



RECHT AKTUELL

CURRENT LAW

Edition IV/V-2012

Focus in this edition: Real Estate and Tax Law

aclanz Partnerschaft von Rechtsanwälten
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1. Statement of Operating Costs: Advance Payments

An operating costs statement is formally effective even if the landlord has failed to list the tenant's advance payments properly (*Bundesarbeitsgericht* / German Federal Court in Civil Matters, February 15, 2012 – VIII ZR 197). According to the Court's rulings so far, a statement of operating costs had been formally effective if it contained (1) the total costs, (2) the scale of distribution, (3) the calculation of tenant's part and (4) the deduction of tenant's advance payments. These requirements have now been modified by the Court: Advance payments accounted for too high or too low or not at all are "just" a substantive error but do not make the statement as such void since they would not affect the comprehensibility of the statement. The tenant would be still able to check the statement on the basis of his own receipts in this regard.

2. Official Receiver Bound by Landlords Discount on Lease?

Also an official receiver must recognize an agreement of the landlord with the tenant according to which the tenant does not have to pay rent in exchange for construction works in the premises, no matter whether they are done by the tenant himself or just financed by the tenant (*Bundesgerichtshof* / German Federal Court in Civil Matters, February 15, 2012 – VIII ZR 166/10). In the case at hand, the tenant had reconstructions done in the amount of € 320,000. In return, he and the landlord had agreed that the tenant would not have to pay any lease for a period of 18 years. Later, the landlord was replaced by an official receiver who ignored the agreement and decided to terminate the lease agreement unilaterally due to default in payment. The Court dismissed the lawsuit of the official receiver. According to sec. 1124 para 1, 2 BGB (*Bürgerliches Gesetzbuch* / German Civil Code), sec. 146 para 1, 148 para 1 s. 1, 20 ZVG (*Zwangsvollstreckungsgesetz* / German Compulsory Enforcement Act) agreements affecting lease payments do not need to be taken into consideration by an official receiver. This, however, would not apply to agreements as described in the case at hand.

3. Retroactive Lease Reduction due to Defect?

If the tenant knows about a certain defect but keeps on paying the whole rent without reserving his rights of reimbursement with regard to individual payments may not retroactively reduce the rent. This applies even in a case where the tenant had given notice of the defect and had announced at an earlier point in time that he intends to reduce future payments (*Amtsgericht Mannheim* / Local Court of Mannheim, September 23, 2011 – 10 C 44/11). The Court draws this conclusion from sec.

814 BGB (German Civil Code) which provides in general terms that payments must not be reimbursed if they are knowingly made without any legal reason.

4. No Tax Deductibility in Case of Qualified Subordination of Debt?

Debts which are subject to a so-called agreement of qualified subordination (*qualifizierter Rangrücktritt*), allowing a future repayment only in the event that the company has sufficient profits or sufficient potential liquidation surpluses, are not to be classified as liabilities for tax purposes (*Bundesfinanzhof* / German Federal Fiscal Court, November 30, 2011- I R 100/10). In the case at hand, the suing GmbH (*Gesellschaft mit begrenzter Haftung* / German Limited Liability Company) had arranged for a qualified subordination with regard to a shareholder loan in the amount of DM 19 million in order to avoid its obligation to file for insolvency. The loan had to be deleted from the tax balance sheet, thus creating additional tax obligations. According to the Court, the tax situation would have been different though if the agreement of subordination had provided that repayments could not only be financed through profits or liquidation surpluses but also through “other assets”. Obviously, agreements of subordination can become a boomerang and need to be reviewed in each individual case for their consequences from both sides: The insolvency law and the tax law.

5. The Bullying Tax Audit

The decision to conduct a tax audit may be arbitrary and therefore unlawful if the main purpose of it, e.g. examining the tax situation of a citizen, becomes actually secondary. The tax administration cannot object that such an audit should not be considered as arbitrary as long as at least one of its goals is still to discover new tax issues (*Bundesfinanzhof* / German Federal Fiscal Court, September 28, 2011 – VIII R 8/09). In the case at hand, the tax office initially justified its order to conduct an audit by the “taxpayer’s fierce resistance at an earlier audit.” Furthermore, the tax payer placed under scrutiny happened to be a lawyer who had decided to represent a client against the tax office for harassment of employees. These were facts, which made the judges suspicious so that they decided that the tax office itself should be subject to a court investigation. Thus, the Court suggested that the tax office should disclose the criteria it has set in general for orders to conduct tax audits and how they would justify picking this specific tax payer for an audit in this specific case.

6. Civil Proceedings' and Criminal Defense Lawyer's Costs

Legal costs may be claimed as income related expenses for tax purposes. This also applies to defense lawyer's fees for criminal proceedings if the criminal charge in question was based on job related activities but not on private acts, e.g. private acts just committed on the occasion of a job activity (*Bundesfinanzhof* / German Federal Fiscal Court, August 17, 2011 – VI R 75/10). In general, if legal cost do not relate to income they will not be deductible as expenses from income as such. However, the Federal Court has now also recognized in another case that lawyer's fees for civil proceedings which are not related to any job activity may be so-called extraordinary expenses which are tax deductible if the lawsuit in question had initially some merits (at least a 50 % chance of winning) and was not initiated arbitrarily (*Bundesfinanzhof*, May 12, 2011 – VI R 42/09). Thus, the Court has given up an initial ruling which provided that it had to be a lawsuit concerning vital interests of the respective tax payer.

Announcement:

Symposium on the new Mediation Act on June 28, 2012 in Cologne

The [Cologne Research Center for Commercial Mediation](#) at the Cologne University of Applied Sciences will hold an all-day symposium on the new Mediation Act in which also *Joachim Hund-von Hagen*, co-director of the Research Center, will participate as one of the speakers. The Act is currently being negotiated as a bill by a joint committee of Bundestag and Bundesrat. Experts from businesses and institutions, especially the Round Table for Business Mediation in Germany, the justice system, law firms and mediation firms will be attending the symposium. Please find more details on the symposium and registration terms in German on the following pages:



Fachhochschule Köln
Cologne University of Applied Sciences
Zentrum für akademische Qualifikationen
und wissenschaftliche Weiterbildung

Kölner Forschungsstelle
für Wirtschaftsmediation

SYMPOSIUM ZUM NEUEN MEDIATIONSGESETZ

28.06.2012 Fachhochschule Köln

Donnerstag, 28. Juni

10:00 Eintreffen/Registrierung/Workshop-Einteilung;

Begrüßungskaffee

10:30 Einführung

Prof. Dr. Joachim Metzner

Präsident der Fachhochschule Köln

Thomas Kutschaty

Justizminister des Landes Nordrhein-Westfalen

Prof. Dr. Frank Gogoll

Dekan der Fakultät für Wirtschaftswissenschaften und

Leiter des Schmalenbach Instituts für Wirtschaftswissenschaften

Prof. Dr. Ricarda Rolf

Leitung Kölner Forschungsstelle für Wirtschaftsmediation

11:00 Eröffnungsvortrag

Mediationsgesetz – Entwicklung, Stand & Perspektiven

Dr. Jürgen Klowait, *Leiter Recht E.ON Kernkraft GmbH, Rechtsanwalt & Mediator, Vorstandsmitglied des Fördervereins des Round Table Mediation & Konfliktmanagement der deutschen Wirtschaft*

11:30 Impulsvorträge

Der Mediator auf dem Prüfstand: Zertifizierung und Ausbildungsstandards

Gebhard Mann, *Rechtsanwalt und Mediator, Justiziar STRABAG Property and Facility Services*

Anwaltsmediation vs. Richtermediation

Karina Nöker, *Rechtsanwältin, Geschäftsführerin der Rechtsanwaltskammer Köln*

12:30 Mittagspause (Buffet)

13:30 Parallele Workshops

Workshop 1 „Vom Zoff im Büro bis zum geschassten Geschäftsführer“: Praxisfälle innerbetrieblicher Mediation

Dr. Markus Troja, *Mediator und Ausbilder in Mediation (BM), TGKS - Troja Gläser Kirchhoff Schwartz, Oldenburg*

Workshop 2 Anwaltsmediation vs. Richtermediation

Karina Nöker, *Rechtsanwältin, Geschäftsführerin der Rechtsanwaltskammer Köln*
Rüdiger Rinnert, *Präsident des Landgerichts Neubrandenburg, Mediator (MA)*

Workshop 3 **Der „geprüfte und zertifizierte Mediator“?**

Aus- und Fortbildungsstandards für Mediatoren

Leitung der Forschungsstelle/ Zentrum für akademische Qualifikationen und wissenschaftliche Weiterbildung

Workshop 4 **Mediation – eine Perspektive im Haftungsfall?**

Rainer-Karl Bock-Wehr, Rechtsanwalt, Mediator (DAA), Leiter Kompetenzzentrum Firmen Haftpflicht-/Unfallschaden, HDI-Gerling, Köln

Workshop 5 **Mediation – das Herzstück eines Konfliktmanagementsystems**

Jürgen Briem, Conflict Management System CMS@SAP

Leiter interner Mediatorenpool SAP AG, Walldorf

15:15 Vorstellung der Ergebnisse im Plenum

Moderation: Leitung Forschungsstelle für Wirtschaftsmediation

Präsentation: *Workshop-Teilnehmer*

15:45 Kaffeepause

16:00 Experten-Diskussion mit Wortbeiträgen des Publikums

Moderation

Armin Himmelrath, Wissenschaftsjournalist

Experten

Jürgen Briem, Conflict Management System CMS@SAP

Leiter interner Mediatorenpool SAP AG, Walldorf

Rainer-Karl Bock-Wehr, Rechtsanwalt, Mediator (DAA)

Leiter Kompetenzzentrum Firmen Haftpflicht-/ Unfallschaden HDI Gerling, Köln

Joachim Hund-von Hagen, D.E.A. en Droit (Paris II), Rechtsanwalt,

Wirtschaftsmediator (TAE, DAA), aclanz Partnerschaft von Rechtsanwälten, Frankfurt a. Main

Rüdiger Rinnert, Präsident des Landgerichts Neubrandenburg, Mediator (MA)

Dr. Markus Troja, Mediator und Ausbilder in Mediation (BM),

TKGS – Troja Gläßer Kirchhoff Schwartz, Oldenburg

17:00 Ausklang und Verabschiedung (bei Kölsch, Wein und Fingerfood)

Anmeldung zum Symposium per Fax an: 0221 16052-50 bis zum 18. Juni 2012

☐ Ich melde mich verbindlich
zum Symposium an

Ich nehme an folgendem Workshop teil:

1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐

Name, Vorname

PLZ, Ort

Telefon

E-Mail

Beruf

Institution/ Unternehmen

Datum, Unterschrift

Teilnahmeentgelt: 110,- €

Anmeldung/Rücktritt: Anmeldeschluss ist der 18.06.2012. Anmeldungen sind verbindlich.
Bei zu geringer Teilnehmerzahl behalten wir uns eine Absage des Symposiums vor.
Bei Stornierung nach dem 20.06.2012 wird das gesamte Teilnahmeentgelt fällig.
Die Benennung eines Ersatzteilnehmers ist jederzeit möglich.

Zimmerreservierungen: Mit Ihrer Anmeldebestätigung erhalten Sie von uns eine Übersicht umliegender Hotels. Bitte nehmen Sie Ihre Reservierung selbst vor.

Tagungsadresse

Fachhochschule Köln,
Claudiusstraße 1,
50678 Köln

Raum: Rotunde - R.436

Wissenschaftliche Leitung Symposium

Prof. Dr. Ricarda Rolf
Kölner Forschungsstelle
für Wirtschaftsmediation

Anmeldung & Information

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Anreise mit

öffentlichen Verkehrsmitteln

UBahn/Straßenbahn:

Linie 15, Richtung: Chorweiler/
Ubierring

Linie 16, Richtung: Niehl/Bonn
jeweils bis Haltestelle Ubierring

Bus, Linie 132 und 133
bis Haltestelle Chlodwigplatz

Weitere Informationen zur
Anreise erhalten Sie auf
unserer Homepage unter
www.zww.fh-koeln.de



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