THE LAW FIRM'S MAGAZINE

SOH

№ 20

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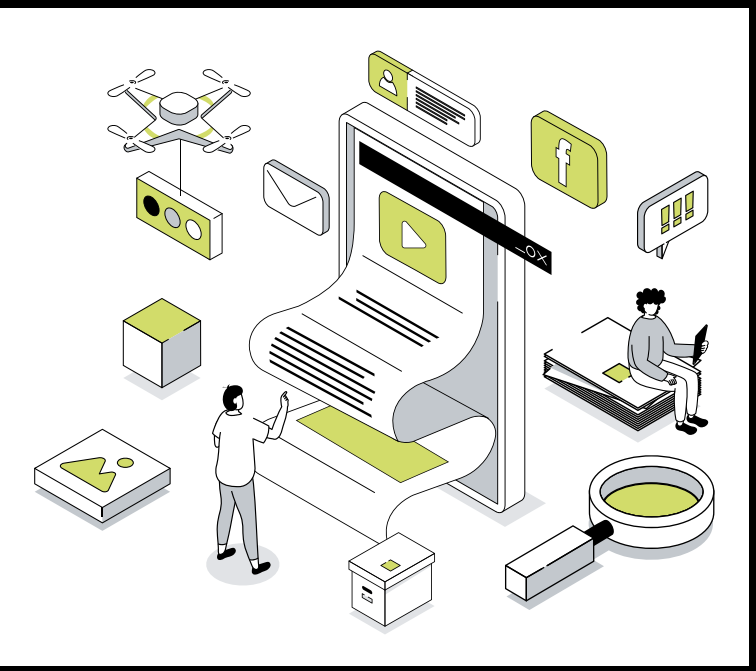

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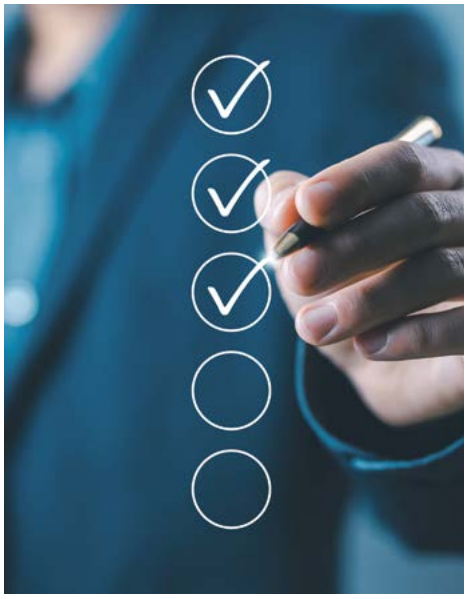

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DEAR READERS,

With Russia's war against Ukraine and the armed conflicts following the terrorist attacks on Israel by Hamas and Hezbollah, 2024 was also characterized by strong geopolitical tensions.

Unfortunately, it is not only due to this global economic climate that we are struggling with an economic recession in Germany. The European Football Championship, with the undeserved elimination of the German national team (#handballpenalty) and the atmospheric Olympic Games in Paris only provided a brief distraction. In any case, it was mainly the forest that enjoyed the summer this year, while not just southern Germany battled against the masses of water.

So, has 2024 been an "annus horribilis"? We think: By no means!

For SOH, 2024 was another successful year. We defied the crisis very successfully in our core business areas of corporate law/M&A and real estate law, and the demand for our advice in medical law and employment law also remained unbroken.

As an employer, we have once again been named a "Top Employer" by the lawyers' magazine "azur" and were able to adorn ourselves with our third professor on the letterhead in the person of Prof Dr Hans-Jörg Schulze.

These economic and academic successes enabled us to grow our workforce, again:

Dr Kristina Grohs-Freytag is the first graduate of our part-time doctoral program to join us. She specializes in medical law, in particular medical malpractice law. Kristina Grohs-Freytag also knows how to code our website. She spends her free time with horses and motorcycles.

Elisa Douven, who we were already able to convince during her legal clerkship, works for us in the areas of corporate law/M&A. Fortunately, Elisa Douven has already completed her dissertation and is just waiting for her doctoral certificate. In her free time, she is currently concentrating on her private construction project. Recently, she has been able to lay pipes and tear out screed herself. To compensate, she runs medium distances and is damn fast at it.

We are proud to announce that Dr Julia Breucker is the third winner of our SOH doctoral award. Julia Breucker supports our employment law practice. The mother of a young son masters the double burden as a commercial lawyer with flying colors.

Finally, Dr Marco Schneider joined us from a real estate law boutique. Marco Schneider advises our clients in particular on questions of commercial tenancy law. As a proud new father, Marco Schneider is absolutely loving looking after his young son, which means that his hobby – tinkering and working on old cars – is currently on the back burner.

We wish all new members of our team all the best and success in their work for our clients and for SOH.

So, they still exist, the good news. Sometimes we just overlook them. For example, did you celebrate the 75th anniversary of the "Grundgesetz", our constitution, in May? The best constitution Germany has ever had would have been a great reason for celebration.

Incidentally, your law firm SOH was founded only a short time after the Grundgesetz came into force. Does that make SOH one of the economic miracles of the 1950s? That may be a bit of an exaggeration. But we have been lucky enough to advise you, our clients, on quite a few "economic miracles", some of them even since 1950. We are really excited to celebrate this success story next year on the occasion of our 75th anniversary.

Therefore, in 2024, we would like to thank you most sincerely for your continued trust and loyalty to SOH. On behalf of all the SOH family, we wish you and your loved ones a Merry Christmas and a Happy and Prosperous New Year!

Stay optimistic, too!

Sincerely,

Dr Jochen Lehmann

Dr Till Wegmann

Dr Alexander Remplik

NEW IN THE SOH TEAM

DR MARCO SCHNEIDER

Dr Marco Schneider has been supporting SOH in real estate law since February 2024. He studied at Philipps University in Marburg and obtained his doctorate on a construction law topic. Marco Schneider completed his legal clerkship in Berlin, spending some time at the German Embassy in Riga (Latvia). Before joining SOH, Marco Schneider had already worked as a real estate lawyer in Düsseldorf for more than five years.

DR KRISTINA GROHS-FREYTAG

Dr Kristina Grohs-Freytag has been working at SOH in medical law, in particular medical liability law, since March 2023.

After studying in Münster and completing her legal clerkship in Essen, she obtained her doctorate on a highly topical health law subject as part of the SOH doctoral programme at the Ruhr University Bochum.

DR JULIA BREUCKER

Dr Julia Breucker joined the employment law team at SOH in October 2023.

Following her studies and legal clerkship in Bayreuth and Münster, she worked as a research assistant at a labour law chair at the Ruhr University Bochum. As part of this work, Julia Breucker obtained her doctorate on a labour law topic.

ELISA DOUVEN

Elisa Douven has been working for SOH in the area of corporate law since December 2023.

She studied at the University of Münster and performed her legal clerkship at the Dortmund Regional Court. Elisa Douven got to know SOH during her legal clerkship and returned there as a lawyer immediately after completing her training.

She will shortly be obtaining her doctorate with a thesis on corporate liability in the CSR context.

PROF DR HANS-JÖRG SCHULZE

OUR NEW PROFESSOR

Our colleague Dr. Hans-Jörg Schulze received a special honor this year. Rhine-Waal University of Applied Sciences in Kamp-Lintfort, where he has lectured for many years, awarded him the title of “Honorary Professor” in August 2024. We are very pleased about this tremendous distinction for Hans-Jörg Schulze and SOH. It is a recognition of his outstanding professional expertise and commitment.

Hans-Jörg Schulze has been working in public and real estate law for more than 20 years. He also advises on regulatory and data protection law issues. He is recognized as an expert in public law in the Handelsblatt “Best Lawyer” ranking and has been a distinguished contact for our clients for many years.

Our successful practice in Hans-Jörg Schulze’s areas is not only growing with his academic achievements, but also steadily with headcount additions.

We wish our new professor well and continued success!

SOH AT THE ESSEN COMPANY RUN

“Laufend im Recht” – under this motto, more than 20 SOH employees once again took part in the Essen Company Run in 2024. In ideal conditions, our first trio achieved a great success in the overall women’s ranking with 70th place out of 1281. We are curious to see whether our men can follow next year. In any case, the SOH team on and off the course is already looking forward to the new edition on 27 May 2025.

SOH AGAIN RECEIVES AWARD AS TOP LAW FIRM AND TOP EMPLOYER

Success makes you successful. And every title win, every award is an incentive to defend the title and repeat the success. In this respect, 2025 will be a challenging year because SOH was particularly successful in 2024.

The most important award shall come first, especially as it was awarded to us just a few weeks ago: The renowned industry magazine “JUVE” has ranked us as a “top tier law firm” in the “West“ region and thus in the highest rating category. We are very pleased that we were able to defend this top position for the fourth year in a row and have to share it with only one competitor. The practice groups “Corporate Law/M&A“, “Health Care Law” and “Succession/Foundations” also received positive rankings.

The “Top Employer” award from the „careers magazine for young lawyers Azur”, which we won once again in 2024, is also of particular importance to us as this award is based on the results of a nationwide associate survey. For the first time, we were not “merely” a regional top employer in this ranking but were able to climb into the top 50 nationwide.

In addition to these important awards for us, we also received a number of individual awards, of which we would like to mention just a few:

The industry magazine “Legal 500 Deutschland” also lists our health care lawyers in the nationwide top tier (Health & Medical Law) in 2024. Furthermore, the “Intellectual Property/Competition Law” practice group was able to defend its ranking.

Our health care law practice group received further awards from the magazines “Wirtschaftswoche” and “brand eins” (“Top Commercial Law Firm Health Care & Pharmacy” and “Best Commercial Law Firms – Health Care Law”).

Finally, six SOH lawyers were named “Best Lawyers“ by the “Handelsblatt Best Lawyers Ranking” (in the areas of M&A, intellectual property, employment law, antitrust and competition law, public commercial law) and two SOH lawyers were named “Ones To Watch” (in the areas of dispute resolution, restructuring and insolvency law, IT law, intellectual property law).

2025, here we come. Let’s tackle it!

THE NEW COLLECTIVE ACTION FOR REDRESS ("ABHILFEKLAGE"): CLASS ACTION 2.0

Claims of consumers against companies are often not enforced because consumers fear the risk of litigation. That applies in particular when the amount in question is relatively small (e. g. air passenger rights) or the underlying facts are complex (e. g. the "Diesel scandal"). The new collective action for redress ("Abhilfeklage") is literally intended to provide redress here.

In the US, it has long been possible to assert consumer claims in a class action (e. g. glyphosate lawsuits against Bayer). However, German law previously only provided for the model declaratory action ("Musterfeststellungsklage") as a collective legal remedy for consumers. As reported in SOH News 2018, the model declaratory action only seeks a judicial declaration of the (non-)fulfillment of factual or legal requirements. If successful, consumers still must pursue their individual claims.

As of October 2023, the new collective action for redress also provides the opportunity in Germany to assert such consumer claims directly and collectively in court. Reason enough to take a closer look.

1. Who is authorized to bring an action?
The collective action for redress can only be brought by so-called qualified entities ("klageberechtigte Stellen"). These include, in particular, consumer associations ("Verbraucherzentralen").

2. What other requirements must be met?
Claims can only be asserted by consumers against companies. The claims may be for payment or for other performance (e. g. subsequent delivery ("Nachlieferung")). The qualified entities may claim performance to named consumers or to an unknown but identifiable group of consumers. However, the collective action for redress is only admissible if the qualified entity can credibly demonstrate that a group of at least 50 consumers could be entitled.

The collective action for redress also requires that the claims concerned be of the same kind. That is the case if a specific event gives rise to claims by several consumers (e. g. cancellation of a flight) or if there is a series of similar facts (e. g. a company concludes several consumer contracts with defective terms and conditions).

3. How does the procedure unfold?
The procedure for a collective action for redress is split into the fact-finding procedure ("Erkenntnisverfahren") and the subsequent enforcement procedure ("Umsetzungsverfahren").

As part of the fact-finding procedure, the court first examines whether the above-mentioned conditions are met and, if so, whether the collective action for redress is substantiated. If the action is successful, the court usually issues a so-called basic redress judgment ("Abhilfegrundurteil"), which specifies the requirements for consumer entitlement and the proof of entitlement to be provided. It should be noted that a judgment may not be issued before the expiry of six weeks after the conclusion of the hearing. This gives consumers the opportunity to join the action at an advanced stage of the proceedings (see below).

After the basic redress judgment has been pronounced, the court requests the parties to submit a settlement proposal. If the proceedings are not terminated by an effective settlement, the court issues a final redress judgment ("Abhilfeendurteil"). Therein, it rules on the enforcement proceedings and determines the costs incurred for the enforcement procedure, all of which are to be borne by the company.

The subsequent enforcement procedure serves to fulfill the consumers' legitimate claims. Therefore, the court appoints a competent person as a so-called trustee ("Sachwalter") (e. g. a lawyer or tax advisor) who conducts the enforcement procedure under court supervision as an independent authority and examines the registered consumer claims. Regarding the legitimate consumer claims, the trustee arranges for the corresponding sum of money to be paid by the company or requests the company to render performance.

4. How can consumers participate?
Consumers can participate by registering their claims for entry in the register of representative actions ("Verbandsklageregister"). Legally binding final redress judgments are only binding for those consumers who have registered their claims. Registration is free of charge and can be done without legal representation. Furthermore, there is no cost risk for the consumer: If the action is dismissed, the qualified entity bears the costs of the proceedings.

The registration suspends the limitation period and can be made from the announcement of the collective action for redress in the register of representative actions until three weeks after the conclusion of the hearing. Consequently, consumers can await the course of the proceedings and decide to file their own claims based on the court's assessment in the hearing. However, this creates uncertainty for the affected company regarding the final number of consumers involved and the expected amount of damages.

5. How relevant will the collective action for redress become?
The German legislator expects the collective action for redress to lighten the workload of the courts and to strengthen consumer rights. In fact, the collective action for redress is likely to lead to an increased number of consumer claims and to more intensive enforcement of consumer rights. This applies in particular to claims based on product defects, cartel law violations or the violation of sustainability-related obligations. The relevance of the collective action for redress has already been proven in practice: Several collective actions for redress have already been filed since the law was amended, including actions against Vodafone and Amazon.

Even though for non-registered consumers the decisions in the redress proceedings are not binding in law, it can nevertheless be assumed that the outcome of a redress procedure constitutes de facto a preliminary decision. If a redress action is successful, it is likely that especially operators of legal enforcement portals (myright, flightright etc.) will attempt to collect such consumer claims and assert them collectively through qualified entities.

Thus, the collective action for redress entails a significant economic risk for companies with B2C business, the actual extent of which may not become clear until further proceedings have been initiated. Such companies should therefore consider the new legal remedy as soon as possible and proactively take the risks involved into account in their business decisions (e. g. how to handle complaints from consumer associations).

BY:
ELISA DOUVEN

NEW REQUIREMENTS REGARDING THE FORM OF COMMERCIAL LEASES
FOURTH GERMAN BUREAUCRACY REDUCTION ACT – LEGISLATOR MISSES OUT HISTORIC OPPORTUNITY

Commercial tenancy law is a central component of German commercial law. The legally prescribed form of rental contracts plays an important role in this field of law. Until now, rental contracts had to be concluded in writing. This seemingly tiny requirement is not only associated with an enormous amount of work. In practice it is mainly used to prematurely terminate rental agreements that have become a nuisance.

The federal government seemed determined to abolish the written form in total
The federal government apparently wanted to put an end to the possibility of prematurely terminating rental agreements that have become unpleasant. On 30 August 2023, it advocated a complete abolition of the written form requirement for commercial leases. This initiative caused quite a stir. On the one hand, the abolition of the written form would have been associated with an enormous increase in legal and planning certainty. On the other hand, from the point of view of the party seeking grounds for termination, the option of terminating the lease with reference to the lack of written form would have not longer been available.

A welcome approach is quickly abandoned
However, in the draft law that was presented by the government on 13 March 2024 not much remained of the federal government‘s far-reaching plans. Instead of abolishing the written form, the draft provided for an exchange of the written form for the text form. This was criticised by, among others, the German Mietgerichtstag and the Bundesrat (Federal Council) but the criticism went unheard by the federal government. Accordingly, the draft law was accepted by the Bundestag (German parliament) and the Bundesrat.

Lack of written form leads to premature terminability
Background: If a rental agreement or an amendment to a rental agreement is not concluded in written form for a period longer than one year, the rental agreement remains legally effective but is deemed to have been concluded for an indefinite period. As a consequence the rental agreement can be terminated prematurely with the statutory notice period of six months. Long fixed terms of up to 30 years are worthless in this case. For the receiving party the termination often has painful consequences. Investments made in the rented property do not amortise as planned and are generally not to be reimbursed by the terminating party.

A lack of written form can arise for a variety of reasons. All material agreements between the parties must be set out in the written lease in order to comply with the written form requirement. In particular, amendments to the existing lease that are also subject to the written form requirement are susceptible to a lack of written form. Even minor deviations from the rental agreement that are not set out in writing can lead to a lack of written form.

Current practice is not covered by the purpose of the legal regulation

This has led to a practice that is far removed from the original purpose of the legal regulation. The written form requirement should primarily serve to protect the purchaser of real estate, who enters into the current rental agreements by law upon acquisition. However, under the current legal situation, the original parties to the rental agreement can prematurely withdraw from long-term leases that have become unpleasant by invoking a lack of written form as well. This leads to considerable legal and planning uncertainty for both parties. Furthermore, it undermines the important principle of pacta sunt servanda (Latin for 'agreements must be honoured').

Text form does not resolve existing uncertainties and brings new ones with it

The replacement of the written form for the text form may make things easier in some respects. In the future, rental agreements and associated (subsequent) agreements can be concluded with an electronic signature, e. g. via DocuSign, or by exchanging signed scans. However, the requirements regarding the exact determination of individual contents of the rental agreements are likely to remain just as high as they are despite the implementation of the text form. Ambiguities or gaps in rental agreements will continue to be used to get rid of unpleasant rental agreements during the current lease term. This continues to circumvent the protective purpose of the legal regulation and does not eliminate existing legal and planning uncertainties.

Furthermore, the text form gives rise to a new problem: for the written form and the electronic form, the law stipulates that, in order to conclude a contract, the written signature or electronic signature must appear on the same document. However, there is no legal regulation for the text form that stipulates which formal requirements must be met when concluding a contract. For example, it is unclear whether the entire content of the contract, including the offer and the acceptance, must be contained on one data carrier (e. g. within an e-mail or an SMS) or whether a reference to the contract document is sufficient. If a reference is sufficient, it is unclear how it should be made. This leads to considerable legal uncertainty, which the Bundesrat had already pointed out in its statement on the draft law.

The legislator has therefore not only missed a historic opportunity that is unlikely to arise again in near future but has also created additional uncertainties at the expense of digitalisation and the hoped-for relief of citizens from unnecessary bureaucracy. In the meantime, it is advisable to continue to set out rental agreements and/or amendments in a joint document with reference to all previous agreements and to have the document signed by both parties at least with an electronic signature.

BY:
DR MARCO SCHNEIDER

CLOSED – FAMILY-RUN TRADITION, MADE IN EUROPE, DESIGNED IN HAMBURG

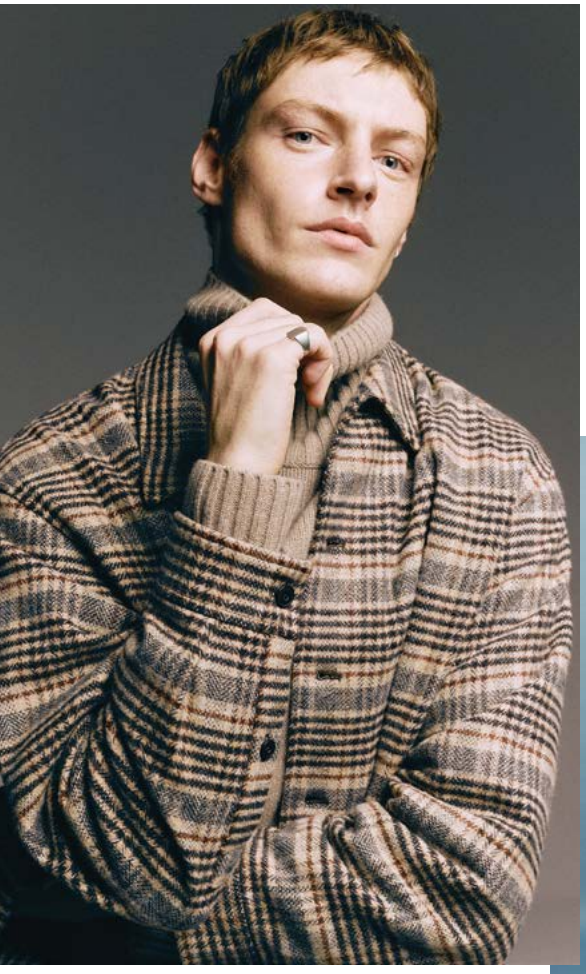
Due to the somewhat advanced age of the author, his law studies began in 1982 and they were already around then: Closed trousers. As chinos in many colours and of course as jeans: the famous “pedal pushers” with the legendary fly label and X-pockets at a 33° angle.

If you walk past the Closed company headquarters on the Straßenbahnring in Hamburg today, you rub your eyes: of course they still exist, the trousers in an incredible number of variations. But today Closed is more: a contemporary brand with a full collection for men and women. Denim and trousers remain the focus of the collection – made from the best fabrics, in the highest quality and with a perfect fit. The collection is innovative, modern and timeless. But in such a way that the author’s generation can still wear them well.

Today, Closed has more than 40 stores of its own, spread all over Europe, even though sales are now mainly channelled through the online shop.

We are all the more delighted that our enthusiasm for Closed has been met with “counter-love”: Managing Director Hans Redlefsen comments: *“After a very short time, we formed a close partnership with SOH as equals. Of course, there are also many law firms in Hamburg. But what convinced us about SOH as soon as we met them was that they speak our language: Clear, professional and with targeted recommendations.”* And with a smile, Hans Redlefsen adds: *“And the fact that our lawyers have a lot of empathy for our brand is certainly not wrong either”.*

Retail and SOH – they simply go together. And so we recommend that all readers, especially the young at heart, visit one of the Closed stores (unfortunately Essen is still missing) or the online shop soon.



CLOSED

BY:
DR TILL WEGMANN

THE MEDICAL DOCUMENTATION
THE END OF EVIDENTIARY SIGNIFICANCE IN MEDICAL MALPRACTICE PROCEEDINGS?

Medical documentation has played an important role in medical malpractice proceedings not only since the Patients' Rights Act came into force on February 26, 2013. This is because in many lawsuits, the course of treatment in all its details can only be traced with the help of the written documentation. This is particularly true with regard to pre-treatment discussions, as this is a "mass business" for doctors, meaning that they cannot be expected to remember every single conversation. In practice, medical documentation is therefore highly relevant for the preservation and management of evidence on the part of the practitioner.

The obligation to document exists for the medical facts essential for the medical diagnosis and therapy. On the one hand, in the event that a breach of the documentation obligation can be established, the law contains the presumption that an undocumented measure was not carried out (negative indicative effect). On the other hand, however, the supreme court case law may also attribute circumstantial value to proper treatment documentation in favor of doctors, namely that documented measures were actually carried out as documented (positive indicative effect).

Medical documentation must be made in writing or electronically. If patient records are stored on electronic media, tamper-proof software that contains the original entries and makes changes visible must be used. Electronic documentation that does not meet these requirements has no indicative value due to the risk of intentional or accidental deletion or alteration of the stored content.

However, in a decision from 2023, the Federal Court of Justice (Bundesgerichtshof – BGH) may now question the indicative effect of medical documentation as a whole (BGH, judgment of 05.12.2023 – VI ZR 108/21). The decision was based on the question of a treatment error during a birth.

At her request, a mother was cared for by a midwife employed by the hospital when she arrived at the hospital. Therefore, an initial medical examination did not take place. The midwife performed a CTG several times, which was pathological from 3:00 pm, clearly pathological from 3:30 pm and highly pathological from 3:55 pm. The midwife did not react to this. However, in the medical documentation she noted that she had shown the CTG to the assistant doctor on duty at 7:10 pm. In contrast, the reports drawn up the following day by both the assistant doctor and the head physician state that no information about the CTG was passed on to them by the midwife. A further CTG revealed bradycardia, i. e. a slowed heartbeat in the child. In the course, an emergency caesarean section was ordered by the then involved doctors, because the child's heartbeat could not be detected, whereupon the child was delivered at 8:20 pm. However, the child was lifeless at the time of delivery and had to be resuscitated. It suffers from irreversible brain damage, as a result of which the suing health and long-term care insurance provided and continues to provide benefits for the child.

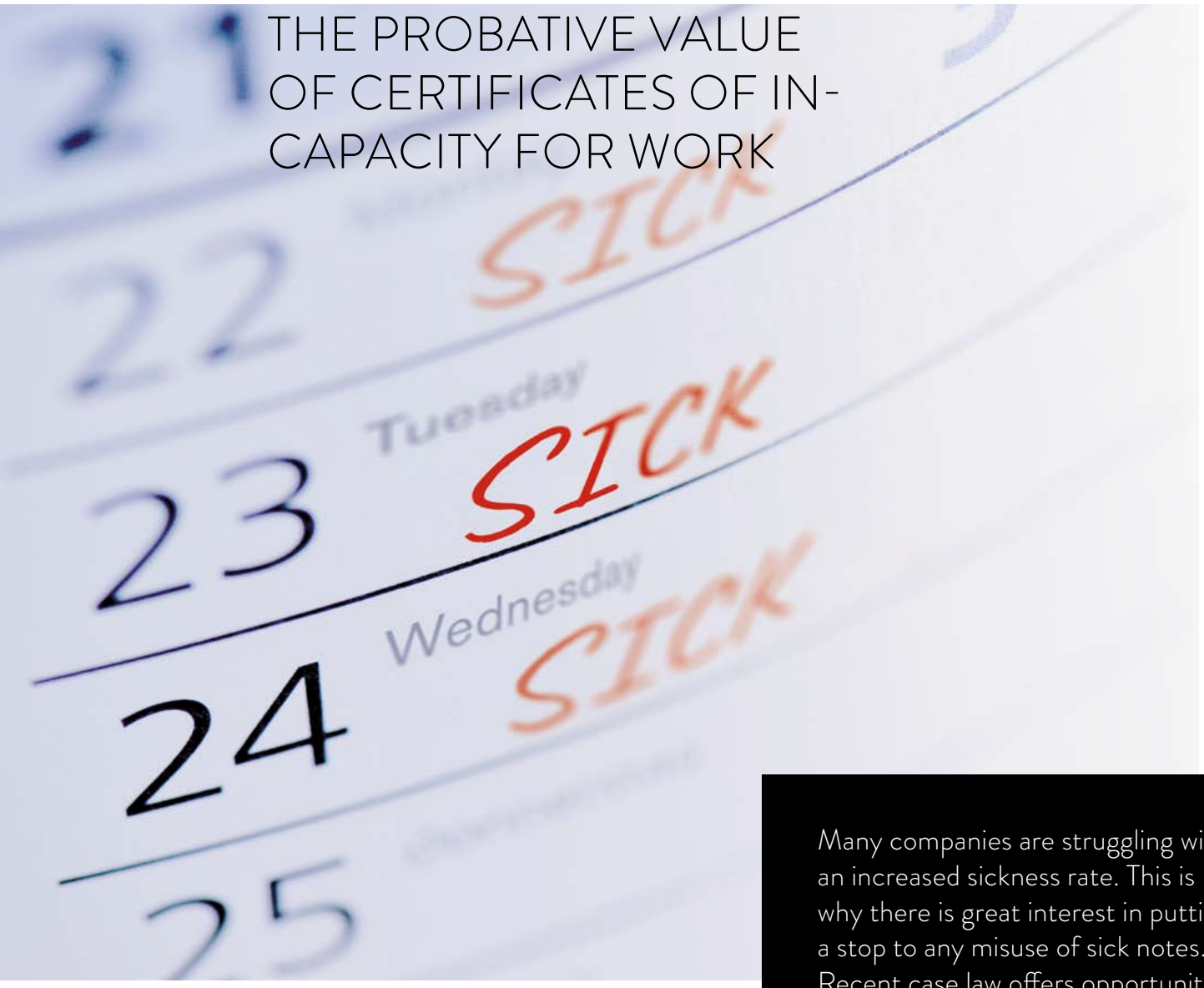
The District Court had upheld the claim against the midwife on the merits and found that she was liable to pay compensation as she had failed to react to the documented course of the birth and the highly pathological CTG in a grossly negligent manner. The action against the doctors and the hospital was dismissed, as the Regional Court was unable to convince itself that the doctors had taken over the management of the birth before 7:45 pm. In particular, it was unable to convince itself that the CTG taken by the midwife was seen by the doctor at 7:10 pm. The only indication of this was the written documentation prepared by the midwife, which the court did not believe, however, because it could not be ruled out that it had been made in the midwife's own interest in order to avoid or reduce her own liability.

In the opinion of the BGH, the ruling is not objectionable. According to the 6th Senate, *"the content of the documentation is not to be assumed to be correct in favor of the party providing the evidence unless the opposing party proves the contrary."* The opposing party does not have to disprove the accuracy of the content of what is stated in the document; it is sufficient if the accuracy of the content remains doubtful according to his submissions. This is certainly the case *"if the documenting party has recorded circumstances in the patient file that are detrimental to the co-treatment provider (opposing party) in the specific case and it cannot be ruled out that this was done in their own interest in avoiding or reducing their own liability."* There is also no presumption, which must first be rebutted, that a documented measure was actually carried out.

If the BGH's reasoning is followed consistently, the evidential value of the treatment documentation would now be questionable in any medical malpractice lawsuit. This is because the patient regularly argues that entries in the patient documentation do not reflect what actually happened, but were made by the nursing staff and/or doctors untruthfully and for their own protection. Especially if the documentation is made promptly, but e. g. after the doctor has become aware of the occurrence of a complication, it can never be completely ruled out that the documentation was not only overly obligatory, but may also have been made untruthfully in their own interest to avoid or reduce their own liability. It therefore remains to be seen how the courts of lower instances will implement the decision of the BGH in the future and how the significance of medical documentation under evidence law will develop.

BY:
DR KRISTINA GROHS-FREYTAG

REALLY SICK? – THE PROBATIVE VALUE OF CERTIFICATES OF INCAPACITY FOR WORK



Many companies are struggling with an increased sickness rate. This is why there is great interest in putting a stop to any misuse of sick notes. Recent case law offers opportunities to take action against "suspicious" certificates of incapacity for work.

INITIAL SITUATION

As a rule, the employee provides evidence of incapacity for work to the employer by submitting a medical certificate of incapacity for work. Such certificates of incapacity for work generally have a high probative value, meaning that employers have rarely been able to successfully challenge these certificates.

However, this established assessment of certificates of incapacity for work has been under scrutiny for some time. There have been an increasing number of court decisions in which the evidential value of certificates of incapacity for work has been shaken due to justified doubts.

Violation of the Incapacity for Work Directive ("Arbeitsunfähigkeits-Richtlinie")
Doubts about a certificate of incapacity for work can arise on the one hand from a breach of the Incapacity for Work Directive ("Arbeitsunfähigkeits-Richtlinie") by the doctor writing the sick note.

In practice, particular attention should be paid to certificates of incapacity for work that have been issued for a period of more than two weeks. Care should also be taken to ensure that backdating the start of the incapacity for work to a day before the date of issue is only possible in exceptional cases and for a maximum of three days. It should also always be checked whether the certificate was issued by a suitably qualified or specialized doctor. Doubts may arise if, for example, an orthopaedist issues a certificate of incapacity for work due to a cold.

In addition, employers should always be wary of so-called "online certificates of incapacity for work", i. e. certificates of incapacity for work generated by online providers without direct personal contact between doctor and patient. With some providers, employees can obtain a certificate of incapacity for work without any contact with a doctor by entering their symptoms in a questionnaire on a website or via an app, for example, and a doctor then issues a certificate of incapacity for work based on this self-diagnosis. In these cases, the lack of contact between doctor and patient also constitutes a breach of the Incapacity for Work Directive ("Arbeitsunfähigkeits-Richtlinie").

Consequences of shattering the probative value
If an employer succeeds in undermining the probative value of a certificate of incapacity for work, this does not automatically mean that the employee is not entitled to continued payment of remuneration. In such cases, the employee must rather prove his incapacity for work with other evidence, e. g. by naming the doctors treating him as witnesses, releasing them from their duty of confidentiality, disclosing the causes of his illness, symptoms, diagnoses as well as examinations and therapeutic measures taken or submitting medical reports. Only if the employee is unable to prove that he was actually unfit for work will he lose his entitlement to continued payment of remuneration.

In cases in which the evidential value of the certificate of incapacity for work is shaken, disciplinary measures such as a warning or even extraordinary dismissal may be considered in addition to a reduction in pay or reclaiming the continued payment of remuneration already paid. This is because faking incapacity for work constitutes a breach of contractual obligations.

OUTLOOK

Against the background of numerous other pending proceedings, the further development of case law can be eagerly awaited. Employers can and should take the current change in case law as an opportunity to review the certificates of incapacity for work submitted to them with regard to the guidelines developed by the case law on the shaking of the value of evidence.

BY:
DR JULIA BREUCKER

IS IT NECESSARY TO WORK ON FRIDAY AFTERNOONS? SELLER'S DUTY OF DISCLOSURE IN THE CONTEXT OF DUE DILIGENCE

In a judgment of 15 September 2023, the German Federal Court of Justice (Bundesgerichtshof – BGH) considered, among other things, whether a seller has fulfilled its duty of disclosure by merely posting a document in a virtual data room, if the circumstance that the seller should have disclosed can be inferred from this document.

The judgment was based on a property purchase. At an earlier owners' meeting, a decision had been taken to carry out extensive renovation work on the building complex. This information was contained in the minutes of the owners' meeting, which the seller posted in the virtual data room on the Friday before the notarisation of the purchase agreement was due to take place on the following Monday. No separate information was provided to the buyer. On the last working day before the notary appointment, should the buyer have expected to receive newly posted documents?

Duty of disclosure and information

According to German case law, a seller is generally not obliged to disclose all details and circumstances that might influence the buyer's decision to purchase. This does not apply to circumstances that are likely to frustrate the conclusion of the contract and are therefore of material importance to the buyer. In such a case, the buyer may regularly expect the seller to provide information. The BGH had to decide whether the seller fulfilled its disclosure obligation by placing the relevant information in a virtual data room (shortly before the conclusion of the contract) without further notification to the buyer.

According to the BGH, this question cannot be answered in general terms and in isolation from the circumstances of the individual case. The mere fact that the seller sets up a data room and allows potential buyers access to the data should not always lead to the conclusion that the buyer takes note of the fact requiring disclosure, given the diversity of procedures in practice. However, if, in an individual case, it is reasonable to expect that the buyer will take note of certain information provided by the seller in the data room – for example, during a technical, economic, and legal review of the target company (due diligence) – and consider it in its purchase decision, no separate clarification by the seller is required.

In the view of the BGH, whether the seller can have a legitimate expectation that the buyer will learn of a disclosure obligation by inspecting the data room depends on the individual case. Decisive factors may include whether and to what extent the purchaser carries out due diligence, how the data room and access to it are structured and organised, what agreements have been made in this regard and what type of information is involved in the disclosure. In its judgment, the BGH thus establishes fundamental criteria for the interaction between the seller's duty to disclose and the buyer's duty to evaluate.

Significance of the criteria established by the BGH for the seller

From the seller's point of view, it is advisable to record in writing whether the buyer is conducting due diligence and, if so, whether it is being supported by experts. The number of people carrying out the due diligence and their qualifications and expertise in the area may be important. If the buyer does not carry out due diligence, the seller will not generally be able to rely on the fact that it has fulfilled its disclosure obligations by providing documents subject to disclosure in a virtual data room. However, if the buyer is assisted by experts, the mere placement of the documents in the virtual data room may generally be sufficient to satisfy the seller's obligations. In the view of the BGH, the circumstances of the individual case are ultimately decisive.

SIGNIFICANCE FOR THE FUTURE

In our view, the decision will not only have an impact on real estate practice. In corporate transactions (M&A), the seller should also bear in mind that it is in its interest to minimise the risk of breaching the duty of disclosure towards the buyer. Particularly in the case of corporate transactions, the seller should prepare all relevant information for the buyer by structuring and organising the data room. If this is done, the view of the BGH that in the present case there was no reason for the buyer to inspect the data room again on the Friday before the notary appointment does not pose a real problem. Irrespective of the requirements to be met by the buyer's due diligence and the infrastructure provided by the seller, particularly important circumstances should be dealt with separately – preferably in the purchase agreement.

From the buyer's point of view, the clear message from the BGH should be noted: If the buyer is of the opinion that he needs more time to carefully examine the documents provided, it is generally up to him – subject to any agreements made in this respect – to point this out to the seller and, if necessary, to request an extension of the examination period and a postponement of the notary appointment.

The seller should then consider how the virtual data room will be set up and used. Is it possible to give meaningful names to the documents in the data room? Can the documents be organised systematically? Is there a table of contents or a search function? Is the buyer specifically notified when new documents are added (notification function)? The more of these criteria the virtual data room meets, the more likely it is that the seller will have confidence that the buyer will take note of the information. Accordingly, the seller's indemnity is linked to a detailed, meaningful, and organised structure of the virtual data room. Professional data room providers usually provide this logistics. In practice, it is worth checking the offer carefully before selecting the data room provider.

In terms of content, it must be determined on a case-by-case basis whether the seller is obliged to draw the buyer's attention to a particular circumstance. The seller must consider whether a circumstance could be of material importance to the buyer. This is particularly likely if it could frustrate the purpose of the contract or cause material damage to the buyer.

BY:
DR MORITZ KRAFT

BY:
DR ALEXANDER HERRFURTH

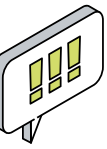
THE ELECTRONIC INVOICE IS COMING
A STEP TOWARDS DIGITALISATION – ARE BUSINESSES PREPARED?

With the Growth Opportunities Act, the German legislator is pushing ahead with the digitalisation of VAT law initiated by the EU Commission. He is gradually implementing electronic Invoicing ("eInvoicing") at the national level for B2B transactions from 1 January 2025. Businesses must ensure that they implement the requirements.

The eInvoice
In future, the VAT Act will distinguish between "eInvoices" and "other Invoices". The "eInvoice" is an invoice that has been issued, transmitted and received in a structured data format which allows for its automatic and electronic processing. To comply with the structured data format, the invoice must meet the European standard for eInvoicing as defined in Directive 2014/55/EU. Under certain circumstances, a supplier and a buyer can agree on a certain format. All other electronic formats or paper invoices qualify as "other Invoices". This means that, for example, PDF files sent by email no longer constitute an "eInvoice". Instead, an XML file with structured data is usually required.

EInvoice becomes the default method for B2B sector
Businesses based in Germany with taxable turnover in Germany must comply with the new requirements from 1 January 2025. They are obliged to receive "eInvoices". It is sufficient to provide an email address for this purpose. Furthermore, it must be ensured that the "eInvoice" can be read by the recipient – for example by using a suitable accounting software. There is no right to demand "other Invoices"; the previous priority of paper invoices will be abolished. However, if the business does not receive an "eInvoice" – either because it refuses to accept it or the technical requirements for receiving the "eInvoice" have not been established – this does not mean that the issuer breaches VAT obligations: If he has issued a proper "eInvoice" and can prove that he has made every effort to transmit it properly, he will not face any VAT-related disadvantages.

In addition, businesses must issue "eInvoices" if the invoice recipient is based in Germany. But this change does not take full effect immediately. The legislator has created transitional regulations for the issuing of "eInvoices": As of 1 January 2027, business with a turnover above EUR 800 000 are no



longer allowed to issue invoices on paper or in unstructured electronic format. As of 1 January 2028, the obligation will be extended to all remaining businesses. Until then, consent, at least implied, between the supplier and the buyer about the "other Invoice" is required. For example, it is sufficient if the invoice is accepted without objection.

If a business wishes to issue "eInvoices", they must also transmit them electronically. In addition to sending them by email, possible transmission methods include providing the data via an electronic interface or downloading it via a (customer) portal. Transmission via external storage media, such as USB sticks or similar, do not fulfil the requirements! The business is allowed to use an external service provider. In such case, however, the business must ensure that the third party fulfils the formal requirements for correct invoicing.

Special constellations
As before, contracts that contain all the information required for invoices can continue to be regarded as invoices. If there is an obligation to issue an "eInvoice" for continuing obligations, e. g. for tenancies, the tax authorities will accept an "eInvoice" for the first partial performance period, as long as it is clear that it constitutes a recurring invoice. For low-value invoices up to a total amount of EUR 250 and tickets, businesses may be able to dispense with the "eInvoice".

Input VAT deduction jeopardised?
In practice, the introduction of the eInvoice obligation raises a number of questions: one of these concerns the possibility of input VAT deduction. While the requirements for the content of an invoice remain unchanged, the choice of an "other Invoice" means that the legal requirements for a correct invoice – hence an "eInvoice" – are not met. In principle, there is no right to deduct input tax from such an incorrect invoice. However, if the issuer subsequently corrects the original "other Invoice" with a proper "eInvoice", input tax deduction is possible.

The ECJ and BFH have confirmed in the past that a formally correct invoice is not always a necessary condition for the deduction of input VAT: this principle should continue to apply if a business provides the tax authorities with proof that the service was provided as part of their business and that the VAT was paid. The tax authorities agree. Regarding the "eInvoice", the tax authorities have already announced that, applying a strict standard, they may also allow an input tax deduction from an "other Invoice" under certain circumstances if all information is available to verify the content requirements for the input VAT deduction.

The residency of the contractual partner as a risk
An "eInvoice" only has to be issued between domestic businesses. However, the residency of the contractual partner in Germany can be uncertain. The tax authorities therefore recognise that the invoice issuer can rely on the information provided by the recipient of the service when exercising the diligence of a prudent businessman, unless they have information to the contrary. However, this does not apply to the recipient of the service. An input VAT deduction is only possible if a correct invoice is presented. Recipients therefore always have an interest in the country of residence of the invoicing party. For recipients, the fact that they cannot obtain knowledge in a legally secure and practical manner represents a VAT risk.

OUTLOOK

The changeover to "eInvoicing" is forcing businesses to act quickly and is an unavoidable step on the way to the digitalisation of business transactions. The legislator is endeavouring to ensure a smooth transition. The tax authorities also promise to take the transformative nature of the process into account. However, companies should not rely too much on the latter, but should start their preparations immediately.

BY:
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AND
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AI REGULATION: DRIVER OR HURDLE FOR DIGITIZATION?

With the AI Regulation, the European Union (EU) has created the first comprehensive set of rules on the use of artificial intelligence in the world. We provide a brief overview of the key content.

Europe lags behind the USA and other countries in the technical development of artificial intelligence systems (AI systems). In contrast, Europe is a pioneer in the field of artificial intelligence regulation. With the AI Regulation, the EU has presented the first comprehensive set of rules. It is intended to ensure a human-centered and trustworthy approach to AI.

In addition to the aim of regulating the risks arising from the new technology, the AI Regulation also aims to bring the EU member states forward in the international competition for progress, digitalization and innovation.

The AI Regulation already partially came into force on August 1, 2024; however, the majority of the provisions will not come into force until later – gradually until 2 August 2027.

The AI Regulation imposes requirements on public and private developers and operators of AI systems inside and outside the EU, provided that the AI system is (also) placed on the market in the EU or its use has an impact on people in the EU.

It initially provides for AI systems to be classified on the basis of a risk-based approach. A distinction is hereby made between AI systems with

a) minimal risk (e. g., AI-supported video games),
b) with special transparency obligations (e. g., chatbots),
c) with high risk (e. g., medical AI software or AI for use in recruiting) and
d) with unacceptable risk (e. g., social scoring).

AI systems with higher risks are consequently subject to stricter regulation.

No special restrictions apply to AI systems with minimal risk They only have to comply with the generally applicable legal regulations. However, companies are free to subject themselves to additional codes of conduct.

In the case of AI systems with special transparency obligations. Transparency shall ensure that it is always clear to the user that they are communicating with a machine and not with a human being, e. g., in an online chat. This is intended to protect against deception and misleading.

Significantly stronger restrictions apply to high-risk AI systems, which are intended to provide appropriate protection in view of the high risk. In addition to a fundamental rights impact assessment – which must always take place before a high-risk AI system is put into operation – this also includes the mandatory guarantee of human supervision. The AI systems must therefore have a human-machine interface to enable effective supervision by humans for the duration of their use.

Finally, AI systems with unacceptable risk (referred to in the AI Regulation as “prohibited practices in the field of AI”) are expressly prohibited. Before the prohibition comes into force on 2 February 2025, the European Commission is also expected to publish guidelines on the bans in order to specify this prohibition.

In addition to the risk categories, there are AI systems with general purpose (e. g., ChatGPT). Further provisions of the AI Regulation apply to these AI systems. Among other things,

providers are subject to information obligations towards providers of downstream systems and must have strategies in place to ensure compliance with copyright law when training their models. The aim of the regulation is to counter the assumed systemic risks of AI systems with general purpose. The AI Regulation assumes these systemic risks if the general-purpose AI system has been trained with a total computing power of more than 10^{25} FLOPs (floating-point operations per second). The threshold can be adjusted by the European Commission depending on technical progress.

In order to enforce the obligations arising from the AI Regulation, the Member States are to appoint a national competent authority by 2 August 2025. In addition, the European Panel on Artificial Intelligence (AI Panel) will be created to ensure EU-wide coherence and cooperation. Further, the Artificial Intelligence Office at European Union level, established at the European Commission on 16 June 2024, will support the Member States and the AI Panel in implementing the AI Regulation.

Depending on the type of infringement, the AI Regulation provides for fines of up to EUR 35 million or 7 % of the previous year's total global turnover, whichever is higher. The upper limits of the fines vary depending on the type of infringement.

Besides protecting against the risks of the new technology, the AI Regulation also aims to promote innovation in the EU. This is achieved not only by creating a secure legal framework, but also through concrete innovations. In particular, the AI Regulation stipulates that the Member States must each set up at least one so called real-world laboratory. These real-world laboratories shall provide a controlled environment to promote innovation and facilitate the development, training, testing and validation of innovative AI systems before they are put into operation.

The goal of promoting AI technology in the EU is a welcome one. However, if this does not succeed, all that will remain is a legal framework that could once again be a setback to the efforts on urgently needed digitalization in Europe. The topic remains exciting. Thanks to the transparency obligation of the AI Regulation, we will at least soon find out how often we have already communicated with AI systems as chatbots.

BY:
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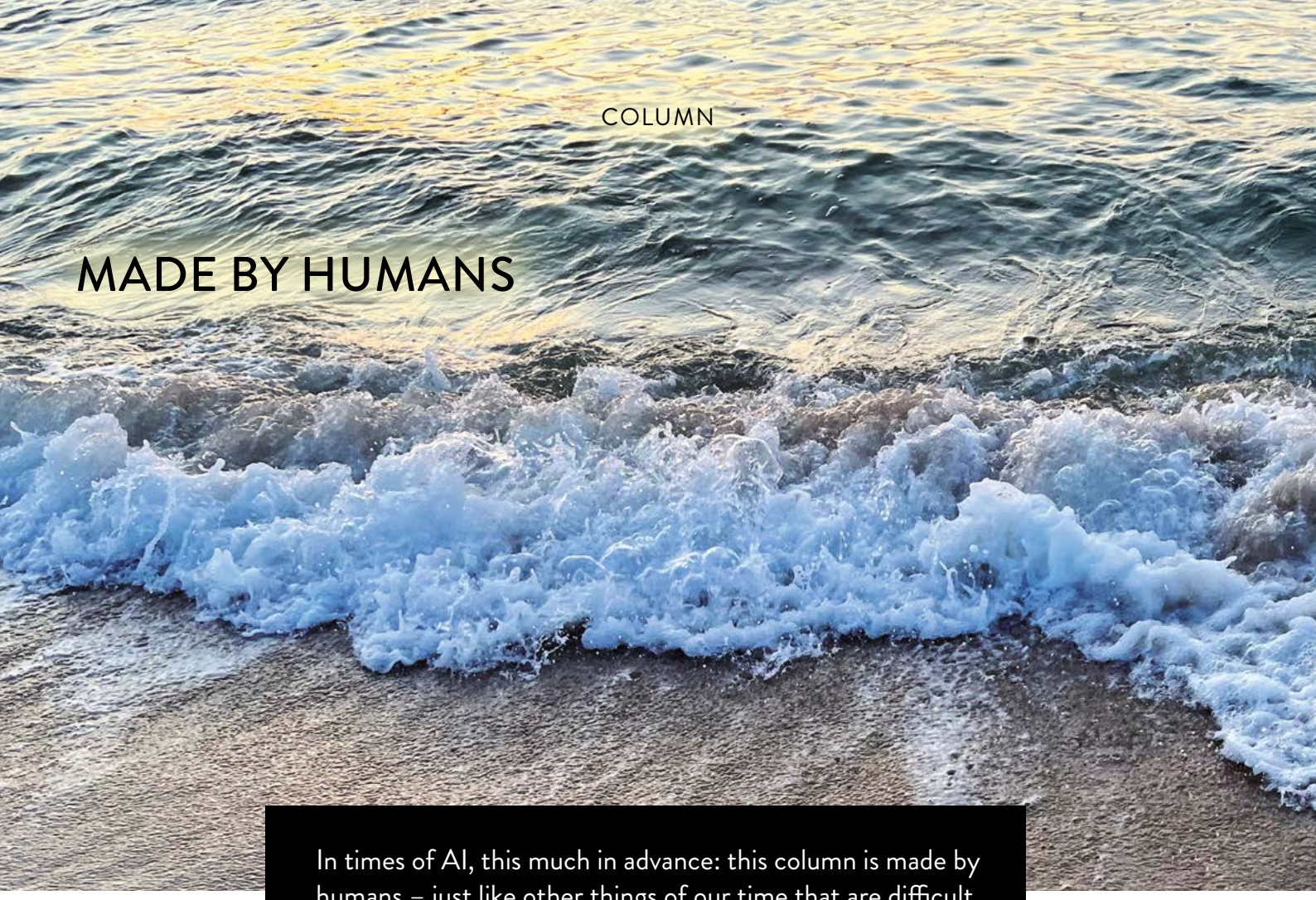
MADE BY HUMANS



In times of AI, this much in advance: this column is made by humans – just like other things of our time that are difficult to bear. Bureaucracy, for example. As we all know, we all moan about it.

In times of AI, this much in advance: this column is made by humans – just like other things of our time that are difficult to bear. Bureaucracy, for example. As we all know, we all moan about it.

A civil servant from the German state North Rhine-Westphalia took a pragmatic approach to reducing bureaucracy. The selfless public servant was late for work on 816 days. His lateness totalled 1,614 hours. The German Federal Administrative Court calculated that, based on a 41-hour working week, this resulted in almost nine months of absence. That's some effective relief from the yoke of bureaucracy, isn't it? But we all know what's coming. The taxpayers' association will no doubt construe this as a waste of public money. You simply can't please anyone in this country!

We certainly cannot accuse the federal government of being unwilling to reduce bureaucracy. It has now presented the **"Draft of a Fourth Act to Reduce Bureaucracy for Citizens, Business and Administration – Bureaucracy Reduction Act IV".** Well? That sounds like even more bureaucracy at first, doesn't it? But sometimes you have to fight fire with fire. Just like a lady from Greece who lit fires to get the flames of her heart under control: In the city of Tripoli, this woman was arrested after allegedly setting fires several times. The simple explanation: she wanted to meet men in uniform this way. Well, longing and desire are just consuming embers!

It is not known how this story ended. But we hope the good woman doesn't throw in the towel too quickly. At least not on a lounger by a Greek hotel pool. The Local Court of Hanover has ruled that it can constitute a defect of the travel contract if the pool loungers are constantly blocked with towels from other guests. In the case of limited sun lounger capacity (which is generally acceptable to the traveller), the hotel operator must ensure that every guest has a place in the sun. Honestly: We'd rather go straight to the sea!

But not "into" the sea, please! Which brings us to the man who urinated in the Baltic Sea at night "standing with his back to the beach in the direction of the water" and was caught by three (!) public officers. They saw the nocturnal wild urination as a "grossly improper act (...) which is likely to cause a nuisance to the general public". Only bureaucrats could come up with that! The Lübeck Local Court thinks bigger. Natural law applies to quite natural needs: "Humans have no less rights under the vastness of the heavens than the deer in the forest, the hare in the field or the seal in the fringes of the Baltic Sea." Nothing more needs to be said.

Hold on. We already know what you're thinking: "That's all well and good, but do you really want to bathe in such murky waters?" The local court has also considered this: *"No nuisance pollution or odour impairment has occurred. The Baltic Sea contains 21,631 cubic kilometres of brackish water. Even in the event of repetition or imitation, the degree of dilution would be high enough to rule out the possibility of nuisance pollution or odour impairment."* Well, then we've cleared that up and learnt the word "degree of dilution".

However, we would also have wished a high degree of dilution for a driver from Belgium. He was caught with two per mille at the wheel. Nevertheless, he was acquitted of the charge of drunk driving because he suffered from home-brew syndrome, according to which his intestines produce alcohol themselves. Sure, we all remember that from driving school: *"If the booze comes from inside, you can start driving"* – or something like that. But joking aside. If the driver really does produce alcohol inside his body, it should be checked whether alcohol tax is payable on this. Where is the bureaucracy when you need it?

Somehow, we got off topic. So back to the Baltic Sea. You really can't accuse the three public officers of a lack of hard work during their night-time deployment (so much for cheaply criticising officials!). We would just love to know whether the officers are on patrol in smart uniforms at the edge of the Baltic Sea. We're asking for a Greek lady ... Wouldn't that be a wonderful twist?

In the end, the best stories are still written by life – made by humans and not by AI. Cheers and Merry Christmas!

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DR BRITTA BULTMANN

BY:
DR FELIX ADEN

P.S.: And if after reading this column you have a desire for more or the sea, we recommend the reasons for the judgement of the Lübeck Local Court (linked under the QR code). Every line is a pleasure to read!

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