchance.com

asbestos-related liability cases. The duty of the vendor to disclose potential risks of asbestos contamination in buildings when selling land is discussed.

In conclusion, Steffen Amelung and Larissa Hartmann address the latest developments regarding the obligation to put urban development contracts out to tender throughout Europe. They also take the opportunity to bring you up to speed with the latest public procurement law news and developments.

We trust that you will find our Newsletter interesting and informative and wish you all the best at Expo Real. While one shouldn't expect miracles from the Expo, as optimism continues to grow, this may spur a turnaround. It is well known that Ludwig Erhard, the father of Germany's economic miracle, stressed that 50 % of macro-economics is psychology. We encourage you to play your part in discovering the light at the end of the tunnel and making visionary projects like the one depicted on our title page to once again become reality and would like to invite you to share a drink at our cocktail party at Hotel Anna on 6 October 2009.

Best regards

Christian Trenkel Gerold M. Jaeger

EXPO Real 2009

Save the Date

Cocktails in the Hotel Anna bar

Date: Tuesday, 6 October 2009 at 10 p.m.

Venue: Hotel Anna bar,
Schützenstraße 1, 80335 Munich

If you have not received an invitation, please contact nicole-christine.hoffmann@cliffordchance.com.

Factory outlet centers: A catch-up race begins in Germany

Germany is an island in Europe. This holds true, at any rate, when one compares the number and the size of Factory Outlet Centers (FOCs) in Germany to the relevant figures for other European countries. In western Europe, apart from Germany, FOCs are an established component of the retail trade landscape. But a catch-up race has now begun in Germany. International FOC operators are intensively exploring the market. Planning proceedings are under way at a large variety of different locations and more and more building permits are being granted for the construction of such centers.

According to materials published by the Wiesbaden research center ecostra, there are currently 141 FOCs with a total sales area of more than ".2 million m² in operation in Europe and another 88 FOCs in planning with the planning process being quite advanced in some cases and less advanced in others. Eight new FOCs were opened in different European countries over the past 12 months (+6:0 %) and the total sales area grew by almost 220.000 m² (+10:9 %) over this period of time.

Outlet Centers benefit from the economic crisis

This upward trend has become increasingly dynamic over the last few years. In Italy alone, the number of outlet centers grew from four in 2003 to 25 in 2009 and 15 further centers are under construction or being planned in that country, which is the most popular destination of German holiday-makers. During the same period the number of FOCs in Spain has doubled from 9 to 18. Presently, there are 18 FOCs in France and as many as 41 in Great Britain. The development of this form of retail trading is being accelerated by a growing demand by manufacturers and licensees for shop premises in FOCs. The current economic crisis is further contributing to the growth of these bargain-buy centers. Retailers going out of business increase the pressure on manufacturers to use alternative distribution channels. Many manufacturers of branded name goods have found that well-managed FOCs at suitable locations do not significantly harm their existing distribution channels and this has led to a rethink. Manufacturers no longer regard FOC stores as being merely an escape valve for seconds and returns, but now view them as "profit centers". All leading FOCs in Europe have waiting lists for would-be tenants.

FOC Developers switched to foreign locations close to the German border

However, the number of FOCs in Germany is still comparatively small. This is due to, amongst other things, stiff resistance from retailer organizations over a long period of time, coupled with restrictive permit-granting policies of the public authorities. Therefore, some developers and operators of FOCs preferred to chose locations just across the German border where they can nevertheless absorb the buying power of German consumers. Attractive outlet centers are able to attract

© Clifford Chance, Partnerschaftsgesellschaft von Rechtsanwälten, Wirtschaftsprüfern, Steuerberatern und Solicitors · Sitz: Frankfurt am Main · AG Frankfurt am Main PR 1000 · September 2009

customers within a radius of a 90 minute car drive or more, making it quite possible to attract customers from beyond national borders. One example for this is the designer outlet in Roermond, Netherlands. According to figures provided by the management of that center, 65% of its customers come from Germany. On public holidays or if the center opens on a Sunday as much as 85% of its customers come from Germany. Moreover, the Roemond center is authorized to open every Sunday all year round, which would be quite impossible in Germany. Other such "beggar-my-neighbour" locations will follow: An outlet center with 28,000 m² will open just outside Salzburg in Austria in autumn 2009 and is expected that a large portion of its customers will come from Bavaria. The construction works for a 23,000 m² FOC in Roppenheim, France, started last year. This FOC in the immediate vicinity of Karlsruhe and Baden-Baden is likewise expected to attract many customers from Germany and is scheduled to open its doors in March 2011. Let it be reminded that just under 10 years ago two attempts by different would-be operators to build a FOC on the German side of the border failed because the requirements imposed by the relevant approval authorities were too strict.

"Go East": High hopes regarding Eastern Europe

Against the background of increasing competition in Western EU countries and also as a reaction to high approval requirements in some of these countries several FOC operators and project managers have begun to move into the East European phare countries. FOCs are already well established in the retail world in Poland, where six such centers are already open and another 7 are currently in the planning stage. FOC-developers are also turning their attention to Russia as a place for investment. Projects near Moscow and St. Petersburg are already under way. However, most FOC operators and investors still see the East European markets as markets of the future. Currently, almost all products sold in the existing centers still fall within the lower and middle-of-the-range price categories, while premium products are still rare exceptions in Eastern European FOCs. Especially the Russian market poses problems because the license rights for the sale of brand name products are almost all held by an oligopoly consisting of four enterprises, namely the Crocus Group, Mercury, Jamilco / LBV and Bosco di Ciliegi. Unless at least one of these enterprises is willing to cooperate it will be very difficult to find tenants for a FOC premises. This situation is likely to have major effects on any FOC developments in Russia for quite some time to come. However, the financial crisis had even greater adverse effects since it made most investors shy away from projects in Eastern Europe for the time being.

Germany: Restrictive permit granting policies of public authorities are partly eased

In contrast to Eastern Europe, it is not the financing, put the procurement of a building permit which poses most problems in Germany. Given the size and the attractiveness of the German market it must be said that FOC development in Germany has taken place "with the handbrake on" up to now. The total number of outlet centers in Germany rose to a mere 6 with the opening of the designer outlet in Wolfsburg in December 2007. The purchasing power and the brand-consciousness of German consumers offer an excellent basis for the success of further FOC projects. The principal reasons for the slow progress made in this field is attributable to the fierce resistance put up by retailer organizations as well as the partly highly restrictive permit-granting policies of the public authorities. One example for this is the development program on state level of the Land of North Rhine-Westphalia, which makes it almost impossible to realize any FOC projects. However, other German Länder are more open-minded in this respect, at least as regards a certain selection of potential locations.

Rising number of FOC projects approved by German authorities

There are increasing signs that the resistance to FOC projects is waning. The number of permits granted for the construction of new centers or the extension of existing centers is slowly growing. Some months ago the first part of the entirely newly conceived B5 Designer Outlet Center in Wustermark (Brandenburg) was opened. In the last few months permits have been granted for the construction of new centers in Montabaur (Rhineland Palatinate), Wadgassen (Saarland), Neumünster (Schleswig Holstein), Wiedemar (Saxony Anhalt) and Soltau (Lower Saxony). Moreover, the sales areas of the outlet centers in Zweibrücken (Rheineland Palatinate), Wertheim (Baden-Württemberg) and Ingolstadt (Bavaria) were extended last year. The administrative proceedings that preceded these extensions illustrate the general change in the attitude of the authorities towards this form of retail trading: while drawn out regional planning proceedings and lawsuits with neighboring municipalities (in some cases involving several appeal proceedings) had to be weathered before these centers could be built, the subsequent extension of the sales areas met with no serious resistance in almost all cases. The general attitude towards FOCs become less prejudiced in Germany than it once was, and in addition thereto the approval authorities now have more experience and information about the possible effects of such centers. Standardized arguments such as "job losses in retail trade" or "desolation of the inner cities" that once dominated all discussions are a thing of the past. Instead, considerations such as the use of synergies or the development of (touristic) destinations have moved to the foreground of the debate.

Exemplary development proceedings in the Luneborg Heath

The proceedings carried through by the state government of Lower Saxony last year for construction of a FOC in the Luneborg Heath were quite remarkable. The general objective was to build an FOC to lastingly promote regional tourism while at the same time making use of synergies with existing facilities. The towns of Soltau, Bispingen and Bad Fallingbostel competed as possible locations of the new FOC. Finally, in February 2009 Soltow was ultimately selected because it already

© Clifford Chance, Partnerschaftsgesellschaft von Rechtsanwälten, Wirtschaftsprüfern, Steuerberatern und Solicitors ·
Sitz: Frankfurt am Main · AG Frankfurt am Main PR 1000 · September 2009

a large and well-known recreational facility called the Heide Park. Market observers believe that this was most probably the most transparent and best-documented development procedure for the construction of an FOC ever carried through in a German-speaking country to date. All relevant documents are freely accessible in the Internet (http://www.rov-foc-online.de). The advantages and other consequences of a decision in favor of selecting any one of the three proposed sites were thoroughly by several specialized institutes. At the same time, the approval authority made full use of all possibilities existing in terms of planning law to ensure that any adverse effects of the project in terms of urban or regional planning would be kept to a minimum. Far-reaching contractual arrangements were made to ensure that the desired effects on regional tourism will indeed materialize. Experts agree that this entire planning and approval procedure was indeed excellent in all respects and will certainly serve as example for similar proceedings elsewhere.

Definition of the term Factory Outlet Center:

A Factory Outlet Center (FOC) is an agglomeration of a large number of shop units within a block or a set of buildings forming one unit and with these shops, the sales area of which must be no less than 5.000 m² in aggregate, being used by manufacturers or vertically integrated retailers to sell discontinued fashion, seconds, excess stocks etc. to final consumers without using retail traders as intermediaries. A center management is responsible for attending to all coordination, organization and marketing requirements.

Based on this definition ecostra considers that the outlet facility in Metzingen, for example, in not a factory outlet center.

Improved choice of FOC operators

The changed attitude of the approval authorities towards FOCs is not the only change that has occurred. The market for FOC operating services has also changed considerably compared to what it was ten years ago when there were only about 5 FOC operators in the whole of Europe managing more than two FOCs. Moreover, these operators had developed the centers virtually all by themselves. This meant that, on the one hand, there were only a few professional FOC operators who dominated the market for such management services, while on the other hand there were also many "lone fighters" providing services of different quality levels. The changes on the European FOC market that have occurred since then are reflected not only by a shift in market shares, but also by a greater degree of professionalization. Factory outlet centers are no longer an entirely new form of retail trading and there is an increasing number of market participants who have experience with real property developments of this kind. These new players on the FOC market are

- project developers that originally specialized in commercial real estate (such as shopping centers and specialized retail centers). These include Stable International (NL), Neinver (E) or Promos Srl. (I)

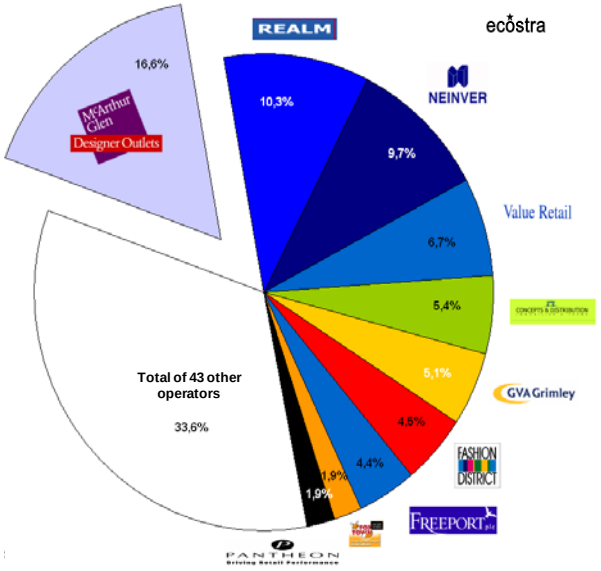
- service providers with experience in letting outlet stores on behalf of large, well-established FOC operators. These include GVA Outlet Services (GB) and CB Richard Ellis (GB, D, F).

- firms newly established by former employees of FOC operators, e.g. BVS Outlet Villages (B, GB) and Pantheon Retail (GB, I)

It should also be noted that several major operators of traditional shopping centers carefully monitor the developments on the FOC market (not only in Germany) and are already preparing plans for entering that market themselves. Therefore, there is a strong possibility that firms that are (currently still) specializing in classical shopping centers will seek to enter this new market very soon.

Top 10 of the FOC operators in Europe 2009

Ranking according to proportion of total FOC sale space in Europe



Source: ecostra-location research, May 2009

Mounting pressure on potential developers

Currently, there are about 20 FOC projects under consideration in Germany, whereby the probability that these projects will actually be realized differs considerably. The FOC boom has had the effect that this form of retail trading is often seen as being a realistic possibility of putting otherwise worthless grassland to a profitable use. There are also many town planners who

© Clifford Chance, Partnerschaftsgesellschaft von Rechtsanwälten, Wirtschaftsprüfern, Steuerberatern und Solicitors · Sitz: Frankfurt am Main · AG Frankfurt am Main PR 1000 · September 2009

dream of transforming depressed urban areas into an outlet center. None of these dreams has been realized to date. The most recent example of this are the dashed hopes of the Hessian town of Idstein.

List of unprofitable FOCs in Europe that had to be closed

Country	Location	Name	Reasons for failure/further information
Austria	Leobersdorf	Leoville Premium Outlet	• Inexperienced operator • Intensive competition with nearby FOC Designer Outlet Parndorf • Owner plans relaunch with new operator
Austria	Vösendorf	Sale City Süd	• Inexperienced operator (only familiar with shopping centers) • Ill-chosen location, unsuitable for a FOC • Intensive competition with nearby FOC Designer Outlet Parndorf
Sweden	Arlandastad	Arlandastad Outlet Village	• Inexperienced operator (this was one of the first projects of OCI Outlet Centres International) • Poor choice of location, unsiutable for an FOC
Sweden	Södertalje	Festival Park Södertalje	• Inexperienced operator
United Kingdom	Dundee	City Quays	• Inexperienced operator • Ill-chosen location, unsuitable for a FOC • Insufficient brand name goods • To be relaunched as a leisure and fashon center
United Kingdom	Haydock	Rolling Stock	• Intensive competition with another FOC
United Kingdom	West Calder	Freeport Designer Outlet West Calder	• Intensive competition with nearby FOC Designer Outlet Livingston
Switzerland	Rümlang	Foxtown Factory Outlet Center Rümlang	• Ill-chosen location, unsuitable for a FOC • Inappropriate concept (including a supermarket) • Has been relaunched as a classical shopping center
Hungary	Budaörs	M1 Outlet Center	• Ill-chosen location, unsuitable for an FOC • Intensive competition with nearby FOCs Premier Outlet Center und GL Outlet Center • Inexperienced operator

Source: ecostra-location research, May 2009

The dreams of several investors who, having no adequate expertise and experience specific to FOCs, have built such centers at unsuitable locations or with an ill-conceived conceptual design. The premium outlet center in Leobersdorf, Austria, in which its investors and developers had placed high hopes, had to be closed last year. The owners of that center are preparing a relaunch, but the prospects of success of these efforts are uncertain. Similarly, an attempt of a shopping center operator to enter the FOC market by setting up such a center in Vösendorf near Vienna had to be abandoned last year, only weeks after the opening of that center. Two FOCs in the Swedish cities of Arlandastad and Södertalje also had to be closed due to their unsuccessfulness. Britain is the country with the greatest concentration of FOCs anywhere in Europe, but even there three FOC projects have failed to date, namely those in Dundee, Haydock and West Calder. Other FOCs that did not survive are those near Zurich in Switzerland and near Budapest in Hungary. There are several other FOCs which clearly seem to be in trouble for different reasons and it is to be expected that the number of such cases will rise. The number of successful FOCs will always be limited due to the large radius within which they need to attract customers. Whenever the relevant market becomes increasingly mature neighboring FOCs will begin to "cannabilise" each other and only the best locations with attractive marketing concepts will survive in the long run. The failed attempts to establish outlet centers clearly show that the requirements to be met by the locations and, even more important, by the business concept and the management are very strict. Nonetheless, it is also true that in general FOCs are on the winning side and prospering on the commercial real estate markets throughout Europe. This holds true despite the economic downswing we are currently experiencing. ecastra is believes that the German market has a potential for between 15 and 20 FOCs, albeit that locations just across the German borders must also be taken into consideration in this respect. We are here looking at a situation in which the market is currently being divided up between potential market participants.

Please find further information in the attachment on page 16.

For further questions please contact:

Dr. Joachim Will
CEO
ecostra

joachim.will@ecostra.com

Jan Schwarze
Senior Researcher
ecostra

jan.schwarze@ecostra.com

Restructuring of securitised real estate loans from the borrower's perspective

The market for securitised real estate loans in Germany and Europe has grown significantly over the last few years. While already necessary today, real estate loan restructurings are expected to become even more frequent in the future. From the borrower's perspective, the following specific features of securitised real estate loans should be taken into consideration.

In a typical securitisation transaction, a bank which has originated a portfolio of loans secured by real estate sells such loans to a special purpose vehicle (SPV) which refinances the purchase of the loans through the issuance of notes. This entails the issuance of senior and junior tranches of notes which are each assigned a credit rating from a rating agency. Securitisation structures generally provide for a trustee who is responsible for safeguarding the interests of the investors as well as

© Clifford Chance, Partnerschaftsgesellschaft von Rechtsanwälten, Wirtschaftsprüfern, Steuerberatern und Solicitors · Sitz: Frankfurt am Main · AG Frankfurt am Main PR 1000 · September 2009

any other participating parties, and for the benefit of whom the SPV creates security over all of its assets. The Issuer will typically need to appoint a servicer for the purpose of administering the loans acquired by the Issuer. Although the originating bank often assumes this function, external service providers specialising in real estate loan administration are also appointed for this purpose. Sometimes the originating bank will initially act as the servicer and subsequently assigns this function to an external service provider once an event of default occurs under the loan agreement ("special servicing"). Insofar as the originating bank is not responsible for loan administration activities, the borrower has a different contact person, accordingly. Aside from the fact that the borrower has a different contact person, the loan agreement will largely remain unaffected by the securitisation. In particular, the legal position of the borrower will not be affected thereby.

The scope of a restructuring can vary significantly. A restructuring can be as straightforward as a mere "waiver letter" but can also require extensive structural changes to the security structure. A restructuring is often triggered by a breach of financial ratios. A breach of the loan-to-value ratio (i.e. the ratio of the nominal value of the loan to the value of the property) is particularly common. Loan agreements often stipulate that valuation reports must be obtained at regular intervals. The fact that valuation reports are currently less "optimistic" than those recorded during the real estate boom, means that breaches of the loan-to-value ratio are virtually inevitable. The interest-cover-ratio is the ratio of rental income earned from renting the property to interest payments payable under the loan. Because the loans often provide for variable interest rates (Euribor or Libor), the favourable current low interest rates at present still provide enough lee-way. However, even with the current low interest rates, a breach of the interest-cover-ratio may be triggered as a result of a lessee going into insolvency or a decreasing level of rent.

In any case, a borrower would, as a first step, contact the servicer or special servicer.

The authority of the servicer's/special servicer's to agree to restructuring measures is determined by the servicing agreement. Servicing agreements often include special provisions regarding amendments to loan documents as well as waiver declarations which impose special restrictions on the service provider as to what acts it is permitted to perform or which are subject to the consent of the trustee.

The trustee's authority to consent to any amendments is in turn governed by the trust agreement applicable to the relevant securitisation transaction. It should also be noted that the trustee's activities are in practice handled differently by different trustees. If the respective trust agreement or the terms and conditions of the notes do not allow for the consent of the trustee, it may be necessary to involve the investors. This may require the convening of a noteholder meeting. A possible participation of noteholders at a noteholder meeting, may impact on restructuring measures to the extent that noteholders have different interests. Since senior tranche notes are paid before the junior tranches, noteholders may have diverging interests. In particular, senior creditors may press for a liquidation, whereas junior noteholders may want to avoid a liquidation and wait for "better times" as junior noteholders might otherwise suffer a loss under their investment.

Other aspects which may have an indirect effect on the borrower but which can nevertheless potentially have a direct impact on the restructuring measures by restricting the SPV's room for manoeuvre, are the usual requisite involvement of rating agencies as well as the potential requirement to make adjustments to the information included in the prospectus published by the SPV issuing the notes in the case of extensive changes.

In conclusion, the restructuring of a real estate loan which has been securitised may under certain circumstances be a challenge especially if it is necessary to to arrange for the involvement of servicers, trustees or even noteholders. However, securitisation structures are not standard products and may differ significantly with respect to the competences of the relevant parties. As a result, it will always be necessary to analyse each transaction individually.

For further questions please contact:

Dr. Oliver Kronat
Partner
Banking & Capital Markets

oliver.kronat@
cliffordchance.com

Fabian Marschall
Associate
Banking & Capital Markets

fabian.marschall@
cliffordchance.com

Offshore Windparks – recent changes in German permit law

Introduction

In the past years, an increasing number of permits for the construction and operation of Offshore Windparks ("OWP") have been issued in Germany. Currently, 21 OWP have been permitted (18 in the North Sea and 3 in the Baltic Sea); more than 50 permit applications are still being processed at the competent permit authority, the Federal Maritime and Hydrography Agency (Bundesamt für Seeschifffahrt und Hydrographie – "BSH") in Hamburg. In many cases, OWP-projects have been initiated by rather small specialist companies. After the successful completion of the permit procedures, these companies are now looking for investors, who are able to provide the financial resources required for the realization of the permitted projects.

© Clifford Chance, Partnerschaftsgesellschaft von Rechtsanwälten, Wirtschaftsprüfern, Steuerberatern und Solicitors ·
Sitz: Frankfurt am Main · AG Frankfurt am Main PR 1000 · September 2009

In Germany, most of the OWP are located within the so-called Exclusive Economic Zone ("EEZ") in the North Sea and Baltic Sea. The relevant permit laws for OWP in the EEZ have been changed last year. This new legislation expands the competencies of the BSH, in particular with respect to the consideration of conflicting public interests. In addition, amendments concerning the permit procedures for the cable connection of OWP with the grid on the mainland will come into force within these days. In the following, we take this opportunity to give a short overview on the relevant legal regime governing OWP permits, on key permit issues and on these legislative changes.

Legal Relations on the Seas

Legal relations on the seas are governed by the Convention on the Law of the Sea of the United Nations of 10 December 1982 ("UNCLOS"). According to UNCLOS, the sea is divided into three distinct legal areas:

- the "Territorial Sea", which extends from the mainland of a coastal state up to 12 nautical miles into the sea,
- the coastal state's "EEZ", which extends beyond the 12 nautical mile limit up to 200 nautical miles from the mainland and
- the "High Seas", which begin beyond the EEZ.

Whereas the Territorial Sea belongs to the sovereign territory of the (respective) coastal state, and the (respective) law of the coastal state is therefore (also) applicable in this area without limitation, the state's sovereignty does not extend, at least not a priori, to the EEZ. Rather, the coastal state has certain sovereignty rights in the EEZ, but must explicitly make use of these rights. Germany has made use of these rights regarding, inter alia, the approval of installations such as OWP in the German EEZ. The legal basis for permitting of OWP is the Ordinance on Sea Installations (Seeanlagenverordnung – "SeeAnlV"). In contrast, no state has sovereignty rights on the High Seas.

This means that different permit laws apply, depending on whether the OWP is located in the Territorial Sea or in the EEZ. In the Territorial Sea, an OWP is permitted according to the Federal Immission Control Act (Bundes-Immissionsschutzgesetz – BImSchG). OWP in the EEZ are permitted according to the SeeAnlV. However, as most OWP projects are (and will be) located in the EEZ, the SeeAnlV is the principal permit law for OWP.

Permit under the SeeAnlV/ Legal changes

Purpose of the permit procedure is the assessment of the impacts caused by the construction and operation of the OWP on the environment and other conflicting interests as well as the evaluation, whether or not these impacts are tolerable. However, under the former SeeAnlV, the BSH was – formally – limited to only consider the impacts of the respective OWP on the marine environment and on the navigation of ships. Other conflicting uses of the sea, such as military use, oil and gas exploration or fishing could not justify a refusal of the OWP permit under the former SeeAnlV. The BSH, however, did nevertheless address these issues in the course of the permit procedures. This limitation has been removed from the SeeAnlV. According to the new SeeAnlV, the approval of an OWP permit now also has to take into account conflicting "public interests" (mainly fishing, military safety and oil and gas exploration) and regional planning stipulations. Impacts on any of such permit issues could now lead to the refusal of the permit.

Permit issues

Environment

One of the main issues in the permit procedure of an OWP is the impacts on the marine environment. Such impacts particularly relate to:

- fish, marine mammals (wales and seals) and benthos (small creatures in the seabed);
- birds, in particular bird migration;
- visibility of OWP from the mainland.

The impacts on fish, marine mammals and benthos are mainly caused in the construction phase, because of noise emissions and damages to the natural habitats. In contrast, the possible impacts on birds are caused during the operation of the wind turbines. Bird migration routes are located in the North Sea and the Baltic Sea, so that bird collisions could be an issue in certain times of the year with mass migration.

In order to minimize the impacts on fish, mammals, benthos and birds, the permits stipulate, inter alia, the following obligations:

- time limits for the construction phase;
- use of special materials such as environmentally compatible materials and antiglare paint;
- reduction of noise during the construction phase;
- restrictions to use lights other than those for air traffic or marine safety;
- interruption of the operation of wind turbines in times of mass migration of birds;
- preparation of different geotechnical and environmental studies;
- long-term monitoring obligations with respect to the environmental impacts (because the knowledge on the actual the impacts of OWP is still limited).

If OWP consist of more than 20 wind turbines, the impacts on the environment are to be assessed in a formal environmental impact assessment according to Section 2a SeeAnlV and the German Environmental

© Clifford Chance, Partnerschaftsgesellschaft von Rechtsanwälten, Wirtschaftsprüfern, Steuerberatern und Solicitors ·
Sitz: Frankfurt am Main · AG Frankfurt am Main PR 1000 · September 2009

Impact Assessment Act (Gesetz über die Umweltverträglichkeitsprüfung). In addition, if a project may affect an "FFH-area" or bird sanctuary, an impact assessment under the European FFH-Directive or Birds Directive is required. Projects that can significantly affect protected habitats or species are not permissible.

Other Issues

Besides the impacts of OWP on the marine environment, the following other issues are assessed in the course of the permit procedures:

- navigation, i.e. the risk of collisions of ships with the wind turbines and interferences with the ship radar systems;
- military safety, i.e. impacts on firing danger areas or low level flight areas;
- fishing;
- natural resources, i.e. oil and gas exploration;
- air traffic safety.

OWP permits always contain ancillary provisions for navigation safety, e.g. the obligation to install navigation lights, radar systems, automatic identification systems and rescue systems as well as the obligation to use of a foundation design mitigating the risk of ship collisions. In addition, operators are required to provide an expert report on the probability of ship collisions with the OWP at the respective OWP site in the course of the permit procedure.

Cable Connection

With amendment of the Energy Industry Act (Energiewirtschaftsgesetz – EnWG) in December 2006, the responsibility for the construction and operation of the cable connection between the OWP and the national power grid on the mainland has been transferred to the respective grid operator, in Germany (currently) either Vattenfall (for the Baltic Sea) or E.ON (for the North Sea). According to section 17 EnWG, the grid operator must ensure that the cable connection is completed by the time the OWP is ready for operation. This legislation shall promote the development of OWP. On the other hand, separating the responsibilities for the construction of the OWP and of the grid connection led to coordination issues: OWP developers try to refrain from entering into the construction phase of the projects until they have a clear statement from the grid operator on the point of time the grid connection will be ready for operation. On the other hand, grid operators are not willing to develop the grid connections unless they have a clear statement on the point of time the OWP will be ready for operation.

The German Federal Parliament has passed an act in May 2009, which leads to a significant simplification of the permit procedures required for the cable connection of OWP. According to previous law, numerous different permits from several permit authorities were required for the cable connection. The new legislation provides for only one permit procedure, a so-called planning approval procedure (Planfeststellungsverfahren).

Conclusion

The amendments of the SeeAnlV expand the competencies of the BSH with respect to the consideration of interest in the use of the sea conflicting with an OWP project. Further conflicting interests could now in principle lead to a refusal of the permit. However, it is unlikely that these amendments will result in relevant changes of the permit procedure, because the interests that are now explicitly specified in the SeeAnlV have already been part of the assessments made by the BSH under the prior SeeAnlV. In addition, main aspects of the permit procedures are the impacts on the environment and on the navigation of ships and these issues are not affected by the legislative amendments. But in individual cases, certain conflicting interests might have a stronger impact on the permit procedure than in the past and could lead to increased evaluation obligations. In contrast, with the amendments of the EnWG coming into force, the permit procedure for the cable connection from OWP to the grid on the mainland will be significantly simplified. In particular grid operators will benefit from this legislative change, but – indirectly – also the OWP operators.

For further questions please contact:

Prof. Dr. Ferdinand Kuchler
Partner
Real Estate

ferdinand.kuchler@
cliffordchance.com

Dr. Martin Spieler
Associate
Real Estate

martin.spieler@
cliffordchance.com

"End of the lease" Problems and risks faced by lessors at the end of the lease relationship

An issue of central imporatance for the lessor is that the leased premises is available in good condition and suitable for beine re-leased as soon as possible after the end of the lease. This entails a number of specific issues and risks for the lessor. This article provides an overview of several key aspects regarding the end of the lease after notice of termination has been given or upon the expiration of the lease.

Return of the leased premises

Upon termination of the lease, the lessee's right to occupy the leased premise also expires and the lessee is obligated to return the leased premises to the lessor.

© Clifford Chance, Partnerschaftsgesellschaft von Rechtsanwälten, Wirtschaftsprüfern, Steuerberatern und Solicitors · Sitz: Frankfurt am Main · AG Frankfurt am Main PR 1000 · September 2009

If the lessee fails to return the leased premises in a proper condition, the lessor may be entitled to raise claims for damages.

Two things are needed for the return of the leased premises to the lessor, i.e. the transfer of "actual possession" of the leased premises to the Lessor: Firstly, the lessee must ensure that the lessor is put in a position to gain an overall picture of the condition of the leased premises, including any defects, alterations and deterioration in the condition of the leased premises, and, secondly, that the lessee has fully and unequivocally surrendered possession of the leased premises.

The return of all keys alone is not, in principle, sufficient to constitute a conclusive return. In the event that the lessor fails to co-operate with the return of the leased premises, i.e. in taking possession of the leased premises, it will be in default. In such case, the lessee may unilaterally surrender the leased premises by vacating the leased premises and returning all keys to the lessor.

Time of return

According to the unambiguous wording of the law, the leased premises must be returned after the end of the lease, i.e., upon the expiry of the last day of the term of the lease. Nonetheless, according to some views expressed in legal literature the return should be effected already on the last day of the term of the lease. This is justified by the fact that it facilitates a seamless transfer in the event of re-letting by the lessor. For example, the lessor takes possession of the premises on 31 January thereby enabling it to hand over the premises to the subsequent tenant on 1 February. Although this may sound plausible, it does not work in practice if the last day of the lease falls on a Sunday or public holiday, meaning that the day to vacate the leased premises has to be postponed to the next working day. In addition, the lessee ultimately rented the leased premises until the last day of the lease and paid rent thereon until the expiry of that day. The lessee has a right of possession up until such time, and the owner has a right to repossess the property only subsequent thereto.

In the event that the lessor wishes the lessee to return the leased premises to it on the last day of the term of the lease, this should be contractually agreed upon.

The lessee refuses to move out

Potential self-help measures to be undertaken by the lessor?

In the event that the lessee refuses to vacate the leased premises despite the lease having ended, a convenient solution available to the lessor would be to gain actual possession of the leased premises forcibly or by other means (e.g. by changing the locks) against the will of the lessee. This would, however, be deemed to constitute unauthorised interference by the lessor against which the lessee could defend itself against by filing a motion for interim judicial relief and entitling the lessee to demand damages. Such conduct by the lessor may also constitute trespassing and may result in consequences under criminal law.

The lessor is thus compelled to seek restitution of the leased premises by seeking an eviction order. The duration of the proceedings depends on the workload of the competent court and the court bailiff. It usually takes six to eight weeks to get an eviction order but it may take months or even years. The court costs accrued for the eviction order are governed by the amount of the contractually agreed annual rent. If, for example, this amounts to EUR 120,000.00, approximately EUR 4,300 is payable. There are attorneys' fees on top of that. A court bailiff can be ordered to go to the leased premises in question to enforce an eviction order issued by a final and conclusive court ruling. The amount of the advance payment of costs payable to the court bailiff is at the court bailiff's discretion, whereby such costs cover his fees and, above all, the cost of vacating the premises (opening of doors, removal and storage of the items on the leased premises etc.).

Although the belated return of the leased premises is annoying for the lessor, it shall nevertheless be entitled to compensation for loss of use (Nutzungsentschädigung) for the period between the end of the lease and the actual date of return in the amount of the contractually agreed or fair market rent, depending on which is higher. In the case of an insolvent lessee, this claim will, however, be very difficult to enforce.

Utilities cut-off (Versorgungssperre)

Insofar as the lessor is responsible for supplying water, electricity or heating to the leased premises, he may not, in principle, simply cut off these utilities following cancellation in order to effect a "cold eviction" (kalte Räumung). In this respect, the lessor may also be subject to perform post-contractual duties, in particular, if this would otherwise pose a health risk or cause severe damage.

Pursuant to a German Federal Supreme Court (Bundesgerichtshof, BGH) ruling pronounced in May 2009 as regards a commercial lease, this shall not be applicable if it is unreasonable to expect the lessor to provide further utilities services, e.g. if the lease was terminated for default in payment and if the lessor had to supply utilities services at its own expense due to a lack of advance payments.

Because the lessee does not necessarily have to reckon with the utilities being cut off, the lessor must provide the lessee with advance warning thereof. In the event that the utilities are cut off without prior notice causing the lessee to sustain any loss or damage, it shall be entitled to claim for damages. Given the fact that a lessee of residential housing has a greater need for protection, the established case law of the German Federal Supreme Court is probably "not transferable" to a residential lease agreement.

© Clifford Chance, Partnerschaftsgesellschaft von Rechtsanwälten, Wirtschaftsprüfern, Steuerberatern und Solicitors ·
Sitz: Frankfurt am Main · AG Frankfurt am Main PR 1000 · September 2009

Condition of the property on the date of return

The lessee must return the leased premises to the lessor in a proper condition, detailed regulations of which are often set out in the lease agreement. In practice, however, such agreements are, in many cases, not compatible with the requirements of the German Standard Terms of Business Act (AGB-Gesetz) and are therefore void.

Decorative repairs

According to the law, the lessee is not responsible for any alterations to or deterioration in the condition of the leased premises caused by normal wear and tear. The lessee is therefore, in principle, not required to carry out any decorative repairs as these are merely signs of wear and tear that need to be remedied. Under many lease agreements, however, the lessee is under a duty to carry out decorative repairs by the end of the lease, at the latest.

A standard clause falling under the German Standard Terms of Business Act and stipulating that the lessee shall be required to carry out decorative repairs is only valid if the lessee is not unfairly disadvantaged. The following, inter alia, triggers the invalidity of such a clause: Rigid time schedules for decorative repairs or, as the case may be, the obligation to carry out final renovations without specifying the state and condition of the leased premises. Even if the lease contains a settlement clause providing for the rendering of a payment at the end of the lease in lieu of carrying out decorative repairs, the clause must allow for some degree of flexibility in respect of the condition of the leased premises and, in addition, the lessee should be afforded the opportunity to carry out the requisite renovations in lieu of making such a payment.

A further aspect was also addressed in a judgement pronounced by the German Federal Supreme Court in May of this year. A lessee of residential housing carried out decorative repairs at the end of the lease unaware of the invalidity of the agreed renovations clause. The Court ruled in the lessee's favour holding that it should be compensated for the time he spend, the requisite materials he used carrying out decorative repairs during his free time and for the remuneration paid to helpers to perform work. The ruling should apply accordingly to lessees of commercial premises.

In the event that the lessor reviews the renovation clause and draws the conclusion that it is invalid, it may less expensive for it to carry out the decorative repairs itself. This prevents it having to face claims for damages by the lessee.

Failure to carry out (proper) decorative repairs

In the event that the lessee fails to fulfil this duty despite having effectively transferred the obligation to carry out decorative repairs, the lessor basically has the option of seeking recourse to the courts to seek an order compelling the lessee to carry out the decorative repairs. This course of action is impracticable due to the length of such a legal dispute and the impossibility of re-letting the property during such time. The lessor is not entitled to demand reimbursement of any loss of rent in the full amount because the lessor is under a duty to mitigate loss.

In the event that the lessor has requested the lessee to carry out decorative repairs within a fixed deadline and the lessee fails to comply with that request, the lessor may carry out the decorative repairs itself and may assert a claim for damages against the lessee for the expenses incurred in carrying out the decorative repairs by itself.

Removal of installations and fixtures and fittings

In addition to a transfer of possession of the leased premises, the lessee is required to return the leased premises to the lessor completely vacated. The lessee is not only required to remove all of its movable items found on the leased premises, but, unless the lease agreement expressly provides otherwise, must also remove all installations and fixtures and fittings installed by it.

In the event that the removal of installations and fixtures and fittings would not be appropriate because of the substantial costs involved, and there is a possibility that the lessor is prepared to accept the return of the leased premises including any installations and/or any fixtures and fittings which the lessee may have installed, details of what is to happen at the end of the lease should preferably be stipulated in writing prior to their installation in a supplement to the lease agreement. Many variations are possible: e.g. the installations must be removed; the installations can remain on the leased premises with or without payment of compensation by the lessor, at the end of the term of the lease, it is the lessor or the lessee are free to choose whether the installations are to be removed or may remain against compensation.

Articles left behind

The lessor is not entitled to immediately remove any items left behind by the lessee, as this would constitute a violation of the lessor's postcontractual duty to exercise custodial care and may give rise to damage claims. The length of the retention period depends on the value of the items left behind. In the event that the lessee leaves behind worthless items this can, in cases of doubt, be interpreted to be an abandonment of ownership. In addition, the lessee is in violation of the principles of good faith if it demands damages for items which it has not taken care of for a long period of time.

In the event that the lessor arranges for the items to be removed at the lessee's expense, he should issue a threat beforehand and establish the value of the items in a manner that is susceptible of proof at a later date. The lessor may demand that the lessee pay a user fee (Nutzungsentgelt) for the period of storage between the end of the lease and the removal and/or collection in accordance with the rental value of the space required for storage.

© Clifford Chance, Partnerschaftsgesellschaft von Rechtsanwälten, Wirtschaftsprüfern, Steuerberatern und Solicitors ·
Sitz: Frankfurt am Main · AG Frankfurt am Main PR 1000 · September 2009

Return protocol

To the extent that there is no contractual agreement as regards the drawing up of a return protocol, no obligation exists to draw up any such return protocol. From the lessor's perspective in particular, it is, in principle, inadvisable to draw up a return protocol on account of the risks associated therewith. The protocol is often interpreted to be an acknowledgement of non-indebtedness by the lessor which precludes any subsequent assertion of claims for damage not mentioned in protocol.

At the time of the conclusion of the lease agreement, a contractual undertaking to draw up a return protocol without detailed provisions specifying the consequences should be avoided. If a return protocol has to be signed, it should also contain a clause stating that it is purely for the purpose of facilitating the provision of evidence. In other words, any enforcement of claims at a later point in time is not excluded.

Reimbursement of the security for rent

Insofar as the lessee has provided a security deposit (Kaution), it has a contingent claim for reimbursement of the rent security. Such claims become due and payable only once the lessor is able to gain a clear overview of whether it needs to draw on the security deposit to satisfy its claims. Only then will a statement be prepared in which the lessor may set off its counterclaims.

There is neither a legally prescribed time limit for such a statement, nor has any case law emerged as regards a generally applicable time limit. This ranges from two to nine months depending on the individual case. The time limit must, however, be reasonable.

In the event that ancillary costs have yet to be settled for the preceding or current year, the lessor is entitled to retain a reasonable portion of the security for rent until the settlement is effected.

Special case: Insolvency of the lessee

In the event that the lessee becomes insolvent, it is particularly questionable which claims of the lessor are deemed to be preferential claims and which claims may merely be raised as insolvency claims.

Insolvency claims are, in that respect, all claims arising prior to the institution of insolvency proceedings. These claims will only be satisfied in the relevant proportion determined on the basis of the ratio between the aggregate amount of all claims filed against the existing insolvency assets. Hence, in many cases the lessor is not credited with any substantial payments towards its claims. In contrast, preferential claims against the insolvent estate (Masseverbindlichkeiten) are claims ensuing from the activities of the insolvency administrator in the insolvency proceedings that have been instituted. Irrespective of the insolvency quota, such claims are paid from the insolvency assets in priority over the other claims.

In principle, settlement claims already accrue at the time of the conclusion of the lease agreement, and are thus deemed to be insolvency claims. This does not apply, however, to claims based on a deterioration of the condition of the leased premises. A distinction must be made as to when the deterioration occurred. If it only occurred after the institution of the insolvency proceedings, they are deemed to be privileged claims (Masseforderungen).

Irrespective of whether the lessor has privileged claims or insolvency claims, he may offset these claims against the lessee's claim for reimbursement of the security deposit. In the event that security for rent is furnished as a guarantee, the claim against the guarantor shall remain unaffected by the insolvency of the lessee.

For further questions please contact:

Christian Trenkel
Partner
Real Estate

christian.trenkel@
cliffordchance.com

Barbara Rybka
Associate
Real Estate

barbara.rybka@
cliffordchance.com

Law regarding electronic data transmission systems and electronic files in land register matters

At present, land registers are already kept in electronic form in Germany. The law entering into effect on 1 October 2009 which will bring about modifications, in particular, concerning the Land Register Act (Grundbuchordnung) and the Regulation Regarding the Implementation of the Land Register Act (Grundbuchverfügung), will allow for electronic communication between parties to legal proceedings. Land registry transactions which have hitherto been paper-based, as well as the file management will now also be able to be conducted in electronic form. This will eliminate media disruptions (Medienbrüche) and facilitate and accelerate land register proceedings, in particular, registration procedures. Thus, this law will provide the legal framework for the electronic transaction processing without media disruption, whereby it is the intention of the legislator to preserve the high standard of quality of German land register proceedings. The introduction of state-of-the-art information and communications technology to be used in real estate transactions is designed to result in more efficient processing for all parties, and thereby making a contribution to promoting Germany as a business location.

© Clifford Chance, Partnerschaftsgesellschaft von Rechtsanwälten, Wirtschaftsprüfern, Steuerberatern und Solicitors ·
Sitz: Frankfurt am Main · AG Frankfurt am Main PR 1000 · September 2009

Strict formal requirements continue to apply

According to the said law, all documents that may be required for entries in the land register may in the future be submitted as electronic documents and kept by the land registry in an electronic file. The advantage of the electronic procedure is that, from now on, all procedural steps, from the submission of required documents to the land registry, their subsequent processing, culminating in their storage in an electronic file and the preparation of the registration certificate to be issued to the parties involved, can be done electronically. The strict formal requirement of land register proceedings conducted in paper format will, however, continue to apply to the electronic procedure. Even in electronic data transmission proceedings, statements required for entries in the land register will need to be recorded or certified by a notary. If official or officially certified documents are required for entries in the land register, such documents may be submitted in the form of an electronic document bearing a qualified electronic signature. Any qualified certificate on which a relevant electronic signature is based, needs to show the issuing authority or person entitled to take official records of instruments (notary). Consequently, the parties to electronic land register proceedings need relevant IT equipment enabling them to prepare and store electronic signatures. A notary who has the required IT equipment at his disposal may, for example, submit an electronically authenticated signature of a notarial instrument by data transfer to the land registry. The procedural principles and formal requirements applicable to paper-based land register proceedings will also apply, without any restrictions, to electronic data transmission system matters.

Successive launch: The time of the launch will be determined by the German Federal States (Länder)

Electronic legal transactions in land register matters are, thus, in compliance with the procedure that is already applied to commercial register matters. The online electronic data transmission system is to be launched incrementally. In contrast to commercial register matters, there will be no obligation to convert the system uniformly on a nationwide basis. Instead, it will be up to the governments of the Federal States to decide about the time and scope of the launch of the electronic system. Therefore, the launch will probably be less abrupt having long development and test phases, but it will nevertheless be implemented uniformly in the various Federal States.

The Federal States may firstly restrict the launch of the electronic system to individual land registries. It may be possible to permit the use of electronic data transmission systems without introducing the electronic land register file (elektronische Grundakte), whereby the reverse is also conceivable. A parallel application of electronic data transmission systems and electronic land register files and procedures providing for documents in paper format would also be possible. All in all, the various Federal States will have considerable room for manoeuvre when launching the electronic system.

Notaries, as principal communication partners of the land registries, may be obligated to participate in the electronic data transmission system, while individuals may continue to address land registries in the usual manner.

For further questions please contact:

Dr. Gerold M. Jaeger
Associate
Real Estate

gerold.jaeger@
cliffordchance.com

Henning Aufderhaar, LL.M.
Associate
Real Estate

henning.aufderhaar@
cliffordchance.com

Liability of vendors of real estate for asbestos contamination: New Federal Supreme Court decision

Asbestos contamination of buildings is a true 'evergreen' when it comes to being a source of trouble and disputes. The most recent decision handed down by the Federal Supreme Court (Bundesgerichtshof, BGH) in an asbestos-related case is that of 27 March 2009. The question to be decided was whether today the presence of asbestos in a residential building should be seen as a constructional defect that may trigger warranty obligations, even though asbestos was a frequently used construction material in the past. The second question that was to be decided in the case brought before the Federal Supreme Court was whether the vendor, who was aware of such asbestos contamination but failed to disclose it to the purchaser, could be subsequently held liable even though any warranty for defects had been contractually ruled out.

Asbestos as a defect in quality

The Federal Supreme Court stated in an earlier decision that the presence of asbestos in a building can constitute a defect in quality and therefore give rise to warranty claims. That decision was rendered in a case involving a pre-fabricated residential building from 1980. The vendor was aware that asbestos-fiber plates has been used for the exterior facing of the building but did not disclose this information to the purchaser. In the judgment appealed from, the lower court had ruled that a party purchasing a building built during the period in question could never be sure that the construction materials used at the time would be compatible with current health protection requirements. Moreover, asbestos was only contained in the exterior facing and therefore had no adverse effect on the interior of the building. Therefore, the court of the lower instance ruled against the purchaser by dismissing his claim for reimbursement of the rehabilitation costs.

© Clifford Chance, Partnerschaftsgesellschaft von Rechtsanwälten, Wirtschaftsprüfern, Steuerberatern und Solicitors ·
Sitz: Frankfurt am Main · AG Frankfurt am Main PR 1000 · September 2009

The Federal Supreme Court did not share this view. In its opinion, the question as to the existence of a defect in quality should be answered irrespectively of when the building was built. Rather, the decisive issue was whether a house with exterior facing containing asbestos was fully fit for human habitation the in the opinion of the relevant public at the time of the finalization of the relevant contract (i.e. in 2006). The Federal Supreme Court answered this question in the negative, arguing that the situation in the case under consideration was similar to cases involving pre-existing pollution in the classical sense of the term. Due to the health hazards involved, the presence of pollution was always seen as being a defect in quality. While the health hazards created by construction materials were as a rule less serious than those caused by pollution, the presence of potentially insalubrious construction materials nevertheless clearly did constitute a defect in quality if these materials had the effect that normal renovation or refurbishment work and/or structural changes could not be undertaken without encountering material health hazards. Consequently, asbestos in the exterior facing of a house was a defect in quality, even though it had no adverse effect on the habitability of the house. In the case on hand, for example, the purchaser intended to drill holes in the façade in order to install certain devices, but the drilling of such holes would involve a substantial health hazard due to the asbestos dust that would thus be set free.

Liability despite exclusion of warranty

In the case decided by the Federal Supreme Court one interested party had already shyed away from purchasing the property when it had learned about the presence of asbestos. After that experience, the vendor refrained from disclosing this defect to party which finally purchased the property. Instead, the purchase agreement contract contained a clause ruling out possible warranty claims. The Federal Supreme Court ruled that even though this clause was legally valid the vendor could nevertheless be held liable by virtue of the legal principle of culpa in contrahendo. Whether this legal principle could be applied irrespective of warrato warranty considerations had been a controversial issue until then. This question had been answered in the negative in the judgment appealed from, but the Federal Supreme Court adopted a different view and held that at least in cases where the vendor acted with intent, i.e. deliberately withheld information (acting in bad faith) the vendor could be held liable on grounds of culpa in contrahendo, even though warranty claims were otherwise contractually ruled out. According to that decision, any failure to fully and accurately answer questions asked by the other contracting party amounts to acting in bad faith.

Practical consequences

This judgment shows that ruling out warranty claims may not suffice to fully protect a vendor against claims being raised due noxious construction materials having been used when a building was built. It is not relevant in this respect whether the relevant materials were considered safe at the time the construction work was undertaken. Nor are such liability claims definitively ruled out if the noxious materials do not directly affect the inhabitants of the building. Most likely, both these statements hold true not only for asbestos, but also for other materials that subsequently prove to be harmful to health or even carcinogenic. Given that it may be taken for granted that any reasonable purchaser of real estate is likely to inquire about hidden defects the vendor is in fact obligated to disclose any information about the use of noxious building materials he may be aware of. According to the criteria defined by the Federal Supreme Court, any failure to make such disclosure means that the relevant question was not fully and accurately answered. Therefore, in order to prevent any future ambiguity, it is wise for the purchaser to document the questions asked, while it is wise from the vendor's perspective to record the answers given.

For further questions please contact:

Dr. Klaus Minuth
Partner
Real Estate

klaus.minuth@
cliffordchance.com

Dr. Gerold M. Jaeger
Associate
Real Estate

gerold.jaeger@
cliffordchance.com

New developments regarding mandatory Europe-wide tenders for urban development contracts

Up to now, the 2009 reform of public procurement law failed to provide legal certainty to local authorities regarding their obligation to organize Europe-wide invitation to tender for urban development contracts. A judgment of the Higher Regional Court (Oberlandesgericht, OLG) in Düsseldorf of 13 June 2007 known as the "Alhorn decision" (- Verg 2/07 -) was the starting point of this controversial discussion about the applicability of public cartel procurement law to the sale of real property by public authorities. According to this decision, local government authorities must organize a Europe-wide tender if they wish to combine urban development contracts with the sale of real property (see our Real Estate Newsletter of summer 2008). Despite certain efforts undertaken by the German government to pass legislation "correcting" this decision, there is still no precedent of the European Court of Justice on the obligation to organize a public tender for urban development contracts, which means that there is a risk that any such contracts concluded without a Europe-wide tender may be held to be void.

© Clifford Chance, Partnerschaftsgesellschaft von Rechtsanwälten, Wirtschaftsprüfern, Steuerberatern und Solicitors ·
Sitz: Frankfurt am Main · AG Frankfurt am Main PR 1000 · September 2009

The new legal situation

In order to exempt real property transactions by local authorities from the applicability of cartel procurement law certain "clarifications" were included in the German Act against Restraints on Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB) as part of the procurement law reform of last April. In particular, the scope of the term "public contract" was restricted in several respects:

- According to the amended legislation, public contracts subject to mandatory public procurement procedures are only contracts relating to the "procurement of goods or services" (Leistungen). This is to make clear that a sale of real property by public authorities does not involve any form of "procurement", given that an asset is being sold, while nothing is being "procured", i.e. purchased.

- A building contract is only subject to public procurement law if, in economic terms, a public authority will "directly benefit" from the work to be done. This amended wording of the legislative text is to counteract the "Alhorn decision" in which the Higher Regional Court in Düsseldorf ruled that even an indirect self-interest of local authorities in the building work to be undertaken suffices to made a building contract subject to mandatory public procurement procedures.

- Finally, it is to be a constituent element of the statutory definition of the term development license (Baukonzession) that the investor's right to use the relevant premises is limited in time, which is not the case if real estate is being purchased.

Conformity of the amended legislation with EU law

It is uncertain whether the above "clarifications" are in line with European procurement law because the definition of the term public building contract falls within the scope of EU law, which takes priority over national law. Certain concerns may be raised in this respect in that the new version of sec. 99 of the Act on Restraints on Competition may not be compatible with the rather broad definition of the term building contract under European law.

This matter has already been brought before the European Court of Justice. In October 2008 the Düsseldorf Higher Regional Court submitted the principal contents of its "Alhorn decision" to the European Court of Justice for confirmation (decision of 2 October 2008 – Verg25/08). In particular, the Düsseldorf Court inquired whether a public building contract implied by definition

- that the relevant work and materials are being procured directly for use by the principal,

- that the building work is to serve specific public purposes,

- that the investor (directly or indirectly) assumes an obligation to perform the relevant building work, and

- the principal is in a position to take court action to enforce compliance with such obligation.

It is expected that the European Court of Justice will hand down its decision in the course of next year.

Until then, the objective of the above legislative

© Clifford Chance, Partnerschaftsgesellschaft von Rechtsanwälten, Wirtschaftsprüfern, Steuerberatern und Solicitors · Sitz: Frankfurt am Main · AG Frankfurt am Main PR 1000 · September 2009

Attachment

Table 1:
Locations, basic data and general developments of FOCs in Europe between 2003 and 2009

Country	Number of locations		Total sales area in m²		Average sales area in m²per location		Sales area in m² for each 1.000 inhabi-tants		Projects under planning	Medium-term planning trend*
	in operation									
	2003	2009	2003	2009	2003	2009	2003	2009		
United Kingdom	36	41	438,530	608,430	12,180	14,840	8.3	9,9	5	↘
Italiy	4	24	74,700	466,300	18,680	19,429	1.4	7.8	15	↑
Spain	9	18	93,850	266,350	10,430	14,780	2.5	5.9	3	↗
France	12	15	198,400	232,150	16,530	15,477	3.6	3.6	9	↑
Poland	1	6	8,100	84,910	8,100	14,152	0.2	2.2	7	↑
Switzerland	4	6	37,530	71,500	9,380	11,920	5.7	9.4	2	→
Germany	3	6	31,230	71,800	10,410	11,970	0.4	0.9	21	↑
Portugal	1	4	22,500	83,500	22,500	20,880	2.4	7.9	1	→
Czech Republic	-	2	-	46,400	-	23,200	-	4.5	3	↗
Netherlands	2	3	24,320	62,100	12,160	20,700	1.7	3.8	1	↗
Hungary	-	2	-	33,540	-	16,770	-	3.3	-	→
Belgium	2	3	23,670	43,220	11,840	14,410	2.6	4.1	2	↗
Ireland	-	3	-	25,000	-	8,330	-	5.7	2	↗
Croatia	-	2	-	30,000	-	15,000	-	6.8	1	↑
Sweden	3	2	37,550	29,000	12,520	14,500	4.7	3.2	-	→
Austria	1	1	18,000	37,300	18,000	37,300	2.5	4.5	3	↗
Romania	-	1	-	16,000	-	16,000	-	0.7	4	↑
Greece	-	1	-	13,000	-	13,000	-	1.2	2	↗
Denmark	-	1	-	12,580	-	12,580	-	2.3	1	→
Bulgaria	-	-	-	-	-	-	-	-	1	↗
Latvia	-	-	-	-	-	-	-	-	1	↗
Luxembourg	-	-	-	-	-	-	-	-	1	↗
Norway	-	-	-	-	-	-	-	-	1	↗
Russiad	-	-	-	-	-	-	-	-	1	↑
Slovenia	-	-	-	-	-	-	-	-	1	↗
Total	**78**	**141**	**1,008,380**	**2,233,080**	**12,930**	**15,837**	**2.5**	**4.6**	**88**	↗

* = Assessment of medium-term development trends of FOC locations and sales areas in the individual countries, ranging from ↑ (= strong growth) to ↓ (=strong decline)

Source: ecostra-base research: May 2009

© Clifford Chance, Partnerschaftsgesellschaft von Rechtsanwälten, Wirtschaftsprüfern, Steuerberatern und Solicitors · Sitz: Frankfurt am Main · AG Frankfurt am Main PR 1000 · September 2009

Table 2:

FOC operators: Number of operational locations, total sales areas and average size per FOC in 2009

Operator *(Home market)*	Number of locations		Sales area		Average sales area per FOC in m²
	absolute	in %	in m²	in %	
McArthurGlen *(Great Britain)*	17	12.1	369,100	16,6	21,710
Realm Outlet Centre Management *(Great Britain)*	15	10.6	228,450	10.3	15,230
Neinver *(Spain)*	12	8.5	214,750	9.7	17,890
Value Retail *(USA/ Great Britain)*	9	6.4	148,330	6.7	16,480
Concepts & Distribution *(France)*	9	4	119,600	5.4	13,290
GVA Grimley *(Great Britain)*	7	5.0	112,830	5.1	16,120
Fashion District *(Italy)*	4	2.8	98,800	4.5	24,700
Freeport *(Great Britain)*	4	2.8	97,400	4.4	24,700
Pantheon Retail *(Great Britain)*	2	1.4	43,000	1.9	21,500
Studio Silvio Tarchini *(Switzerland)*	3	2.1	41,500	1.9	13,830
43 other operators	59	41.8	745,620	33.6	12,640
Total	**141**	**100.0**	**2,219,380**	**100.0**	**15,740**

Source: ecostra-base research: ranking by total sales areas as of May 2009

© Clifford Chance, Partnerschaftsgesellschaft von Rechtsanwälten, Wirtschaftsprüfern, Steuerberatern und Solicitors · Sitz: Frankfurt am Main · AG Frankfurt am Main PR 1000 · September 2009