DAS MAGAZIN DER KANZLEI

SOH

№ 19

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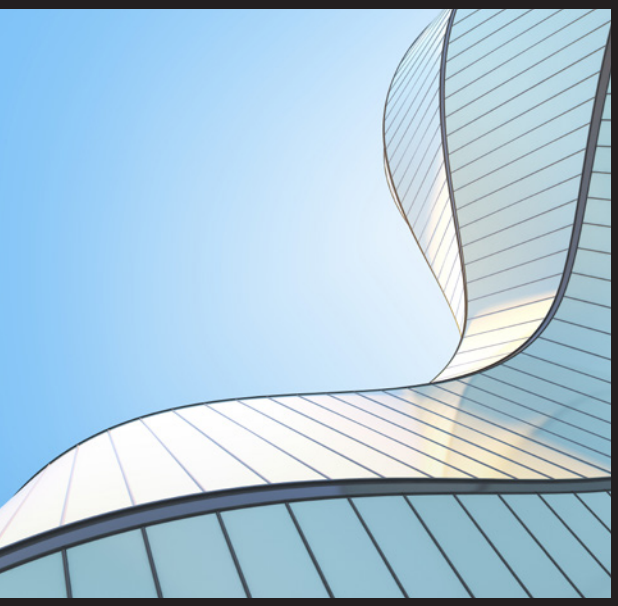

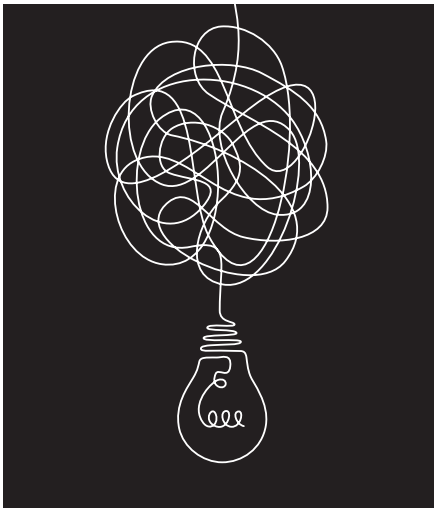

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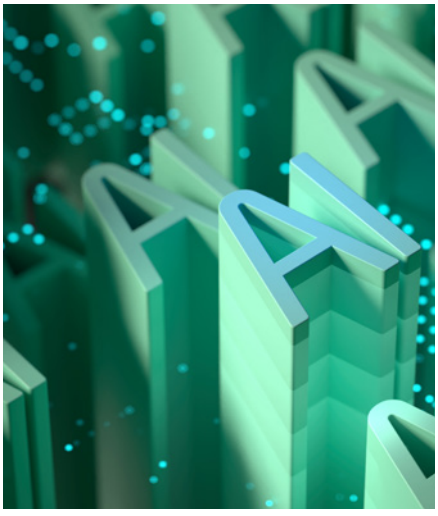

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DEAR READERS,

Last year, we already found it difficult to summarize the past year positively in light of the Russian invasion of Ukraine. This year is no different, now that the world is also holding its breath because of Hamas' terrorism.

We are all the more grateful that 2023 was another successful year for SOH:

This was not only due to the one or two major corporate transactions that kept us on our toes last year, some of which were reported on in the (specialized) press. Even outside of one of our core business areas, corporate law advice and support for corporate transactions (M&A), our advisory services were in high demand, e. g. in medical law and property law.

And so we grew again last year:

Dr. Maximilian Guntermann, a former trainee lawyer who is also a winner of our SOH doctoral scholarship, has joined us. Mr. Guntermann works in the areas of corporate law, antitrust law and labour law. We also convinced Ms. Julia Hilger of a career at SOH during her legal traineeship. She joins us in medical law and is particularly active at the interface with corporate law. And Ms. Hilger is even the first winner of our SOH doctoral scholarship. So anyone who thought that SOH had changed its recruiting principles is wrong: Ms. Hilger will be awarded her doctorate in the next few weeks. We are delighted about this double proof of the quality of our trainee lawyers and our doctoral scholarship. We are also delighted that Dr. Marina Adams has joined us from a well-known competitor after more than five years of professional experience. Ms. Adams specializes in commercial and corporate law, insolvency law and litigation. With her, SOH's insolvency team now comprises three lawyers, which demonstrates the increased demand in this area.

We wish Ms. Hilger, Ms. Adams and Mr. Guntermann much pleasure and success in their work for you, our clients, and for SOH.

In 2024, our senior and name partner Dr. Jochen Schmidt will prove that we are not only able to inspire young colleagues to join us, but that we even resemble a multi-generational home: He will be celebrating his 50th anniversary as a lawyer, just ahead of the 75th birthday of the law firm that bears his name. SOH's 75th anniversary is coming up in 2025 and is already casting its shadow. Finally, our colleague Prof. Dr. Franz-Josef Dahm enjoys his work at SOH so much that he has remained with us as of counsel following his age-related retirement as a partner at the end of last year. We would like to thank both of them for their great services to the benefit of SOH!

Apart from legal matters, we have also continued to develop our sporting activities: This year, SOH took part in the Essen Company Run for the first time with a team of more than 25 runners (claiming SOH, "Recht Sportlich"). We are pleased to show you some impressions of the run in this issue. For next year, some eager colleagues have set themselves the goal of attacking the top teams. We will report back.

We would like to thank you for your continued trust and loyalty to SOH. On behalf of all SOH employees, we wish you and your loved ones a Merry Christmas and a Happy and Prosperous New Year! May it also be a more peaceful year for everyone!

Sincerely,

Dr. Jochen Lehmann

Dr. Alexander Remplik

Dr. Till Wegmann

NEW IN THE SOH TEAM

DR. MAXIMILIAN GUNTERMANN

Dr. Maximilian Guntermann joined SOH in October 2022 and works in the areas of corporate law, employment law and antitrust law. After studying in Hamburg and Oxford, he completed his doctorate at the LMU Munich on a capital markets law topic in the field of "Environment-Social-Governance". During his legal clerkship, Mr. Guntermann became acquainted with SOH and returned as an attorney at law immediately after completing his training.

JULIA HILGER

Ms. Julia Hilger has been working at SOH since November 2022 and will complete her doctorate on a corporate law topic at the end of this year. She complements the teams in medical, corporate and company law. She recently wrote an article in the anthology "Queere Vielfalt im Fußball" on the topic of legal protection of members in associations in the event of discrimination.

DR. MARINA ADAMS

Dr. Marina Adams has been supporting us in commercial and corporate law as well as insolvency law since August 2023. She studied at the University of Münster and received her doctorate there on a corporate law topic. Following her doctorate, Ms. Adams completed her legal clerkship at the Düsseldorf Court of Appeal, including a training at the German Embassy in Pretoria (South Africa). Before joining SOH, Ms. Adams worked for more than five years as an attorney at law in a commercial law firm in Düsseldorf.

Would you like to get to know our new colleagues even better? Just watch a video in which our colleagues introduce themselves personally.

Scan the QR code with the camera of your smartphone or device and confirm the link that is displayed. Alternatively, you are welcome to visit our colleagues' page on our website soh.de. You can access the videos there.

Have fun!

PROF. DR. FRANZ-JOSEF DAHM

DR. JOCHEN SCHMIDT

50 YEARS AS AN ATTORNEY AT LAW

50 years as an attorney at law – by today's standards an unimaginably long period of time for a professional activity! Our name and senior partner Dr. Jochen Schmidt (for us just "JS") joined SOH in March 1974 at the age of 27 while working on his doctorate in stock corporation law.

After initially also conducting litigation – mainly corporate disputes – he then worked for decades as an advisor for major clients of our firm. His focus – also as a notary public – was in particular on corporate law structures including corporate succession. JS was and is at home in various areas of commercial law – a counselling personality par excellence. He also managed SOH for decades as managing partner.

He will continue to advise his clients on fundamental and strategic issues – supporting the younger partners to whom JS has successfully transferred his mandates. Even though JS will be celebrating his 50th anniversary as attorney at law next year, we are grateful that we can continue to count on his expertise!

THANK YOU AND "GLÜCK AUF"

A significant change for our dear colleague Prof. Dr. Franz-Josef Dahm and us already took place on 01. 01. 2023: "DA" retired as a long-standing senior partner of our firm after reaching the age of 75 and has since been working as an "of counsel", i. e. as a freelance consultant who remains organizationally connected to our law firm.

An impressive professional career has thus entered a new phase: Prof. Dahm joined SOH as a lawyer in 1980. Since then, he has worked here as a colleague who is held in high esteem by us and his clients.

What sets him apart from his professional colleagues is his academic work in the field of medical law, which is closely intertwined with his work as a lawyer and has been reflected in an almost unmanageable body of literature. In particular, as editor of the specialised journal "Medizinrecht" and as co-founder and active member of various professional associations, he has had a lasting influence on medical law over decades and is therefore described without exaggeration as one of the "founding personalities of the field". The fact that this has been reflected in the award of the title "Specialised Lawyer for Medical Law" is almost a side note. More significant is the fact that he has been an honorary professor at the Medical Faculty of the University of Duisburg/Essen since 2008 due to his outstanding contributions to medical law. And because DA apparently likes to remain a "founding personality" even in old age, he has been the first "of counsel" in the long history of SOH since his retirement as a partner.

This means that little will change for us, his clients and for DA. We are delighted that he will remain associated with us as a colleague and legal "authority". His passion for "his" area of expertise remains an inspiration and incentive for us – thank you very much, dear DA! And – as the title of the academic commemorative publication published in 2017 on his 70th birthday says – "Glück auf" for the years to come!

NFT LECTURE

In cooperation with the Folkwang-Museumsverein, Dr. Felix Aden and Dr. Timo Heller gave an exciting lecture on the topic "First-hand: NFTs from a legal perspective" on May 11, 2023. The background for the introduction to the world of so-called NFTs (non-fungible tokens) was the exhibition by the well-known digital artist Rafael Rozendaal at the Folkwang Museum entitled "Color, Code, Communication". Afterwards, SOH and the Museumsverein invited guests to a small drink in the Edda restaurant. We would especially like to thank the Folkwang Museumsverein for the successful cooperation.

POWER BREAKFAST

The first SOH Powerbreakfast on the topic of "Green Lease" took place on 23.11.2022. Now that the EU has set itself the goal of being climate-neutral by 2050 with the "Green Deal" announced in 2019, the topic of "sustainability" is now on the agenda for practically every commercial lease agreement. After a breakfast, Dr. Ulf Rademacher explained what landlords and tenants need to know in this regard. This was followed by an opportunity for discussion and networking in our coffee bar.

Our SOH Powerbreakfast took place again on June 14.06.2023. In the familiar format, Dr. Maximilian Guntermann and Dr. Felix Aden presented the reporting obligations for SMEs under the revised EU Sustainability Reporting Directive (CSRD). Many thanks to our interview guest Alexander Fromme (ESG.DNA) for his exciting insights into the practical implementation of CSRD reporting.

AI DEEP-DIVE

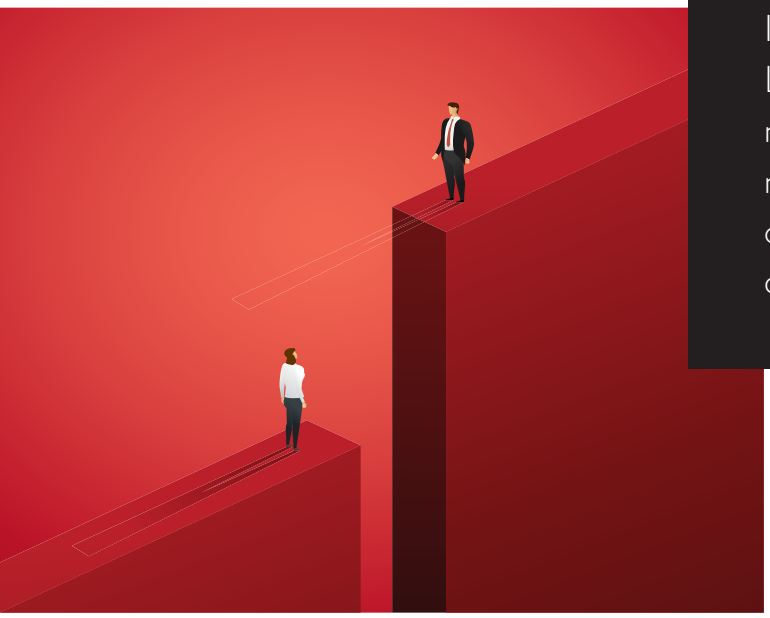
SOH with artificial intelligence? "Not necessary!" is the SOH's answer. After all, there is enough of it of natural origin on Rüttenscheider Strasse. But why should a medium-sized law firm be any different from other companies? Rapidly developing technology is creating new opportunities. After the summer vacation, we held a workshop to take our first deep dive into this fascinating technology and its strengths and weaknesses. It is now clear to us that artificial intelligence can and will help us. It can make the knowledge we have acquired over decades and stored in our databases available quickly and securely for our day-to-day consulting. The resulting qualitative synergies will help our clients and us. Or as we now call the project: AI-SOH approved.

SOH COMPANY RUN

"Recht erfolgreich" – this was the motto of SOH's participation in this year's Essen company run.
With more than 25 participants, we competed for the first time, of course equipped with hard-to-miss running shirts. All participants reached the finish line in Grugapark in glorious weather and with great support from the spectators.

We will certainly be taking part again next year!

EQUAL PAY
THE END OF SALARY NEGOTIATIONS?



In a much-noticed ruling, the Federal Labor Court decided that individual salary negotiations cannot justify different remuneration for women and men for the same or equivalent work. The resulting consequences are far-reaching.

FROM:
DR. ALMUT GATHMANN

DR. CHRISTIAN MEHRENS

In the case underlying the decision, the female plaintiff had accepted the salary offered to her by the employer in the job interview if she was granted 20 days of unpaid special leave per year. The employer also employed another employee in the same position who had been offered the same salary during his job interview. However, this employee had not accepted the salary, but had requested a higher salary for a certain period, which the employer had accepted.

The Federal Labor Court decided that the plaintiff was entitled to the same salary as her male colleague. If employees of different genders receive a different salary for the same or equivalent work, it is according to the Federal Labor Court legally presumed that there is a disadvantage in pay due to gender. This presumption cannot be rebutted by the fact that the higher salary of the employee of the opposite sex was agreed due to salary negotiations.

It is a matter of course and nothing new that female employees must not be discriminated against because of their gender. However, the decision of the Federal Labor Court contains important key statements that must be taken into account when determining salaries in the future. First of all, it is important to note that whether or not there is an unequal treatment must be determined on the basis of a direct comparison of the individual remuneration components and not on the basis of an overall assessment. Non-remuneration-related benefits, such as special leave, generally cannot justify a lower salary.

In order to refute a presumed disadvantage, objective reasons are required to justify the unequal treatment. The difference in salary must be exclusively attributable to these reasons. A mere reference to better negotiating skills is not sufficient. Examples of justification named by the Federal Labor Court include proven recruitment difficulties, higher qualifications or longer relevant professional experience. The explicit request for a lower salary in exchange for other benefits (e. g. more vacation days) can only be considered as justification if the request is made being aware of all the circumstances, including the possibility of a higher salary.

In addition, the Federal Labor Court also indicates which circumstances cannot justify a different treatment. In addition to the reference to mere negotiating skills, this is the case for circumstances that were not even known at the time of recruitment and only become apparent later, such as performance or quality of work performance. Similarly, the job title is not a differentiating factor if the job is comparable. The replacement of a higher-paid colleague is also not sufficient in itself.

Contrary to what is sometimes reported, the ruling of the Federal Labor Court does not mean the end of individual salary negotiations. However, in order to justify a different treatment in the event of a dispute, employers should document the background and accompanying circumstances of the salary negotiations in an appropriate manner. In addition, risks can be reduced if a remuneration system with objective and transparent criteria for determining salaries is in place.

Employers will also have to be prepared for further regulation with regard to pay transparency and equal pay . The European Remuneration Transparency Directive came into force in the middle of this year and must be transposed into German law by mid-2026. In some cases, the directive contains regulations that go well beyond the German Pay Transparency Act. For example, applicants must already be informed of the salary or salary range for the advertised position in the job advertisement. In addition, employees have a right to information about individual pay levels and the average pay levels (broken down by gender) of comparable groups of employees. This is flanked by far-reaching information obligations regarding the right to information and the criteria for determining and developing pay.

The directive also extends employers‘ reporting obligations significantly. For example, numerous indicators, in particular the gender pay gap, must be reported publicly. Depending on the results of the report, a joint pay assessment must also be carried out with the works council. The directive also stipulates a reversal of the burden of proof that goes beyond the existing principles. For example, the reversal of the burden of proof is also linked to non-compliance with reporting obligations. The Directive also obliges the Member States to impose effective sanctions, such as fines. The German Pay Transparency Act does not yet provide for such sanctions, yet.

Even if there is still time before the transposition deadline and the specific implementation of the directive requirements is not foreseeable, employers are well advised to deal with the future requirements well in advance. Adjustments require careful planning and take time – especially if negotiations with the works council are still required. The future administrative requirements should also be considered in good time.

If you have any questions, we will be happy to assist you. Of course, this also applies to issues relating to the Federal Labor Court’s ruling on equal pay, such as the continued legal admissibility of performance- and results-based remuneration components.

THE REFORM OF PARTNERSHIP LAW
EFFECTS ON THE GBR, OHG AND KG

On 01. 01. 2024, the Act on the Modernization of Partnership Law (MoPeG) will come into force and introduce the biggest reform of German partnership law in over 100 years. A total of 137 laws and ordinances will be amended. Here is an overview of the most important changes:

Legal capacity of the company under civil law
The partnership under civil law (GbR) participating in legal transactions is expressly recognized as a separate legal entity by the new regulation. This was not clear, at least considering the previous wording of the law. For example, the legislator spoke of the "assets of the partners" instead of "company assets", implying that the company itself could not be the bearer of rights and obligations.

The ambiguous wording in the German Civil Code led to various follow-up questions, particularly with regard to the liability of the partners. Initially, the so-called "double obligation doctrine" was advocated, which stipulated that the partner acting on behalf of the GbR also represents and legally obligates the GbR and all co-shareholders. This solution was not only highly impractical, but also entailed a not inconsiderable risk of abuse.

As early as 2001, the Federal Court of Justice therefore ruled that the GbR participating in legal transactions itself had legal capacity and endorsed the so-called accessoriness theory, according to which the partners of a GbR are jointly and severally liable for the company's liabilities. This twenty-year-old case law has now been codified in law.

Professionalization of the GbR based on the model of commercial partnerships
As a result of the reform, the law applicable to the GbR will be brought closer to the legal provisions that apply to the general partnership (oHG) and the limited partnership (KG). Thus, the new provisions of the German Civil Code make explicit reference to the provisions of the German Commercial Code.

One of the most important changes is that from January 1, 2024, the profit and loss participation and the voting weight of the individual shareholder will no longer be based on heads, but on participation ratios. If no shareholding ratios have been agreed, the ratio of the agreed contributions will be decisive. In the absence of corresponding contractual provisions, this can fundamentally change the economic situation within the company. Although existing partnership agreements remain effective, there may nevertheless be a corresponding need for amendments if statutory provisions are applied in addition. This applies all the more as the legislator has not provided for any transitional provisions.

In future, civil-law partnerships will also have the option of changing their legal form by way of a merger or demerger. Previously, shareholders of a GbR, for example, were forced to take a lengthy detour via the formation of a partnership company in order to change the legal form to a GmbH. This will be significantly simplified in future.

Introduction of a company register
A company register will also be introduced for the civil law partnership. This shows the name, registered office and address of the company, as well as a list of all shareholders and information on how the company is represented in legal transactions. The register can be viewed by anyone free of charge and creates much-needed transparency and publicity.

In principle, every company is free to decide whether or not to register. However, this freedom is not unlimited. For example, registration is a mandatory requirement for the conclusion of certain legal transactions, such as the acquisition of real estate or GmbH shares or the implementation of a conversion. After registration, the GbR is obliged to use the addition "eingetragene Gesellschaft bürgerlichen Rechts" or "eGbR". The application for registration of the GbR is submitted to the local court in whose district the GbR has its registered office. The application is made electronically in a publicly notarized form.

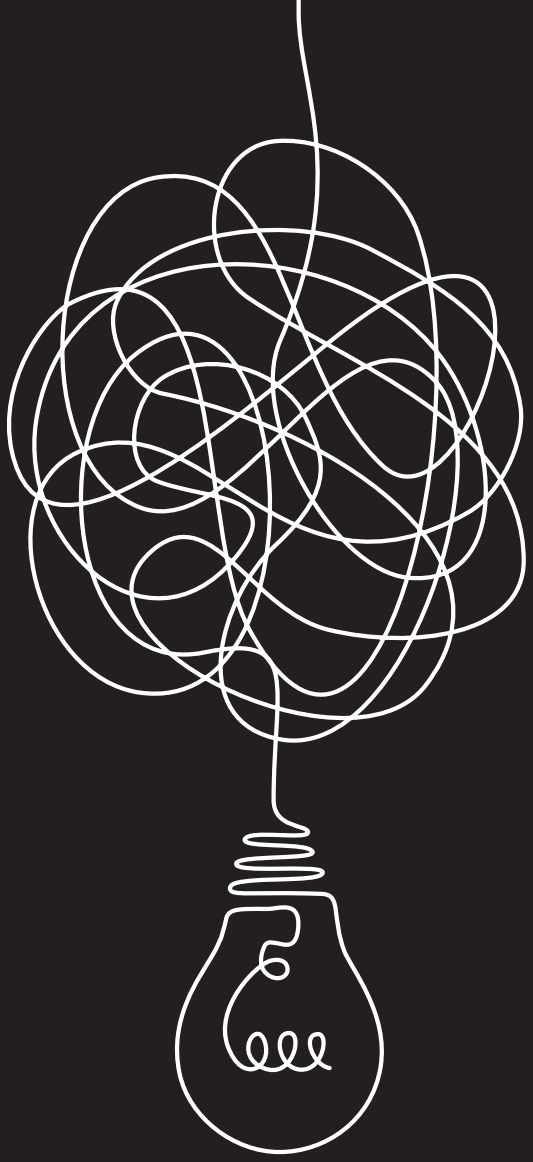
New resolution deficiency law for the oHG and KG
The reform also leads to important changes in the law governing commercial partnerships. First and foremost, shareholders will have to comply with the new law on defective resolutions from January 1, 2024, which has clear similarities to stock corporation law. In future, a distinction must be made between defects that result in the invalidity of the resolution and those that merely lead to the resolution being voidable. Contestable resolutions must be remedied by means of an action, which must be filed in due time. If the shareholders fail to act, the resolution is valid despite its defect and must be observed.

However, the new statutory resolution deficiency regime is optional and shareholders are free to include their own provisions in their partnership agreement. From this point of view, too, it may be worth reviewing existing articles of association and amending them if necessary. We will be happy to assist you with this.

FROM:
JULIA HILGER

THE PROCUREMENT TRANSFORMATION PACKAGE IS COMING!

A revolution in public procurement law or rather a comprehensive update?



Public procurement law regulates the process of public procurement. The latter ranges from pencils to complex social or IT services to large construction projects, meaning that public contracts worth hundreds of billions are awarded every year. Not only municipalities and ministries are bound by public procurement law, but also private companies that are publicly controlled or receive public funding. Start-ups, small and medium-sized enterprises (SMEs) and large corporations enjoy the protection of public procurement law when bidding for public contracts.

However, the subject matter has a reputation for being complex and delaying projects. Against this backdrop, the German government is aiming to reform public procurement law. The current coalition agreement states this:

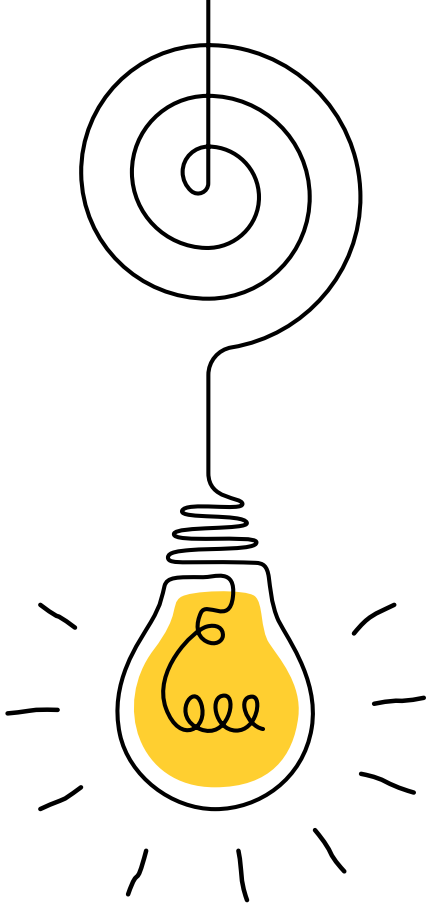
"We want to simplify, professionalize, digitalize and accelerate public procurement procedures. The Federal Government will align public procurement and awarding economically, socially, ecologically and innovatively and make it more binding without jeopardizing the legal certainty of award decisions or increasing the barriers to access for SMEs."

Under the leadership of the Federal Ministry of Economics and Climate Protection (BMWK), a draft bill for a so-called "procurement transformation package" is therefore currently being drawn up, which is intended to reconcile these ambitious goals.

Current status of the reform project

After short-term legislative acts were required in 2022 to accelerate procurement in response to the Russian war of aggression against Ukraine, the BMWK initially initiated a public consultation process over the course of last year in order to take into account as many concerns and ideas from the field as possible at an early stage of the reform project. Those affected on both the client and applicant side (stakeholders) were asked about the areas of action specified in the coalition agreement. By May 2023, over 450 responses had been received from public and private stakeholders. After evaluating the responses, the topic of simplification was given by far the highest priority, followed by the topics of environment & climate and digitalization.

The reform is therefore likely to focus on these areas. According to the latest announcements from the BMWK, a concrete draft bill is expected at the beginning of 2024 and implementation into law in the course of next year.



Significance for contracting authorities
But what do all these buzzwords mean in concrete terms? Above all, contracting authorities can expect simplification in the form of a streamlining and standardization of procurement regulations. There may also be scope for legislative action here with regard to adjusting the value limits or harmonizing the regulations on construction and other services. The intended expansion of environmentally and climate-friendly procurement will pose public contracting authorities with the question of how and at what level such strategic objectives – previously referred to as "non-procurement-related" – can or even must be implemented in the procurement procedure in the future. In the area of digitalization, contracting authorities can hope for the creation of a uniform procurement platform.

Significance for companies
Companies should also benefit from the reform. However, a simplification of public procurement law does not necessarily only imply good things for SMEs or start-ups in particular, as a more flexible requirement for the division of lots – a regulation particularly designed to protect SMEs – is also being discussed under this heading. However, a welcome simplification of public procurement law for companies would mean, for example, a reduction in the participation requirements and suitability criteria for SMEs and start-ups or the more comprehensive introduction of pre-qualification systems in order to reduce the effort involved in preparing tenders. However, if compliance with environmental and climate-friendly aspects is also mandatory in the future, this could possibly prove to be (too) challenging for some companies. However, awarding contracts that are not exclusively based on price criteria is also an opportunity to stand out positively from competing applicants. In the area of digitalization, in addition to the obvious advantages of a uniform procurement platform for companies, there will be simplifications for them, particularly in terms of legal protection, for example if applications for review can be submitted electronically in the future.

Update
The legislative process to date has shown that there will be no far-reaching changes to public procurement law. Neither EU law nor the German Basic Law permit this. There will be no return to "court supplierism". So to answer the question raised at the beginning: the public procurement transformation package contains – although one might assume otherwise given the name – more of an extensive update than a fundamental change to public procurement law. However, even the update means that contracting authorities will probably no longer be able to design their award procedures as before next year. In addition to the need to adapt the award documents, there are also new opportunities to cover procurement requirements in certain areas in future using a simpler procedure. The reform package promises to make it easier for companies to access public contracts.

FROM:
DR. TORBEN GÖTZ

NIS2
NEW REQUIREMENTS FOR COMPANIES' CYBER SECURITY

The threats posed by cyber attacks on IT systems are diverse: criminal blackmailers demand a ransom after encrypting data. Business secrets are threatened by industrial espionage. The Russian war against Ukraine demonstrates that strategic attacks on IT systems by terrorists or states can pose a serious threat to our economic system.

This dynamic risk situation naturally means that the state only has slow response options at its disposal. On the basis of the BSI Critis Ordinance from 2016, companies that operate certain infrastructures critical to the functioning of the community were obliged to take measures to protect IT security. This affects larger companies that operate in the energy and water supply sector, provide telecommunications and information technology, are part of the food supply, belong to the transportation or logistics sector or are financial or healthcare institutions.

Due to the growing threat, the group of affected companies and the catalogue of measures to be taken are now significantly expanded: On December 14, 2022, the European Union issued a "Directive on measures for a high common level of cybersecurity across the Union" (NIS2 Directive). The member states must transpose the requirements of this directive into national law by October 2024. In July 2023, the German government presented a corresponding draft bill. The legislative process and the detailing of the requirements are still ongoing.

The legislative goal is no longer just to protect specific infrastructure to ensure the supply of services to the population. The aim is now to make the entire economy resilient to cyber threats.

The sectors affected have therefore been significantly expanded: To date, around 2,000 companies in Germany are obliged to take special IT security measures. According to the legislator's estimates, several tens of thousands more compa-

nies will be obliged to do so from October 2024 as a result of the NIS2 Directive. Companies from the postal and courier services, waste, food supply, chemicals, digital services (such as search engines, online marketplaces, cloud services, social networks), industry (including mechanical engineering, vehicle construction, construction of data processing devices) and research will also be required to comply.

In principle, the requirements apply to companies with more than 50 employees and an annual turnover or balance sheet total of more than EUR 10 million. Providers of certain digital services, such as publicly accessible electronic communication services or trust services, will in future be subject to the legislative requirements regardless of their size.

The NIS2 Directive covers the cybersecurity of the affected companies' own network and information systems. This includes, for example, the company's own network infrastructure, internal IT and application systems, IT-based services for third parties and industrial control systems. The cybersecurity of the hardware sold by the company is – currently – not affected.

From October 2024, all affected companies must ensure that an appropriate risk management is established for systems and applications. In future, the management must have sufficient knowledge and skills to identify and assess IT-related risks and their impact on business operations. This regularly requires the introduction of an Information Security Management System (ISMS). Part of the ISMS is a risk analysis of the company's own information systems and the creation of a concept for dealing with security incidents. The latter includes plans for maintaining operations, such as backup management and recovery measures, after an emergency. Security measures must be established for the acquisition, development and maintenance of network and information systems.

The effectiveness of the company's own risk management measures must be reviewed regularly. Employees must be trained in cyber security.

The companies concerned are obliged to take measures to ensure cyber security in their own supply chain. This means that suppliers who do not actually fall within the scope of the regulations can also be obliged to take appropriate measures via contracts with their customers.

Reporting obligations have also been introduced: Security incidents must be reported to the responsible body within 24 hours. An initial analysis of the security incident must then be reported within 72 hours.

Violations of the NIS2 requirements will be subject to fines: These fines can amount to up to EUR 10 million or 2 % of annual turnover, depending on the significance of the company to be sanctioned and the severity of the breach.

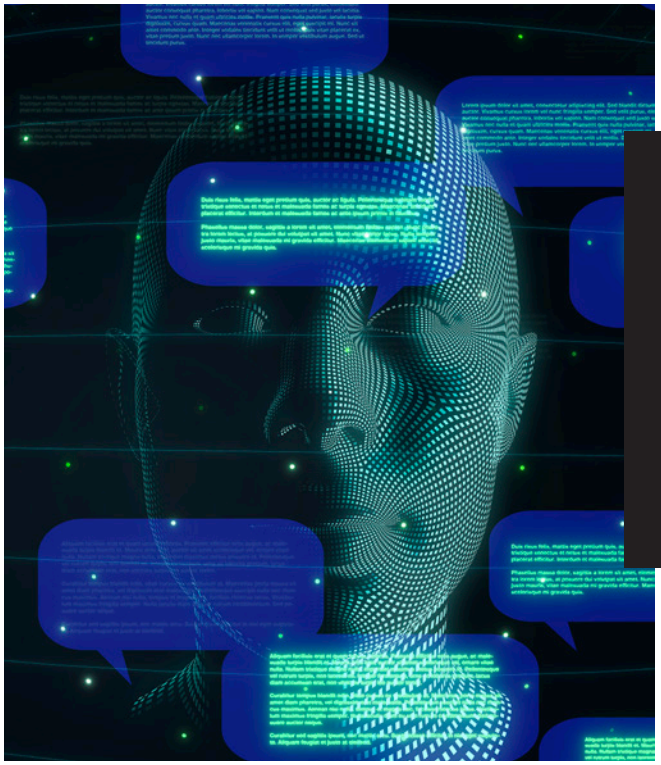
Many details are still being discussed by national legislators, who are expressly authorized by the EU to issue stricter regulations. In Germany, the law is expected to be passed in March 2024. In other member states, the legislative process could be delayed further. Implementation by October 2024 will therefore be challenging for the companies affected.

Further legislative measures on IT security are already on the horizon. The "Cyber Resilience Act" is discussed at EU level. It is intended to oblige companies to implement cyber security measures not only for their own information technology and organizational structure. The list of requirements is also to be extended to the products placed on the market by companies.

It is therefore advisable for affected companies to familiarize themselves with the new requirements at an early stage.

FROM:
DR. CASPAR LUIG

ARTIFICIAL INTELLIGENCE
COPYRIGHT CHALLENGES



The publication of the chatbot ChatGPT was the latest example of the possibilities offered by the use of artificial intelligence. It can write factual texts or poems, create images or videos, compose music and much more.

AI-generated images such as the "Portrait of Edmond de Belamy" have already fetched enormous sums at art events. Ultimately, what is being addressed here are classic objects of copyright law, which serves to protect the authors of literary, scientific and artistic works.

In fact, the use of artificial intelligence raises numerous copyright issues, some of which will be outlined here. On the one hand, they arise when "training" the AI. This requires large amounts of data (so-called input), which the AI can use to "learn". This can also affect copyright-protected works of any kind. Questions also arise with regard to the results delivered by the AI (output): Is this output itself protected and who is entitled to rights to it? Does the use of the results possibly infringe the rights of third parties and who is liable for this? Due to the many different manifestations of artificial intelligence, the circumstances of each individual case will always have to be considered carefully. However, certain guidelines can already be established today.

At the "input" level, copyright-relevant exploitation of existing works of any kind – depending on the circumstances – is only permitted if specific copyright limitations allow this. Since 2021, text and data mining, understood as the automated analysis of individual or multiple digital or digitized works in order to obtain information, in particular about patterns, trends and correlations, has been subject to such a limitation. Reproductions of lawfully accessible works for which the rights holder has not reserved the right to use them are permitted for these purposes.

The question of existing rights to the "output" is quickly answered at first glance. Only personal intellectual creations can be protected as copyrighted works. This requires in particular that the result in question is based on a human creation. The creator of a work and therefore the author can only ever be a natural person who – according to the wording of the European Court of Justice – expresses their personality by making free creative decisions. The prime example of such a non-human "work" to date is the selfie taken by a monkey. Such a result is ultimately in the public domain. It also makes sense to deny human creativity when using artificial intelligence. This is widely accepted in the case of purely computer-generated texts, images and other results in which a human at best provides the impulse or an abstract instruction. This is the case with ChatGPT texts where the user "only" gives the instruction to provide a text on a specific topic. Whether this leads to a relevant gap in legal protection that would have to be filled – as has been suggested in some cases – with new, more time-limited ancillary property right, for example, seems doubtful, but will have to be discussed in terms of legal policy.

In other cases, however, copyright protection will come into consideration. It is recognized that – copyright-relevant – human creation can certainly take place with the use of (technical) aids. When using artificial intelligence, the decisive question will be whether there is sufficient human influence on the specific performance result – was it created with or by AI? Or was the result of the AI further developed by humans in a copyright-relevant manner? Practically manageable criteria for a distinction still need to be developed. However, it would appear to be very far-reaching to allow the specific selection of the "input", i. e. the training data, by a human to be sufficient for the assumption of human creation.

This may also give rise to interesting questions in terms of procedural law, especially as results "created" by humans or AI are often indistinguishable. Can a person who is sued for copying someone else's text now claim across the board that the text may not have been written by a human and is therefore in the public domain? What presentation requirements will apply to the (alleged) author in this respect?

Finally, irrespective of whether the result itself is protectable, the further use of the work result by the user of the AI may infringe the copyrights of third parties by storing, publishing or otherwise exploiting it. This will always come into consideration if the result does not maintain a sufficient distance from an older protected work and ultimately appears to be a (non-free) adaptation of it. This is particularly conceivable if the AI has been "trained" with pre-existing protected works. The objection that the infringing content originates from the AI will not help here. The existence of a copyright infringement must be assessed independently of fault and the principles of so-called accidental double creation will hardly be able to be applied.

Anyone who uses AI to design texts, images, music and other content must not lose sight of third-party copyrights, both in terms of the "input" and the "output". Conversely, the user generally does not "own" the result. In the near future, the German courts will certainly also have to face up to the issues that have so far only been discussed in the literature and find practicable solutions. We at SOH will be watching and following this development and possible legislative intervention with interest.

FROM:
DR. ANDREAS STARCKE

The fact that all parties involved in a legal dispute must be heard is a legal principle that has been recognized since ancient times ("audiatur et altera pars"). We therefore asked the artificial intelligence of ChatGPT (version 3.5) what copyright challenges exist when using AI. The following answer was generated within a few seconds. It turns out that even in this version, ChatGPT is able to provide meaningfully structured answers to open questions.

The use of artificial intelligence (AI) brings with it a variety of copyright challenges that can manifest themselves in different areas. Here are some of the most important aspects:

01 Copyright infringements: AI systems can create protected works such as texts, images, music and videos that are subject to copyright. The challenge is to determine who is the author of these works and how copyright law is applied when a work is created by a machine.

02 Copyright liability: Who is responsible for copyright infringement by AI? Is it the developer of the AI system, the user or the machine itself? The legal allocation of responsibility is complex and can vary depending on the jurisdiction.

03 Fair use and copyright exceptions: The use of AI to create works based on copyrighted material raises questions regarding the application of fair use and other copyright exceptions. It is often difficult to determine whether the use is fair and legal.

04 Copyright filters: Platforms and service providers use AI systems to detect and remove copyright-infringing content. This can lead to false alarms and impair freedom of expression.

FROM:
CHATGPT

05 Data protection and copyrighted data: AI systems often use large amounts of data that are protected by copyright. Access to and use of such data must comply with data protection and copyright regulations.

06 Rights to training data: The data used to train AI systems may be protected by copyright. The question of whether and how this data can be used is crucial.

07 Open source and licensing: Many AI models and frameworks are published under open source licenses. Compliance with these licenses and the combination of open source and proprietary components require careful examination.

08 Digital Rights Management (DRM): DRM systems are used to control access to and use of copyrighted content. AI can be used to both circumvent and protect such systems.

09 Automated detection of copyright infringements: AI systems can be used to automatically detect and report copyright infringements. This raises questions about the reliability and transparency of such systems.

10 Changes in the creative landscape: AI can change the way creative works are produced, which could redefine the boundaries of copyright. This requires an adaptation of legislation.

The copyright challenges posed by the use of artificial intelligence are complex and require careful legal examination and adaptation of existing laws in order to reconcile the interests of rights holders and the development of AI technology. It is important that legislators, lawyers and technology companies work together to find appropriate solutions.

BRIEFLY INTRODUCED
UNIBAIL-RODAMCO WESTFIELD

Who doesn't know them – the Westfield Centro in Oberhausen, the Ruhr Park in Bochum, the Gropius Passagen in Berlin or the Riem Arcaden in Munich – not forgetting the Minto in Mönchengladbach and the Düsseldorf Arcaden?

These nationally renowned shopping centers are real magnets and attract millions of visitors every year; Westfield Centro, Germany's largest shopping center, even attracts over 15 million visitors annually. The concept behind their success is impressively simple: they are modern retail and leisure destinations with an exceptionally high quality of stay. Behind this success is Unibail-Rodamco-Westfield Germany GmbH (URW). It operates a total of 20 shopping centers in Germany with over 1.6 million square metres of retail space. As a partner to local authorities, URW is committed to the regeneration and modernization of urban spaces and focuses on the goal of having a positive ecological, social and economic impact on cities and communities.

URW has been based in Düsseldorf Airport City since 2015 and employs around 450 people across Germany.

One of URW's current flagship projects is the mixed-use new-build project Westfield Hamburg-Überseequartier in Hamburg's HafenCity. Attractive cultural and leisure facilities are combined with modern shopping and entertainment concepts and even an innovative cruise terminal. The result is a vibrant meeting place for locals and visitors to the Hanseatic city.

SOH supports and advises URW in all matters relating to intellectual property rights. "For many years, we have relied on the well-established team at SOH, whose experience, high-end expertise and pragmatism we greatly appreciate," says Philipp von Wallenberg, Head of Legal at URW. We at SOH would also like to say thank you for the trusting cooperation!

ARTIFICIAL INTELLIGENCE
MEDICAL LIABILITY IN THE TECHNICAL AGE

As digitalization is also advancing in the healthcare sector, new treatment options are developing, in some cases without direct doctor-patient contact. We already reported on the expansion of remote treatment options and the so-called e-prescription in SOH News No. 16.

AI is increasingly being used to analyze images, particularly in connection with imaging procedures (e. g. magnetic resonance imaging, computer tomography and X-rays). Algorithms are used to detect signal intensity or changes in density, allowing potential damage or disorders to be identified, for example in the case of malignant tumors.

AI is also used in laboratory tests to detect abnormalities in a patient's blood count. In neurology, AI-supported evaluations of brain scans can make an important contribution to the early detection of Alzheimer's disease, for example. In cardiology, AI is able to evaluate long-term ECGs and detect arrhythmias within seconds.

AI is also being used in surgery. DaVinci, currently the most advanced surgical robot, enables complex procedures. For example, laparoscopic prostatectomies and cystectomies can be performed in a more controlled manner by the robot compensating for the surgeon's involuntary movements. In the future, the robots will also use AI applications to evaluate data from preliminary examinations and previous operations and use this as a basis for optimally guiding the surgical instruments or independently developing new surgical techniques.

The greatest potential for facilitating internal hospital processes is currently likely to be in the area of documentation, as AI is suitable for reducing the time required by doctors. However, it has been shown in this context that AI does not always reliably reflect the course of treatment, but in some cases documents examination measures, diagnoses etc. incorrectly because the course is reconstructed according to probabilities.

The use of AI can be helpful in the management of patient data in order to avoid multiple examinations or the prescription of contraindicated medication. The algorithms can also lead to treatment suggestions tailored to the individual patient by analyzing a large amount of comparative data, for example. However, there are risks, e. g. if not all previous examinations have been recorded or if names are confused.

Due to the large amount of data evaluated, an error-free programmed algorithm can achieve a higher decision probability than an individual doctor who is limited to their personal knowledge and the specialist literature. However, the problem is that it is generally not possible for the individual user to recognize how an algorithm has arrived at its result. AI is also

characterized by the fact that it is self-learning and able to continuously develop by analyzing processed data. This can lead to inaccurate diagnoses or treatment suggestions.

In the event of harm to a patient, the question therefore arises as to what consequences it has for medical liability if the patient does not exclusively make the treatment decision themselves, but instead this is largely made by AI-based software by evaluating a large amount of data in order to make therapy suggestions or diagnoses tailored to the individual patient.

It is recognized that when using technical equipment (e. g. electrocautery for hemostasis), the doctor is regularly liable for its functionality, so that the question arises as to whether he must also accept responsibility for malfunctions of the AI.

The use of AI harbors a particular liability risk, especially in the case of untested application, because the doctor generally owes the patient careful treatment in accordance with the current state of medical science (so-called medical standard). For this reason, there is currently no obligation to use AI because this technology is still in the testing phase. However, if the doctor decides to use it, he is also required to familiarize himself with the general functioning of the AI software and has a corresponding maintenance and servicing obligation.

The AI software used for treatment or diagnostics also constitutes a medical device, so that it can be required that the doctor limits himself to the use of certified AI software for treatment or diagnosis in order not to commit a breach of duty.

If a hospital or medical practice uses AI, it is recommended that technically experienced staff be employed and that the doctors in whose department the AI is to be used be instructed in its use. As there are still no guidelines for the internal use of AI in hospitals, internal standards should be developed in connection with AI. These should include, for example, maintenance intervals, training, operating instructions and error management. Furthermore, an awareness should be created that AI cannot replace medical decisions, but should only serve to support and possibly simplify work processes. Doctors must therefore not rely on AI, but must always examine the patients and evaluate the facts themselves.

Particularly when making a treatment decision, the practitioner must carefully weigh up the methods that correspond to the current standard against the method that the AI proposes as an individual treatment for the patient. The latter may only be used if, after appropriate assessment, it can be assumed that the benefits outweigh any risks. However, the possibility of implementing a more individualized treatment tailored to the patient can also lead to a minimization of risk.

Nevertheless, liability towards the patient requires fault on the part of the practitioner. As the practitioner may not have been able to foresee the error in the individual case because AI is a self-learning algorithm, fault is often likely to be ruled out, with the consequence of a liability gap to the detriment of the patient. It is therefore conceivable that there will be a shift of risk towards the manufacturers of AI systems in the future, with the possibility of creating liability-replacing insurance policies as an alternative to individual liability.

Due to the risks described, the doctor must always inform the patient about the planned use of AI and draw their attention to the possibility of unknown risks materializing. As a result, the use of AI represents a kind of new method for which particularly intensive information obligations apply. Ultimately, it is up to the patient to make a well-considered decision as to whether AI should be used as part of the treatment.

FROM:
PROF. DR.
REGINE CRAMER

WIND ENERGY ON THE RISE
NOT A STORM IN A TEACUP

“We get our electricity from the socket.” Few people today will answer so simply and succinctly when asked about their own electricity supply. The already completed phase-out of the use of nuclear power for electricity generation, the foreseeable end of coal-fired power generation, and the challenges for the secure supply of gas in view of Russia’s – for the foreseeable future – permanent absence as a reliable and acceptable contractual partner, cause tremendous challenges for the electricity supply in Germany.

The current energy transition requires willingness to change. However, reduction of demand and deindustrialization are not options. Rather, considerable efforts are needed to replace capacities that are lost, in particular the rapid expansion of electricity generation from renewable energies.

In this regard, wind energy plays a key role. Its share of domestically generated electricity amounted to 28.6 % in the first half of 2023. It was 3 % higher than in the first half of 2022. Nevertheless, the expansion of wind power has been relatively slow in recent years, especially onshore. The main reasons for this have been long approval periods and a large number of lawsuits; wind power-related lawsuits were the most common type of lawsuit brought before administrative courts alongside lawsuits in asylum proceedings.

What has changed that gives hope for faster expansion?

Due to their character and potential for disturbance, wind turbines belong in the outdoor area under building law. In principle, they are privileged there under licensing law. However, municipalities were given the option of concentrating wind power on certain areas in their municipal area (so-called concentration zones) and thus essentially excluding it from the

rest of the municipal area in the past. The selection of these areas was in particular prone to errors and gave rise to the complaints described above from both turbine operators and local residents. Lawsuits have been conceivable in several directions: Owners of areas that were not taken into consideration for concentration zones may require their inclusion into those zones, while and those affected within the concentration zones may take legal action against their designation.

The federal legislator reacted on those challenges inter alia with the Wind Energy Area Requirements Act. This act provides for the designation of so-called wind energy areas which can be used for onshore wind turbines to generate electricity. In each federal state, a specific percentage of the state area shall be designated for wind farms (the area contribution value) by 2032, amounting to between 1.8 % and 2.2 % of the state area. A lower value is to be achieved already by 2027. The determination of land share for each federal state is based on the results of a comprehensive land potential study commissioned by the Federal Ministry for Economic Affairs and Climate Protection. The legislative approach is also intended to achieve a more even distribution of wind turbines between the federal states. If the area contribution value is, however, not reached in time, operators may claim to obtain approvals for wind energy installations also outside designated areas (which was previously largely ruled out); a further "sanction" is that state laws regulating minimum distances from residential buildings are no longer applicable.

However, the federal states do not want to wait for the application of the new regulatory framework. The state government of North Rhine-Westphalia, for example, has set itself the goal of achieving the designated targets much sooner. By 2025, 1.8 % of the state's land area is to be designated for wind energy. This will require further legislative measures. In particular, the state planning requirements need to be adapted by amendments of the state development plans, which also contain objectives and principles of spatial planning for wind energy use. Priority areas for the use of wind energy are then defined in the downstream regional plans. During the preparation of those plans, differing interests of the stakeholders involved are considered and assessed. Wind energy uses shall, e. g., regularly not conflict with other objectives, for instance with regard to the designation of forest areas and their utilization. In this respect, the state of North Rhine-Westphalia issued a decree on the interpretation and implementation of provisions of the North Rhine-Westphalia state development plan at the end of 2022 to clarify how and under what circumstances sustainably impaired forest areas (so-called calamity areas) can be used for wind turbines.

Similar to any facilitation of large-scale projects, support for the expansion of wind energy is accompanied by critical voices. While, on the one hand, the abandoning of fossil fuels as part of the energy transition is pursued, there are on the other almost corresponding reservations about alternative energy sources if they – such as wind turbines – cannot be erected and operated without nuisances or impairments. Hence, a sober look at and assessment of the legal and commercial framework is required, as after all it cannot be assumed that renewable energies will be privileged or spared by "litigious" stakeholders. Thus, it remains to be seen whether the workload of the administrative courts will decrease in the future.

FROM:
DR. CHRISTIANE WILKENING

DR. HANS-JÖRG SCHULZE

RIGHTS TO SEPARATION AND SEPARATE SATISFACTION
ARE THESE SECURE LEGAL POSITIONS IN THE EVENT OF THE BUSINESS PARTNER'S INSOLVENCY?

The number of corporate insolvencies is currently rising sharply and often leads to significant debt losses. This is because outstanding claims from a period before an insolvency application can often only be realized as insolvency claims with a low insolvency dividend.

However, an agreed security interest can significantly improve the legal position in the event of business partner's insolvency, provided that it is not subject to the risk of being contested in the insolvency proceedings. Nevertheless, there are certain difficulties in enforcing such a security interest in the event of insolvency.

LEGAL POSITION OF THE SECURED CREDITOR

The legal position of the creditor in insolvency depends on the type of security interest. Under German insolvency law, a distinction is made between the right to separation (Aussonderungsrecht) and the right to separate satisfaction (Absonderungsrecht).

Right to Separation
The right to separation grants a claim regarding the return of the secured asset. It arises from rights in rem and personal rights, such as ownership (including the agreed simple retention of title as part of a supply relationship). Whether and under what circumstances, for example, a licensee's right of use establishes a right to separation is a highly controversial legal issue under German law.

The right to return resulting from the right to separation may be restricted in certain cases for the purpose of continuing the debtor's business, either by a court order in preliminary insolvency proceedings or generally by law.

Right to separate satisfaction
Far more frequently, there will be a right to separate satisfaction, which grants the secured creditor the right to preferential satisfaction out of the value of the relevant assets. For this purpose, the relevant assets are usually to be realized by private sale or auction with the secured creditor being entitled to a certain amount of the proceeds received (possibly after deducting any costs). Rights to separate satisfaction regularly arise from the following security rights: prolonged and expanded retention of title (verlängerter und erweiterter Eigentumsvorbehalt), transfer of ownership by way of security (also storage assignments by way of security) (Sicherungsübereignung, auch Raumsicherungsübereignung), assignment of claims (also global assignment) (Forderungsabtretung, auch Globalzession), liens and mortgages (land charge and mortgage) (Grundpfandrechte, d. h. Grundschuld und Hypothek).

Creditors with a right to separate satisfaction are often also entitled to a (payment) claim against the insolvent business partner on which the security right is based. In addition to pursuing the right to separate satisfaction, they should therefore file a claim in the insolvency proceedings. In the event of a successful realization of the right to separate satisfaction, the insolvency claim would have to be reduced by the proceeds received.

German law determines who is authorized to realize assets when insolvency proceedings are opened. In particular, the insolvency administrator is entitled to realize movable assets and assigned claims. In other cases, the secured creditor may be entitled to realization. The distinction can be difficult and, in some cases, controversial. For example, the German Federal Court of Justice (Bundesgerichtshof) recently ruled that the secured creditor is entitled to realize trademark rights to which a right to separate satisfaction existed. However, a provisional insolvency administrator is under no circumstances entitled to realize any assets, claims or rights subject to a right to separate satisfaction without the consent of the secured creditor. It is therefore not uncommon for so-called realization agreements to be concluded at this stage of the proceedings.

DIFFICULTIES IN THE ENFORCEMENT OF RIGHT TO SEPERATION AND SEPARATE SATISFACTION

The enforcement of rights to separation and separate satisfaction may pose difficulties, as the following topics and questions illustrate:

Rights to separation and separate satisfaction in German insolvency proceedings should be notified and documented to the (provisional) insolvency administrator as early as possible; the secured creditor bears the burden of proof in this respect.

In certain cases, it may also make sense to revoke any authorizations granted to the insolvent business partner and the (provisional) insolvency administrator in connection with the security rights, such as debt collection and resale or processing of goods, as soon as the insolvency application is known. This is because the status quo of the security rights can often be maintained in this way. The creditor with a right to separate satisfaction generally also has a right to be informed of the status of his security interest.

As the (provisional) insolvency administrator's willingness to cooperate will often already be low at this stage, legal advice should be sought to ensure that the rights to separation and separate satisfaction are fully preserved.

There is also potential for further legal issues if creditors claim a right to separation and/or separate satisfaction for the same asset.

It may also be legally difficult to distinguish between the right to separation and the right to separate satisfaction in certain cases, e. g. where prolonged and/or expanded retention of title is agreed in addition to a simple retention of title, as it is commonly found in contracts.

In the case of large warehouses, it is often a practical problem to allocate the rights to separation and separate satisfaction in respect of certain assets to the relevant security creditors. In this case, enforcement in a so-called security pool (supplier pool) should be considered.

Overall, the large number of practical and legal issues and their complexity show that insolvency law expertise is required when enforcing rights to separation and separate satisfaction. This can ultimately be a decisive factor for success.

FROM:
DR. MARINA ADAMS

SUSTAINABILITY UPDATE
CURRENT DEVELOPMENTS AND PLANNED LEGISLATION IN THE AREA OF ESG

The regulatory framework in the area of sustainability and ESG (Environment – Social – Governance) is growing rapidly. In particular, small and medium-sized companies are coming under the spotlight of national and European regulations. This article provides an overview of selected current developments and proposed legislation at national and European level.

More about the Powerbreakfast on page 09.

Two of our early morning events ("Power Breakfasts") took place this year. Both events were related to the topic of sustainability and both were very popular. The discussions held over refreshments and coffee showed that sustainability raises a wide range of questions for companies.

Sustainability reporting

As we reported last year (SOH News No. 18), many small and medium-sized enterprises (SMEs) will in future be required by law to report on sustainability aspects. The basis for this is a new EU directive, the "Corporate Sustainability Reporting Directive" (CSRD). The directive came into force at the beginning of 2023 and must be transposed into national law by July 6, 2024 at the latest.

In future, all corporations and equivalent legal forms (e. g. GmbH & Co. KG) that meet two of the following three criteria on the balance sheet date will be required to report: more than 250 employees, a balance sheet total of more than EUR 20 million and/or net sales of more than EUR 40 million. In addition, SMEs listed on the stock exchange are also included, with the exception of micro-enterprises. This means that the group of companies obliged to report on ESG aspects has expanded considerably. It is no longer primarily only capital market-oriented companies that are affected, but also many SMEs – about 15,000 in Germany alone.

Most SMEs must systematically report on sustainability aspects for the first time for the financial year 2025 (reporting in 2026). The reporting must be carried out as part of the accounting under commercial law within a separate section of the management report. An external audit, e. g. by an auditor, is also mandatory. Overall, the framework conditions for corporate sustainability reporting are thus largely aligned with those of financial reporting. Which sustainability aspects are to be reported on and in what form is specified in detail in the form of European reporting standards. The "European Sustainability Reporting Standards" (ESRS) introduce uniform regulations for ESG reporting throughout Europe. The EU Commission published the first set of ESRS in summer 2023, with further standards – particularly industry-specific standards – to follow.

The currently published ESRS consist of twelve individual standards. Two standards are cross-cutting and describe, among other things, how to proceed when identifying and describing aspects that are material to the report (so-called materiality analysis). Accordingly, certain disclosures must always be reported (e. g. the existence of a transition plan for climate protection). However, other topics only have to be reported on if they are of material importance to the company in financial or non-financial terms. The remaining ten standards each deal with a sub-topic of the familiar ESG triad (e. g. climate change, environmental pollution or employee matters). In total, the ESRS specify over 80 so-called "disclosure requirements", i. e. individual sustainability aspects, each with a more detailed description of qualitative and quantitative data points that must or should be published.

The reporting standards indicate that companies will have to report on sustainability aspects in great detail in future, sometimes in the form of hard figures (e. g. on CO_2 emissions and reduction targets). The focus is not only on the direct value creation of the company subject to reporting, but also on the upstream and downstream supply relationships. It is advisable for affected companies to familiarize themselves with the requirements as early as possible and think about their implementation. In particular, competencies and strengths within their own company should be identified for the collection of relevant information and clear reporting channels for its dissemination should be defined.

LkSG

The Supply Chain Due Diligence Act (LkSG) has been in force in Germany since January 1, 2023 for all companies based in Germany with more than 3,000 employees. The group of companies affected will be expanded on January 1, 2024. The LkSG will then also apply to companies with more than 1,000 employees. As the name suggests, the law primarily imposes due diligence obligations on the companies covered to comply with human rights and environmental concerns – not only with regard to their own business operations, but also along the entire supply chain.

One of these central due diligence obligations is the establishment of a risk management system and the performance of regular risk analyses in order to identify human rights and environmental risks in the supply chain and minimize them through preventive measures. Furthermore, companies subject to the LkSG must set up an internal complaints procedure.

This is intended to provide whistleblowers with a reporting channel to draw attention to violations of human rights or environmental obligations along the supply chain.

Because the LkSG deliberately does not allow responsibility to end at the kerb of the company premises, companies also have a duty of care with regard to their direct suppliers. It is therefore necessary, among other things, to obtain contractual assurances from direct suppliers that they will also comply with the company's Code of Conduct and to verify compliance with these assurances.

The Federal Office for Economic Affairs and Export Control (BAFA), which is responsible for monitoring and enforcing these obligations, made it clear this spring with a "mass survey". In letters to almost 80 companies, BAFA requested information on what measures the companies had taken to set up the complaints procedure described and to define internal responsibilities for LkSG risk management.

Corporate Sustainability Due Diligence Directive (CSDDD)
The EU version of the LkSG is the Corporate Sustainability Due Diligence Directive (CSDDD). The CSDDD has not yet come into force, but at the time this SOH News went to press it was already in the final stages of political agreement. The aim of this directive is to establish a uniform EU-wide supply chain law, in which Germany has to a certain extent forged ahead with the LkSG.

Although the content of the EU directive has not yet been finalized in detail, it is currently expected that the scope of application of supply chain law will be extended once again with the CSDDD and will also cover companies with fewer than 1,000 employees. The draft directive also provides for injured parties to be entitled to compensation under civil law from the responsible company.

EU Deforestation Regulation
Another component of the EU sustainability strategy is the Deforestation Regulation, which was published in the EU Official Journal in June 2023. The regulation will apply from December 30, 2024 and is aimed at any operator or trader who places relevant commodities on the EU market, or exports from it.

The aim of the regulation is to ensure compliance with local laws on freedom from deforestation in the producing countries. Companies are required to provide comprehensive documentation proving compliance with the legal provisions (e. g. geodata), a risk assessment for each product concerned and to submit a due diligence declaration to the relevant authorities. In the event of non-compliance, sanctions include not only severe fines of up to 4 % of annual turnover, but also a ban on the sale of the products and a product recall.

FROM:
DR. MAXIMILIAN GUNTERMANN

BASTA “HOTEL MAMA”

Dear readers! According to a German saying being right and getting justice are two different “pair of shoes”. This brings us to the topic at hand. There are shoes everywhere. Soccer boots, wellies, slippers. In the hallway, on the stairs, under the sofa, in the nursery. We can probably all agree that things could be better regarding the help of our beloved offspring in our household. Wouldn’t we be happy if at least the hard-won order of yesterday could be maintained? But what to do to in order to achieve this dreamlike ideal state, which the lawyer soberly refers to as the status quo ante?

The German tabloid BRIGITTE has the following advice for this situation: “There is a rule that makes tidying up almost unnecessary if you follow it consistently and internalize it: every object has its place and returns to it after use.” Well, dear reader, what do you think of the BRIGITTE rule? Our first thought was: “Powder me in sugar and call me a donut!” – this rule should actually be introduced at home and enforced with an iron fist, shouldn’t it? Unfortunately, such well-meaning advice often fails in reality. How often is help at home almost sabotaged by deliberately clumsy (or to use the youth word of 2023: goofy) behavior? “I’d rather do it myself then.” Do you know this?

This brings us back to the beginning: being right and getting justice. In our opinion, we need to roll out the heavy artillery here. Fortunately, the lawmaker provides us with a secret weapon to put an end to domestic insubordination. Section 1619 of the German Civil Code (BGB) stipulates the following, in the spirit of order-loving parents: “As long as the child belongs to the parental household and is brought up or entertained by the parents, he or she is obliged to render services to the parents in their household and business in a manner appropriate to his or her strength and position in life.”

Let that melt in your mouth. yummy! Just read out loud this provision to your children. They’ll be amazed! As we all know, Italian mamas are not too hesitant when its comes to parental advice: An annoyed mama thought “basta così!” and kicked her children, known as “mammoni” (“mama’s boys”) or “bamboccioni” (“giant babies”), out of the house at the tender age of forty. It reads in the news: “Nothing helped. In the end, the mother decided to sue her own sons. Her legal counsel reported in court that the two working men also refused to pay rent or even help with the housework. […].”

That is a direct hit, isn’t it? Before you start making similar plans, a word of advice from us: don’t get too excited! If the children seek legal advice themselves, things will get tricky. Children are only obliged to help out in the household if you also educate and entertain your children. At the thought of parenting, you may sit back with pleasure and wallow in the fond memories of your parenting efforts with a self-satisfied smile. Those were the days! But what about entertainment at home? When was the last time you entertained your children? And I mean properly! Not some old-fashioned museum or gardening disguised as an outdoor event for the kids … Do you notice how the air grows thinner?

We hate to pile on the bad news but legal literature points out that Section 1619 BGB must be read in light of the UN Convention on the Rights of the Child stating that children have a right to “rest and leisure […], to play and active recreation appropriate to their age and to participate freely in cultural and artistic life” (Art. 31 para. 1).

Are you getting nervous? Is it ultimately you who is the culprit and not the children? The alleged legal weapon may prove to be a blunt sword which is ultimately directed against us … Here too, we as lawyers know good advice: Do ut des – or in the vernacular: It’s all about give and take. Maybe we’re all not entirely perfect and need to be lenient here and there. Maybe this epiphany will make us all (Christmas) kinder. Let’s just remember that the next time we trip over a pair of shoes.

FROM:
DR. BRITTA BULTMANN

DR. FELIX ADEN

Dr. Jochen Schmidt
Prof. Dr. Franz-Josef Dahm
Dr. Carl Otto Stucke
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