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1. Works Council Chairman: Personal Liability for Fees of External Advisors

The works council has legal capacity and is in fact the contractual partner of its external advisors if the involvement of an advisor is necessary and the terms of the agreement correspond to the arm's length principle. If those requirements are not met the chairman of the works council is considered to be an unauthorized agent and can be held personally liable for payment of the fees of the advisor (*Bundesgerichtshof / German Federal Court in Civil Matters, October 25, 2012 - III ZR 266/11*). Furthermore, the chairman may not even receive any reimbursement from the employer in such a case because Section 40 BetrVG (*Betriebsverfassungsgesetz / German Works Constitution Act*) sets forward also the criteria of necessity and arm's length principle. Finally, it seems also rather unlikely that the chairman could claim any reimbursement from other members of the works council.

2. Unilateral Reduction of Bonus Pool by Employer

If an employer has defined a certain bonus pool for a specific business unit and has informed employees accordingly, he is bound by such a commitment. A later reduction of the bonus pool can only be justified by extraordinary circumstances (*Bundesarbeitsgericht / German Federal Labor Court, October 12, 2011 – 10 AZR 756/10*). The case at hand dealt with a bonus pool in the amount of € 400 million. Due to an unexpected loss in the amount of € 6.5 billion the bank decided to cut down the bonus pool significantly. The Court agreed and stated explicitly that indeed such a significant loss justifies cutting down the bonus pool of the bankers employed.

3. Age-Discrimination by Job Advertisement “Young Team”

The wording of a job advertisement “we offer a future-proof job in a young, motivated team” is not age-discriminating according to Section 1 and 22 AGG (*Allgemeines Gleichbehandlungsgesetz / German General Equal Treatment Act*), *Landesarbeitsgericht Nürnberg / State Labor Court of Nuremberg, May 16, 2012 – 2 Sa 574/11*. According to the Court, the wording should be understood merely as a self-portrayal. The word “young” would not indicate a job requirement regarding the job applicant. Also, a damage claim according to Section 15 (2) AGG would have been excluded for other reasons in the particular case. The suing applicant had not applied seriously for the job in question. According to the Court this had to be concluded from the disorderly way the alleged application has been made.

4. Payment of Advisory Fees to Members of Supervisory Board

Payments made by the Management Board on behalf of an SE (*Societas Europaea*) or an AG (*Aktiengesellschaft / German Public Limited Company*) to a law firm need prior consent of the supervisory board, if a partner of the law firm is also a Member of the Supervisory Board (*Bundesgerichtshof / German Federal Court in Civil Matters, July 10, 2012 - II ZR 48/11*). The Federal Court confirmed by this ruling a general principle set up by the *Oberlandesgericht Frankfurt am Main / Court of Appeals*

Frankfurt am Main, February 15, 2011 - 5 U 30/10, see [Current Law 3/2011, Nr. 8](#). However, in the case at hand, the breach of this principle did not entitle shareholders to appeal against a resolution of the shareholders' meeting discharging the Management Board of the Fresenius SE. According to the Federal Court, there was no grave and explicit breach of law since this specific legal question had not yet been subject of a ruling of the Federal Court. Of course this objection will no longer be valid in future cases.

5. Criminal Invoicing by Members of Supervisory Board

Members of the Supervisory Board may be guilty of fraudulent breach of trust (*Untreue*) if they invoice unjustified attendance fees to the AG (*Aktiengesellschaft* / German Public Limited Company) they are supervising (*Oberlandesgericht Braunschweig* / Court of Appeals Braunschweig, June 14, 2012 – Ws 44/12, Ws 45/12). In the case at hand, the articles of association of an AG provided that the Members of the Supervisory Board would be entitled to attendance fees for participating in board meetings. However, the board members invoiced these fees also for other appointments, e.g. meetings with the Management Board or days of arrival prior to the board meetings. The Court considered this a breach of fiduciary duty concerning the company's assets. According to the Court the Members of the Supervisory Board could not invoke precedents of the *Bundesgerichtshof* / German Federal Court in Criminal Matters: e.g. the precedent that a breach of fiduciary duty concerning the company's assets is generally excluded in cases where a Member of the Supervisory Board negotiates in its own interest for a higher remuneration or the precedent that an indictment for fraudulent breach of trust generally requires that the Member of the Supervisory Board has committed a gross violation of corporate law at the same time. Finally, the Court pointed out that also those Members of the Supervisory Board must be indicted for fraudulent breach of trust who did not intervene when they saw their Co-Members invoicing unjustified attendance fees.

6. Trademark Violation: Personal Liability of Managing Director of GmbH for Unlawful Company Name

A Managing Director of a GmbH (*Gesellschaft mit beschränkter Haftung* / German Limited Liability Company) may be held personally liable if the name of the GmbH infringes another company's trademark rights. With this judgment, the *Bundesgerichtshof* / German Federal Court in Civil Matters, April 19, 2012 - I ZR 86/10 - had the *Oberlandesgericht Hamm* / Court of Appeals of Hamm reopen a case where the Pelikan Vertriebsgesellschaft mbH & Co. KG had sued the Managing Director of a Musikschule Pelikan GmbH. According to the Federal Court, the Managing Director of a GmbH cannot object that only the shareholders have to decide on a change of the company name but not the Managing Director. According to Section 3 (1) No. 1, Section 53 (1) GmbHG (German Limited Liability Act) he is at least obliged to work towards a change of the company name.



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