Urwantschky Dangel Borst & Partner
Rechtsanwälte · Attorneys at Law

Newsletter

English Issue of September 2009

Our firm participates in the Ulm Marathon and collects donations for a charitable cause

On 20 September 2009, the Ulm Einstein-Marathon will take place, named after the city's famous son Albert Einstein who was born in Ulm. Inspired by the euphoria of the numerous participants and spectators in previous years, we decided to take part in this year's Marathon with a law firm team.

It is with great ambitions that we have been preparing for this event for several weeks and months. An enticement is, of course, to achieve a good time and to reach the goal of the different distances one can register for – Marathon, Half-Marathon, 10 k or 5 k. This alone, however, is not enough for us!

It is quite common in international events of this kind, e.g. in the London Marathon or the New York Marathon, that the participants run for a charitable cause. Our ambition is also not to run only for our personal enjoyment but we aspire to support a charity project.

We would like to utilize our muscular force for a non-profit association in Ulm called **Förderkreis für tumor- und leukämiekranke Kinder** that supports children who suffer from tumours and leukaemia. This association finances itself exclusively from donations and is staffed by volunteers. It supports children suffering from cancer and their families during and after the hospital stay by i.a. providing housing possibilities for the families close to the hospital, organizing care and distractions for the siblings and little 'cheer-ups' for the young patients to make the hospital stay a bit more bearable.

As we have highly regarded the work of this association for a long time, we would like to support one of its projects. Every year, the association organizes a trip for the ill children and their families to a big amusement park where the family has the chance to reunite and to spend an exciting weekend together – and maybe manages to forget the illness for some time. Of course, such a weekend trip involves many expenses.

By running, we, the lawyers, our firm's staff members and some guests who support us, would like to finance the next weekend trip as far as possible. We are grateful for every donation.

Our project is planned in such a way that donations can be made for the completed kilometers of all or individual runners of our team. We have prepared a form in which the mode of donating is explained and in which you may choose the sum you wish to donate per kilometer and the runners you wish to support. We would be happy to send you this form.

Thank you in advance for your support!

For further information please contact: Claudia Hess

Dear Sir or Madam

On the first page of this Newsletter edition, we would like to introduce our ambitious sportive project to you: Our firm will participate in this year's Ulm Marathon and, in doing so, support a charitable cause.

The members of our firm's running team are

the lawyers
Dr. Alexander Bächle, Holger Bräuer, Claudia Hess, Wolfgang Leist, Daniela Nowak, Thorsten Storp and Dr. Peter Urwantschky

the staff members
Alexandra Lang and Sandra Müller

as well as the guest runners
James Smith and Dr. Carola Urwantschky.

We are very happy about every donation for each kilometer run by us. In the article on the left side, you will learn more about our project and how to contribute.

Best regards,

Dr. Peter Urwantschky

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Higher Regional Court Cologne: Clause in Lufthansa's Conditions of Carriage concerning cross-border-selling is effective

Aviation Law

In its judgement of 31 July 2009 (6 U 224/08) the Higher Regional Court *(Oberlandesgericht)* in Cologne held that a clause in Lufthansa's Conditions of Carriage stating that flights have to be used completely and in the sequence provided in the ticket is valid. The Court dismissed an action brought by a German consumer organisation arguing that cross-border-selling and cross-ticketing remain prohibited under the valid Lufthansa Conditions.

The Higher Regional Court in Cologne has ruled the exact opposite of the Higher Regional Court in Frankfurt, which has ruled recently that a similar clause in British Airways' Conditions of Carriage was ineffective (we reported about this case in our Newsletter issue of June 2009).

The Higher Regional Court in Cologne followed Lufthansa's argumentation that they have a certain tariff system based on different criteria e.g. length of the journey, date of the journey and market conditions at the place of departure. This system would be undermined in the case of cross-border-selling respectively cross-ticketing. The Court held that a passenger who intends to use a ticket only partly needs no protection and can not argue that the relevant clause in the carrier's Conditions is ineffective.

The Higher Regional Court in Cologne allowed a further appeal to the Federal Court of Justice *(Bundesgerichtshof)*. Therefore, both the decision of the Higher Regional Court in Frankfurt and of the Higher Regional Court in Cologne are not yet legally binding.

Contrary to the decision of the Higher Regional Court in Frankfurt which had ruled in December 2008 that a clause in British Airways' Conditions of Carriage concerning cross-border-selling is ineffective, in July 2009, the Higher Regional Court in Cologne held that a clause in Lufthansa's Conditions of Carriage stating that flights have to be used completely and in the sequence provided in the ticket is valid.

For further information please contact: Rainer Amann

Establishment of Companies in Europe

Company Law

Article 43 of the EC Treaty states as follows: *"Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State."* During at least the last 20 years, the European Court of Justice (ECJ) has been repeatedly requested by national courts to delineate the contours of the details of this provision.

In its attempt to further establish the single market imperative, which mandates that all barriers to the free flow of merchandise, services, etc. be continually removed, the ECJ has adopted a two-pronged approach when it comes to the establishment of companies in different Member States. It distinguishes between cases of so-called *inbound* or *outbound* establishment:

The establishment of a company is deemed to be "inbound" when a company incorporated in one country seeks to establish either a subsidiary in another country or wishes to transfer its entire business or even its registered seat to that country – in other words, this concept deals with the problems arising out of the movement of companies from one State to another from the perspective of the "arrival" State (i.e. which receives the company).

The concept of outbound establishment refers to a company wishing to leave a country in order either to establish subsidiaries or to transfer its seat from one country to another, thus looking at the problem from the "departure" State's perspective.

In a series of rulings *(Centros, Überseering, and Inspire Art)*, the ECJ paved the way for freedom of establishment only in the sense of "inbound" establishment, abolishing a great number of prohibitive legal measures, such as the prerequisite to register a company in the "arrival" State or the denial to register it or to acknowledge its independent legal personality and limited liability.

Concerning "outbound" establishments, ever since the 1988 *Daily Mail* decision, the ECJ has constantly repeated that national law determines the existence and other issues of companies.

On 16 December 2008, the ECJ ruled in the *Cartesio* decision that a Hungarian limited partnership, incorporated in Hungary under Hungarian law, seeking to transfer its statutory seat to Italy while retaining its legal identity as a company governed by Hungarian company law could be barred by the Hungarian authorities

According to the *Cartesio* decision of the European Court of Justice, the principle of the freedom of establishment does not conflict the stipulations of a Member State according to which a company established pursuant to the national laws of a Member State is prohibited to transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.

from doing so. According to the Court, the company was a "creature" of Hungarian law, and if Hungarian law does not allow the company to transfer its seat from one country to another, the Hungarian authorities can legitimately prohibit the Hungarian company from transferring its statutory seat to Italy under obtaining the status of a company governed by Hungarian law. Thus, as long as *Cartesio* sought to be governed by Hungarian law, it would have to comply with Hungarian law which mandated at that time that its seat be in Hungary, otherwise it would have to be wound up in Hungary and reincorporated under Italian law.

In light of the *Cartesio* decision, what are the possibilities for a European company to migrate within the EU if the national regulations prohibit such seat transfer? The first possibility is to set up subsidiaries in different countries. Secondly, if the relevant law allows for the transfer of the central administration or the principal place of business while retaining the statutory seat then the setting-up of domestic companies, which conduct virtually all their business abroad, should be possible. A third possibility would be to set up a subsidiary in a different country, which would then acquire the mother company via a merger. Fourth, there is always the possibility of a winding-up with subsequent reincorporation abroad.

As to the treatment German courts grant to foreign companies, in a decision dated 27 October 2008, the *Bundesgerichtshof* (Federal Court of Justice) ruled that European companies enjoy the freedom of establishment as laid down by the ECJ whereas companies from outside Europe are subject to a different treatment.

In the subject case, a Swiss public limited company had its administrative seat in Germany and filed a lawsuit in Germany against its debtors. The Court ruled that this company has legal capacity not as a limited company under Swiss law but as a partnership under German law as the company seat principle – and not the incorporation theory – applies to companies of non Member States.

Whereas English limited companies set up in London can conduct their business mainly or entirely in Germany, taking advantage of the limited liability conferred by English law, a comparable company from a non Member State conducting a great part of its business in Germany is treated as a German partnership. The disadvantage for the non-European companies is that its partners bear unlimited liability for the company's debts.

At present, the German legislator is considering a reform of the private international company law in which the company seat principle may be abolished. Whether, when and to what extent the relevant law will be amended remains to be seen.

For further information please contact: Thorsten Storp

Supreme People's Court of PRC issued new interpretation on Contract Law

Chinese Law

We are happy to present to you in this Newsletter edition an article of our Chinese cooperation partner Jin Yu-Lai from Shanghai Kai-Rong Law Firm

On April 24, 2009, the Supreme People's Court of PRC ("SPC") issued the second judicial interpretation in respect of the 1999 PRC Contract Law, which took effect on 13 May 2009. The Interpretation 2 is deemed to be a counter-measure to the global financial crisis, which covers a wide range of issues relating to the conclusion, validity, performance, termination and breach of contracts. The Interpretations apply to disputes in relation to contracts entered into after the Contract Law took effect and in respect of which no final appeal has been concluded as of the effective date. Some important changes contained in this Interpretation are listed as below:

1. Establishing the principle of "Change of circumstances"

The principle of "Change of circumstances" was left out of the final version of Contract Law by PRC legislative body because it was concerned about the discretionary power of the judges in determining contract disputes. However, the absence of this principle had presented difficulty for courts in trying contract cases when a party's failure to perform the contract was caused by a significant change of circumstances. The Interpretations, in Article 26, purport to change the situation by clarifying that the court's right to vary a contract or declare a contract discharged extends to a situation where: (i) significant change occurs after the formation of a contract; (ii) the change could not be foreseeable at the time of the contract; (iii) the change is not caused by force majeure and is not a commercial risk; and (iv) due to the change, continuous performance of the contract is obviously unfair to the other party or cannot realize the purposes of the contract. Many commentators view this article as specially dealing with circumstances caused by the present global financial crisis. | Please continue on page 4

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To avoid courts abusing this principle and affect the order of market unnecessary, the SPC further stipulated in other interpretations that: a. if the dispute relates to some commodities actively traded in market and easily subject to price fluctuation for a long time, such as oil, coke, non-ferrous metals etc, or financial products relating to risk investment, such as shares, futures etc, the court shall be much more cautious in applying this principle; b. the courts shall guide actively the relevant parties to re-negotiate and revise their contract, or, failing this, to settle through mediation; and if eventually all the aforementioned efforts fail and a court is to apply this principle, it shall report level by level to a high people's court for approval, or even to the SPC.

2. Clarifying the requirements for standard clauses

Under Article 39 of the Contract Law, a party that provides standard form clauses has the obligation to draw the other party's attention to limitations and exclusions of liability and explain them on request. Article 6 of the Interpretations clarify how this obligation may be satisfied: Where, at the time of concluding a contract, the party providing the standard clauses adopted special characters, symbols, fonts and other signs sufficient to arouse the other party's attention to the content of the standard clauses regarding liability exemptions or restrictions in favor of the party providing the standard clauses, and made an explanation of the standard clauses according to the requirements of the other party, the people's court shall determine that the requirement of 'a reasonable way' in Article 39 of the Contract Law has been satisfied. The party providing the standard clauses shall bear the burden of proof on its/his fulfillment of the obligation to make reasonable prompting and explanation. This clarification is a piece of good news for those companies providing standard clauses, such as insurance companies, banks, airlines, which may standardize their standard clauses in accordance with this requirement. It shall be noted that the obligation to draw the other party's attention is to be fulfilled when concluding the contract, rather than any other time.

3. Dividing "compulsory provisions" into "compulsory provisions on administration" and "compulsory provisions on effectiveness"

As per articles 52 (5), Contract Law, a contract shall be null and void if violating the compulsory provisions of laws and administrative regulations. In practice, many courts abused this stipulation and nullified many contracts that should have been held valid and enforceable. To avoid this situation, SPC provides a further gloss on "compulsory provisions", explaining that "compulsory provisions" can be divided into "compulsory provisions on administration" and "compulsory provisions on effectiveness", and that "compulsory provisions" in the article 52 (5) of the Contract Law only refers to those provisions of PRC law which expressly provide that failure of compliance will render the relevant contract null and void. For example, under article 16 of the Company Law, if a company intends to invest in any other enterprise or provide guarantee for others, it shall be decided at the meeting of the board of directors or shareholders or shareholders' convention. This stipulation only relates to the internal governance of a company, the violating of which will not and shall not nullify an investment or a guarantee made by the company without such a procedure.

To be continued in the next Newsletter issue.

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