

# Briefing

+ Banking + Finance + Real Estate + Banking + Finance + Real

Germany  
October 2010

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## Editorial

*Property prices seem to have bottomed-out and worries are increasing that all-time low interest rates will be on the rise in the years to come. A configuration which has already a positive effect on the investment market and prospects are good that this will rise as long as interest rates are low.*



*Thomas Ziegler  
Practice Group  
Head*

*Expo Real will be a good occasion to obtain insight in further development of commercial real estate markets. Next Monday the commercial real estate industry will gather again in Munich, this time with 1,600 exhibitors. We would be pleased if you seize the opportunity and join us at our traditional Drinks Reception in the afternoon of Tuesday, 5 October. For details, please see the invite attached to this Briefing. The Drinks Reception will be attended by banking and real estate representatives from various countries, as well as a number of colleagues from our international offices. The event will be again a good opportunity to make*

*contacts and exchange ideas about most recent developments in the banking and real estate world.*

*We look forward to meeting with you.*

*With best wishes*

Thomas Ziegler

## Legislation

Increase in real estate transfer tax

In 2011 additional five federal states plan to increase the real estate transfer tax from its current level of 3.5 %: Brandenburg to 5 %, Bremen to 4.5 %, Lower Saxony to 4.5 % and Saarland to 4 %; Schleswig-Holstein has already decided to increase the tax rate to 5 % at the beginning of 2013. In view of the budgetary pressures at federal, regional and local levels, the tax increase by these five federal states may have a signal effect to the other federal states, so that a nationwide increase would definitely be realistic.

Facts:

The real estate transfer tax falls due when real estate is sold and is calculated according to the purchase price. Until September 2006 a uniform tax rate of 3.5 % of the purchase price applied nationwide. Thereafter, the right to set tax



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rates was assigned to the federal states, which can now set the tax rates for the real estate transfer tax. The original intention of shifting competences to the federal states was to create more competition between the individual federal states and, consequently reduce the amount of additional costs for real estate purchasers. However, this plan did not work out, because instead of reducing the real estate transfer tax, the federal states started to increase it. In 2007 Berlin started with increasing the real estate transfer tax to 4.5 %. The federal states Hamburg and Saxony-Anhalt followed suit and increased the rate to 4.5 % in 2009 and 2010.

The real estate transfer tax considerably contributes to the budgetary revenue of the federal states. Last year it amounted to a total of EUR 4.9 bn. Real property purchasers face significant additional charges because of the increase. The ancillary costs, which are inevitable when buying land, comprise real estate transfer tax, notarial and land registry fees and add up to about 6 % of the purchase price if the real estate transfer tax rate amounts for example to 4.5 %; however, with broker's commission, which may be payable additionally, excluded.

New law on consumer credits

On 11 June 2010 a new law aiming to protect credit customers came into force with the law on consumer credits. Above all, the new law effected changes with regard to advertisement, (pre-)contractual information, revocation, termination and early repayment, prepayment charges and calculation of the effective annual rate of consumer credit agreements.

Facts:

With the new provisions on consumer credits the amended consumer credit directive (directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/108/EEC) was translated into national law. Although the directive does not cover mortgage loans as well as loans which are granted for the acquisition of land or of an existing or planned building (real estate loan), the German implementing provision pursuant to the newly introduced section 503 German Civil Code (*Bürgerliches Gesetzbuch – BGB*) show in reverse that various provisions concerning consumer credits also apply (further) to mortgage loans. The translation of the EU's directive on consumer credit agreements into national law is intended to provide more transparency for borrowers. However, independent financial advisers criticise the new law on consumer credits. They claim that in particular the calculation of the effective annual rate contained obscurities, which resulted in less transparency. The confusion with respect to the effective rate was now even worse, because, due to the new provisions, consumers can no longer rely on a comparability of the products offered by credit institutions.

Ordinance for the Assessment of Property Value entered into force

The Ordinance for the Assessment of Property Value (*Immobilienwertermittlungsverordnung – ImmoWertV*) entered into force on 1 July 2010. The ordinance stipulates the principles for the assessment of the current market value of real estate. It applies in any cases in which the current market value of real estate or real property is to be assessed. In the new ImmoWertV some provisions no longer relevant were cancelled for the purpose of debureaucratization. Provisions for the assessment of the prospective development of an area are new. The provisions on the data necessary for the assessment of the value have also been adjusted with practical orientation. In terms of a better international comparability, new internationally usual terms have been introduced. Furthermore, new and important aspects for real estate transactions, such as energetic features, will be recorded as characteristics of the building.

Facts:

The new regulation accommodates the applicable rules for the assessment of value to the situation on the real estate market which has changed markedly. In particular, the demographic change and the internationalisation of the real estate industry created a new framework, which presented an amendment of the provisions of value assessment as reasonable according to the government. Also new areas of responsibility, such as urban restructuring and the Social City, had to be taken into account.

## Leases

Commercial leases:  
Contractual agreement  
of changes of landlord  
valid even under gen-  
eral terms and condi-  
tions



Gero Martin, Munich

Pursuant to a judgment of the German Federal Court of Justice (*Bundesgerichtshof – BGH*) of 9 June 2010 (XII ZR 171/08) a landlord of commercial premises may validly reserve the right to assign his position as landlord to a third party at any time also under general terms and conditions.

### Facts

In 2002 the tenant rented a retail unit in a shopping centre from a public limited company (*Aktiengesellschaft – AG*). The General Terms and Conditions used by the landlord stated inter alia: “*The landlord shall at any time be entitled to assign this agreement to another company.*” In March 2005 the AG informed the tenant that they assigned the lease agreement to a civil law association (*Gesellschaft des bürgerlichen Rechts – GbR*) – also the owner of the rented property – and that the rent shall be paid to this company. The tenant objected to the assignment of the lease agreement to the GbR. The corporate form of the GbR was then changed into a limited partnership (*Kommanditgesellschaft – KG*), which claimed payment of the rent in arrears and costs for renovation works. In the subsequent lawsuit the parties were in dispute about whether the GbR – and hence the KG – have become landlord.

### Reasons

The German Federal Court of Justice (*Bundesgerichtshof – BGH*) ascertained that in 2005 the AG validly assigned the position as landlord to the GbR. It was conceded that the tenant has to approve such an assignment; however, the BGH argued, the tenant’s approval required for the assignment of the lease agreement had been already granted under the lease agreement itself by way of the aforementioned General Terms and Conditions. These General Terms and Conditions also stand up to the terms control pursuant to sections 307 et seq. German Civil Code (*BGB*). In particular, the assignment clause is not invalid due to *unreasonable disadvantage of the tenant*. In principal, German law does not provide for an assignment of contracts by one of the contracting parties. However, under tenancy law even the statutory provisions of sections 565 and 566 BGB provide for a transference of the property to join a lease agreement in place of the original landlord. Thus, it depends on the circumstances of each individual case if an assignment clause unreasonably disadvantages the tenant. It is essential to considerate the interests of the parties. On the side of the landlord, organised as a company, his general commercial interest in a potential transformation of his legal structure or proprietorship, if considered reasonable in economic points of view, by potential transfer of holdings – including transfer of lease agreements – must be considered. On the other hand, the tenant is interested in a reliable and solvent landlord, but this is only of particular importance if the lease agreement is characterised by the tenant’s special interest in a particular person being the landlord. Such an interest of the tenant may in particular result from the legal form of the landlord – for example in case of natural persons or partnerships – or from a special personal bond of trust. However, such a “personal character” was not evident in the underlying case.

### Comment

By this judgment the BGH decides a question which has been controversially discussed in the legal literature in favour of landlords of commercial premises. It enables the landlord to assign the lease agreement without obtaining additional and separate approval from the tenant. Such an assignment clause may be of special importance for a landlord in case of internal reorganisations (all lease agreements shall be assigned to one “letting company” within the group). The same applies to cases of project development in which the property owner or property developer enters into lease agreements even before the building is completed, and then sells the property before the rented property is handed over to the tenants. In such cases, the statutory provision of section 566 BGB (transfer of the leases to the purchaser as new landlord by law) does not apply. In fact it is necessary for the vendor and purchaser of the property to conclude an agreement which provides for the purchaser to enter into the lease agreements on behalf of the landlord which is also binding to the tenant due to such assignment clause.

Provisions demanding specialist craftsmen in General Terms and Conditions of lease agreements invalid



*Melanie Kersting,  
Munich*

The Federal Court of Justice (*Bundesgerichtshof – BGH*) upheld the decision of lower courts according to which tenants may not be placed under an obligation to have decorative repairs carried out by specialist craftsmen by way of General Terms and Conditions.

#### Facts

A residential lease agreement imposed the obligation on the tenant “to have the decorative repairs in the leased property carried out [...]” on the tenant. Since the tenant refused to carry out decorative repairs, the landlord claimed damages for the performance of the decorative repairs. The German Federal Court of Justice (*Bundesgerichtshof – BGH*) followed in its decision the lower court which dismissed such a claim.

#### Reasons

Initially the BGH made it clear that the relevant provision is a provision contained in the General Terms and Conditions, which are subject to the review of General Terms and Conditions and may therefore not unreasonably disadvantage the tenant. Thereafter, the court continued that the wording of the provision was not clear, as a result the interpretation most beneficial to the tenant forms the basis for the review. Thus, the BGH assumed that a so-called specialist craftsmen provision had been agreed on in the lease agreement, i.e. the tenant should have been obliged to have decorative repairs carried out by specialist craftsmen. Because of this reading, the BGH felt the tenant was unreasonably disadvantaged by this provision, which results in the provision being invalid. The BGH sees the unreasonable disadvantage in the fact that this obligation exceeds the extent of landlord’s obligation which he would owe if he had not passed on the decorative repairs to the tenant. The landlord himself would only owe a workmanlike performance of average kind and quality, which could be carried out for example by acquaintances and relatives. With the obligation to have the decorative repairs carried out by specialist craftsmen, the tenant is denied the possibility to carry out the works in person at low costs. The approval of passing on decorative repairs in General Terms and Conditions is the result of general custom, which has evolved for a long time. However, this general custom has been characterised by the fact that the tenant may carry out the decorative repairs in person.

#### Comment

When tenants are obliged to carry out decorative repairs, the landlord must consider that the tenant must not be denied the possibility to carry out the works by itself. The decision only relates to residential lease agreement. Hence, it is left open whether the possibility to carry out the works by the tenant itself needs to be part of commercial lease agreements as well.

Provisionally invalid rent adjustment clause valid after price clause regulation entered into force



*Melanie Kersting,  
Munich*

Rent adjustment clauses, which would have been subject to approval by the competent State Central Bank (*Landeszentralbank - LZB*) at the time of conclusion, will become valid when the regulation on price clauses (*Preisklauselverordnung – PrKV*) and the law on price clauses (*Preisklauselgesetz*) entered into force, even if an approval has not been obtained.

#### Facts

On 6 October 1987 the parties concluded a lease agreement, which included an automatic adjustment of the rent in case a certain price index stated in the relevant rent adjustment clause changes to a certain extent. An approval of this rent adjustment clause by the competent LZB had not been obtained. In 2008 the landlord demanded a rent increase for the years 2005 to 2008 because of index increases. The tenant objected to the increase.

#### Reasons

The Regional Court of Cologne (*LG – of 20 May 2010, 22 O 179/09*) decided in favour of the landlord and adjudged his claim for a higher rent.

The LG Cologne reasoned that pursuant to the German Currency Law (*Währungsgesetz*) the rent adjustment clause would have been subject to approval by the competent LZB at the time of conclusion of the contract. Since the approval had not been obtained, the provision had become provisionally invalid at that time. On 1 January 1999 PrKV came into force and with it a fiction of approval for rent adjustment clauses in commercial lease agreements, which –

shortened – applies if the adjustment of the rent is linked to the consumer price index and the landlord may not give notice for regular termination for at least 10 years. The LG Cologne decided that the fiction of approval of the PrKV applies also to lease agreements which were concluded before the PrKV came into force even if the 10-year-period stipulated in the PrKV had already expired on 1 January 1999. It is substantial that the tenancy may not be terminated against the tenant's wishes before the 10-year-period has expired. Since this was the case in the underlying record to the decision, the provisional invalidity of the rent adjustment clause ended when the PrKV entered into force. The fact that the index, to which the rent adjustment clause referred, has discontinued was considered to be harmless by the court.

#### Comment

The decision makes clear, that even outdated rent adjustment clauses, which would have had been subject to approval, may be valid. The landlord may base claims for rent increases on such rent adjustment clauses from old lease agreements.

## Property Agency Law

Estate agent may not claim agency fee in case of considerable reduction of the purchase price in the course of contract negotiations

An estate agent may only claim agency fee if the terms of the property purchase agreement actually concluded corresponds – in essence – to the terms originally considered. This shall not be the case if the purchase price agreed under the purchase agreement deviates substantially from the purchase price considered under the brokerage contract (decision of the Higher Regional Court of Munich of 4 February 2010, 24 O 471/09).



*Gero Martin,  
Munich*

#### Facts

In May 2007 an estate agent offered a plot of land (with an older residential building) for sale to a prospective buyer for a purchase price of EUR 2.7 million. In November 2007 a property purchase agreement was concluded, however, with a purchase price of only EUR 1.655 million.

#### Reasons

The OLG Munich negated the agent's claim for agency fee. Pursuant to section 652 (1) BGB an estate agent shall be entitled to a respective fee if the main contract actually concluded corresponds, from an economic point of view, in essence with the agreement intended under the agency agreement with respect to the content, the type and the parties of the transaction. While usual reductions of the purchase price in the course of contractual negotiations shall have no impact, however, there is no so-called congruence between the agency and the main agreement if the purchase price agreed under the main agreement actually concluded deviates substantially from the terms to be effected under the agency agreement. There is no fixed limit for the exclusion of the agency fee; the specific circumstances of each individual case have to be taken into account. However, pursuant to recent decisions of the German Federal Court (*Bundesgerichtshof – BGH*) congruence between the agency and the main agreement shall be denied if the price difference amounts to at least 20 %. This also applies even in case the difference is in the customer's favour. Since in the underlying case the purchase price paid was 39 % lower than the purchase price originally disclosed by the estate agent, congruence between the agency and the main agreement has to be denied. Thus, the agent is not entitled to claim agency fee.

#### Comment

In the view of the above-mentioned jurisdiction it is essential for the estate agent to adjust the agency agreement with the customer accordingly if there are any changes in the course of the contractual negotiations, in particular with respect to the purchase price. In case the object or the terms of the contract deviate substantially from the original stipulations, the claim for agency fee becomes void in full even if – and that is the (actually surprising) consequence of the aforementioned decision - it is a deviation in the customer's favour. Therefore, the estate agent should make respective arrangements with his customer already upon conclusion of the agency agreement.

## Banking and Finance

Validity of guarantees payable on demand given in general terms and conditions in international trade



*Dr. Sandra Hofmann,  
Munich*

In international trade, parent companies frequently demand guarantees payable on demand for the liabilities of their subsidiaries. With its decision of May 3, 2010 (36 O 108/09 KfH) the Regional Court of Stuttgart affirmed the validity of guarantees payable on demand given by internationally operating companies in their general terms and conditions.

The key feature of the guarantee payable on demand, which explains why the guarantee holder particularly prefers this type of guarantee over a simple guarantee, is that a guarantee payable on demand principally excludes the guarantor's objection a case of guarantee did not occur (except in a case of a obvious misuse of rights). In particular, the objection of failure, incompleteness, delay or insufficiency of the guaranteed benefit may not bar the guarantor's enforcement of the guarantee. The basic rule: "pay first, sue later" applies accordingly. From the viewpoint of the guaranteeing bank the advantage is that the bank will not be involved in disputes between the principal debtor and the beneficiary under the guarantee, and from the viewpoint of the beneficiary that he/she is in a position to quickly obtain his/her money, similar to a cash deposit, and may not deal with the guarantor's entitlement of enforcing the guarantee until the principal debtor claims the return of the money.

Pursuant to former decisions by the German Federal Court of Justice (*Bundesgerichtshof - BGH*), the guarantee payable on demand as a typical banking transaction (as well as the surety payable on demand) was reserved to credit institutes. Because as a rule not even businessmen, to whom companies operating internationally also belong, are able to identify and assess the special risks connected with the general exclusion of objections of such a guarantee, and, therefore, need to be protected. The BGH reversed its restrictive opinion in subsequent decisions and basically left it to everybody's discretion to give such guarantees and sureties, however, the court demanded to determine in each case if, and if need be, to what extent the obligors under the guarantee need to be protected from the consequences of their obligation. However, the possibility of routinely giving such guarantees by way of the beneficiary's general terms and conditions, which is always the case if a pre-formulated (standard)text (provided by the beneficiary) is used for the guarantee, remained disputed.

The Regional Court of Stuttgart reasoned in the above-cited decision that a company experienced in international trade with subsidiaries outside the jurisdiction of its registered office may agree on a collateralisation by way of a guarantee (or surety) payable on demand for an affiliated company principally even by using general terms and conditions. The reason are the particular problems, which the creditor/beneficiary under the guarantee is confronted with in case of cross-border proceedings. The court continued that the interest to obtain the money in any case without legal proceedings would be reasonable and also worth being protected. Therefore, in such a case it may not be assumed that the security interest of the creditor is unreasonably extended to the guarantor's disadvantage.

It remains to be seen whether this interpretation of the law is confirmed by the BGH. The special importance of this issue, which results from the fact that the consequence of the inadmissibility of agreeing on a guarantee payable on demand means that the guarantee given is to be null and void (a reduction of the improper guarantee payable on demand to a simple guarantee was rejected), should not be overseen. Therefore, despite the decision of the Regional Court of Stuttgart, it is still advisable for the beneficiary to avoid corresponding risks. This may not be achieved by simply having the guarantor provide for the draft of the guarantee; nevertheless, the beneficiary would have to be considered as user of the general terms and conditions, because with regard to the question, which party is user of the general terms and conditions, it does not matter which party formally and/or technically presented the provisions, but which party provided for the use of them and whether the other party can freely decide over the content of the provisions. Because the parties have only limited possibilities when setting the details of a guarantee payable on demand, and because of the beneficiary's demand to take out a guarantee payable on demand, probably the beneficiary in person will have to be considered as user. In a given case – in cross-border transactions – this problem could possibly be solved by choice of law which has less requirements regarding the validity of the guarantee.

## Tax

Land transfer tax partly unconstitutional?



*Dr. Stefan Diemer,  
Munich*

Already some time ago the German Federal Fiscal Court (*Bundesfinanzhof – BFH*) requested the Federal Ministry of Finance to join a proceeding which has been initiated to clarify whether certain provisions of the German real estate transfer tax law are in breach of the German Constitution. With its decision of 4 August 2010 the Finance Court of Münster ruled the provisions unconstitutional.

This affects any transaction subject to real estate transfer tax for which the real estate transfer tax falls due because of direct or indirect changes of the shareholders of a company, mergers, other corporate transformations, as well as other acquisitions on the basis of the articles of association of the company. In such cases the German real estate transfer tax law provides for standard valuation of property with a consistent rate of a multiple of 12.5 the yearly rent.

In connection with the former inheritance tax law, the German Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*) has ruled the applicable valuation provisions unconstitutional. The court reasoned that such a standardised valuation could lead to individual results which differ considerably, to an amount of less than 20 % to more than 100 %, from the average value. Such a range of results did not comply with the requirements of the rule of equality under the German Constitution, and therefore, the valuation provision was structurally inappropriate, the court continued.

Even if the BVerfG considered this issue only in connection with the former inheritance tax law, by now the BFH tends to apply these considerations to the real estate transfer tax. Should the BVerfG as well rule the applicable provisions of the real estate transfer tax unconstitutional, the real estate transfer tax could no longer be set for the time being in cases where the real estate transfer tax falls due exclusively because of a direct or indirect change in the composition of a company since there would be no basis for taxing.

This issue arises in respect to any real estate transfer tax assessment which has been issued since 1 January 2009 and which has not yet been legally enforceable. Therefore, it should be examined in each individual case whether the real estate transfer tax assessment should be kept open until these issues have been clarified in order to be eligible for tax refund, if applicable. Furthermore, it may be possible to suspend the enforcement of real estate transfer tax assessments. The Finance Court of Münster explicitly granted such a suspension.

## Contacts

For further information, please contact your usual Eversheds contact or

Thomas Ziegler  
Head of Real Estate, Germany  
Tel ++49 (0) 89 545 65 316  
[thomas.ziegler@eversheds.de](mailto:thomas.ziegler@eversheds.de)  
[www.eversheds.de](http://www.eversheds.de)  
For a full list of Eversheds International offices and contact details please visit  
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The editorial contact person according to § 55 RStV is: Daniela Häßler, Heisse Kursawe Eversheds Rechtsanwälte Partnerschaft, Maximiliansplatz 5, 80333 Munich, Germany, [daniela.haessler@eversheds.de](mailto:daniela.haessler@eversheds.de)

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Heisse Kursawe Eversheds  
Rechtsanwälte Partnerschaft

Maximiliansplatz 5  
80333 München

Tel: +49 89 545 65 0  
Fax: +49 89 545 65 201

[www.eversheds.de](http://www.eversheds.de)



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Expo Real 2010

*Join us for a drink*

## Einladung

Sie planen bereits Ihre Termine für die Expo Real 2010 in München? Verpassen Sie nicht die Drink Reception von Heisse Kursawe Eversheds!

Treffen Sie in ungezwungener Atmosphäre bei Cocktails und Canapés interessante Gesprächspartner aus den Bereichen Bauen, Immobilien und Banken, und diskutieren Sie die Themen, die Ihr Unternehmen betreffen.

Die Experten aus dem Münchner Büro von Heisse Kursawe Eversheds sowie aus den internationalen Eversheds Büros freuen sich auf Ihr Kommen.

## Wo?

Novotel Hotel München Messe  
Raum: Weißkopf  
Willy Brandt Platz 1  
81829 München

(ca. 100 Meter vom Messe-Eingang-West,  
unmittelbar bei der U-Bahn Messestadt West)

## Wann?

Dienstag 5. Oktober 2010  
16.00 bis 21.00 Uhr

## u.A.w.g.

daniela.haessler@eversheds.de  
oder Fax: +49 89 545 65 123

Bei Fragen zur Veranstaltung  
kontaktieren Sie Daniela Häßler  
Tel: +49 89 545 65 233

Zur Anmeldung nutzen Sie gern  
auch unser Onlineformular unter  
[www.eversheds.de](http://www.eversheds.de)  
bei News unter Veranstaltungen.

## Invitation

You are already arranging your appointments for Expo Real 2010 in Munich? Don't miss the drink reception of Heisse Kursawe Eversheds!

Come and discuss the real estate issues that affect your organization over a refreshing drink in a relaxed environment. Heisse Kursawe Eversheds and Eversheds' European property and finance teams will be hosting drinks and canapés, so please join them at any time during the afternoon or evening.

The experts from the Munich office of Heisse Kursawe Eversheds and from the international Eversheds offices are looking forward to your visit.

## Where?

Novotel Hotel München Messe  
Room: Weißkopf  
Willy Brandt Platz 1  
81829 München

(appr. 100 meters from Trade Fair Centre Entrance-West, directly at underground station Messestadt West)

## When?

Tuesday 5 October 2010  
between 4pm and 9pm

## RSVP

daniela.haessler@eversheds.de  
or fax: +49 89 545 65 123

For more information contact  
Daniela Häßler  
tel: +49 89 545 65 233

You can also register online at  
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