

Briefing

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Editorial

While turmoil on the international finance markets has reached a new dimension, real estate investors focus on real estate management instead of real estate acquisition. The credit crunch has seen victims in Germany as well, and it remains to be seen to what extent pressure on the refinance side will result in fire sales and price decreases on the German property market. On 6 October 2008, Expo Real re-opens its doors for the commercial real estate world, with a record breaking

1,750 exhibitors from 46 countries. We would be pleased if you seize the opportunity and join us at our Drinks Reception on the afternoon of Tuesday, 7 October. For details, please see the invite attached to this Briefing. The Drinks Reception will be attended by banking and real estate representatives from various countries, as well as a number of colleagues from our international offices. The event will be a good opportunity to make new contacts and exchange ideas about new developments in the banking and real estate world.



*Thomas Ziegler
Practice Group
Head*

We look forward to meeting with you.

With best wishes

Thomas Ziegler

Banking and Finance

Cash-Pooling after the MoMiG



Cash-Pooling after the MoMiG

Following the so-called *Novemberurteil* (II ZR 171/01) of the German Federal Court of Justice (*BGH*) of 24 November 2003, the legal practice was quite concerned about the admissibility of up-stream loans made by companies in connection with their participation in cash-pooling systems under German regulations on maintenance of capital. In view of the *Novemberurteil* the MoMiG now introduces an amendment of the main provision regarding maintenance of capital of a limited liability company (*GmbH* - Section 30 *GmbHG*), which aims to provide for legal security with respect to up-stream loans in general and cash-pooling in particular, which is explicitly regarded as a – from a commercial point of view - generally reasonable practice, being also in the interests of subsidiaries. However, first opinions given in the relevant literature express their concern that the German legislator may have disregarded



the consequences of the new insolvency law introduced by the MoMiG on cash-pooling systems, as a consequence of which the latter could trigger high risks of liability for parent companies participating in such systems.

Both the positive and negative consequences of the Reform of the Law governing Limited Liability Companies (*MoMiG*) with regard to cash-pooling shall be summarised hereinafter.

Practice and basic legal principles of cash-pooling

Cash-pooling aims to provide more liquidity within a group of companies and furthermore to reduce loan costs.

This can be done by granting liquidity available within the group to group companies, as a consequence of which such companies do not need to cover their need for liquidity by taking up loans with (external) creditors which are not part of the group.

To achieve this, the parent company would open an account (*master account*) and further accounts for each subsidiary (*junior account*).

Real cash-pooling is based on a (in most cases) daily transfer of liquidity from the junior accounts to the master account or vice versa, with balances on all junior accounts being zero at the end of the day (*zero balancing*). I.e. that the credit balance of each junior account is transferred to the master account, whereas the debit balance of a junior account will be settled by transferring liquidity from the master to such junior account. From a legal point of view, such transfer of liquidity from and to a junior account is to be regarded as a loan granted by the subsidiary to the parent company and vice versa. The correlating claims for repayment of such loans are periodically offset against each other (*netting* or *clearing*).

The MoMiG and up-stream loans

Until now, the main problem discussed in regard to cash-pooling was the transfer of liquidity from the junior to the master account. According to the *Novemberurteil* this transfer of liquidity has to be regarded as a payout, strictly forbidden pursuant to Section 30 GmbHG (*limited liability company law*), in case such payout does not take place from reserves or accumulated profits of the junior company, but rather to the detriment of the committed assets (*gebundenes Vermögen*) of the junior company, even if the repayment claim against the parent company in the individual case should be full-value.

As a consequence of such forbidden payout, the parent company is obliged to repay the capital received, thus in the worst case the sum of all amounts transferred from the junior account to the master account, even if capital in the same (or higher) amount has already been retransferred from the master to the junior account in order to settle debit balances on such junior account.

The MoMiG, aiming to provide for legal security with respect to cash-pooling, will amend the payout prohibition pursuant to Section 30 GmbHG by explicitly stating that payout made by a subsidiary to a parent company is not to be regarded as forbidden payout, in case in exchange for such payout there is a repayment claim against the parent, which in the individual case covers such payout and is full-value (*balance-sheet-law approach*). Thereby the MoMiG at least secures cash-pooling with regard to up-stream transfer of liquidity taking place in connection with such practice.

The MoMiG and down-stream loans

Furthermore the consequences of the MoMiG in regard to down-stream loans, which also take place in connection with cash-pooling, have to be examined. The claims for repayment of the liquidity transferred from and to a junior account, are periodically (often also on a daily basis) offset against each other (*netting* or *clearing*).

Following the amendments of German Insolvency Law (*InsO*), also made by the MoMiG, it is questionable, whether in case of a crisis of a subsidiary such netting is legally effective.

Pursuant to Section 96, Subsection 1, No. 3 InsO a set-off is prohibited and in consequence invalid at the moment of the opening of insolvency proceedings, in case the parent company has acquired the opportunity to set off its claim by a transaction subject to contest by the insolvency administrator.

The parent company has acquired the opportunity to set off its claim for repayment of transferred liquidity by settling a credit balance on the junior account and transferring such credit balance to the master account (because thereby the claim of the subsidiary for repayment of such transferred credit balance came into existence).

Therefore it has to be assessed, whether such settling of a credit balance on a junior account is subject to contest.

According to Section 135, Subsection 1 InsO, which has been amended by the MoMiG, a transaction granting or facilitating a parent company with a security or satisfaction for a claim for repayment of a loan granted to a subsidiary may be contested by the insolvency administrator, if it was made during the last ten years and one year, respectively, prior to the application for the opening of insolvency proceedings.

According to an opinion in legal literature the settling of a credit balance on a junior account does not provide for satisfaction of claims of the parent for repayment of granted loans, because – following a settlement – such claims do further on exist and are only satisfied following the periodical netting of mutual claims for repayment. However the settlement provides for security for the parent, because the opportunity for set-off is granted which allows the satisfaction of the repayment claim of the parent by making use of this opportunity.

As a consequence of this, the settlement of credit balances would be subject to contest for a time period of ten years, and correlating netting which took place within that time period would be invalid. The parent company would have to repay the sum of all respective amounts transferred from the junior to the master account.

This opinion, however, is to be objected due to the frequent netting of the existing mutual claims for repayment of the loans. In case the creation of the opportunity of netting is considered as security for the claim of the parent company, the performance of the netting has to be qualified as realisation of the granted security. By this realisation the repayment claim of the parent company is satisfied. Following the satisfaction of the claim, this does not make a difference from the perspective of the creditor to the satisfaction of the claim which does not result from the realisation of the security. Hence in our opinion with respect to voidability this constellation is to be treated pursuant to the principles for the satisfaction of the secured claim.

The realisation of security is consequently only subject to contest, if the realisation has taken place within one year prior to the application for the opening of insolvency proceedings.

Applying these principles on the constellation of cash-pooling, this means that the netting of mutual repayment claims in our opinion is only invalid insofar, as the netting has taken place in the last year prior to application for the opening of insolvency proceedings.

However, one has to wait how a court will decide on this matter.

Leases / Facility Management

New financial burden for landlords in consequence of the new Energy Saving Regulation 2009 (EnEV 2009)?

The Energy Saving Regulation 2007 (EnEV 2007) has been in force for one year (since 1 October 2007) only (please see also our article of January 2008). The Federal Government of Germany, however, presented further new regulations to the Federal Council of Germany for approval on 8 August 2008. The planned changes of the Energy Saving



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Law (EnEG), the Energy Saving Regulation as well as of the Ordinance on Heating Cost Allocation (*Heizkostenverordnung*) are to come into force on 1 January 2009.

The draft EnEG and the planned EnEV 2009 contain numerous additional obligations and also tightening of the existing obligations of building owners.

A. New regulations

The following are some of the effects which the planned regulations will have for the building owners:

- In the future, the Federal Government of Germany will be able to decide by ordinance with the approval of the Federal Council of Germany on additional obligations to modernise as well as on obligations regarding shutdown of facilities, which owners have to fulfil irrespective of the measures or projects they planned themselves;
- Gradual shutdown of night storage heating systems older than 30 years;
- Additional obligations to modernise (e.g. insulation, heating and air conditioning systems);
- Tightening of the requirements regarding the primary energy demand per year and heat insulation of energetically relevant parts of the building by 30 %;
- Introduction of standardized provisions for fines.

Furthermore, the following amendments are currently planned:

- In addition to the respective principal/owner, also those persons will be responsible for the fulfilment of the EnEV 2009 which, in accordance with the building codes of the federal states, act as drafters, entrepreneurs, site managers or are as their representatives, such as craftsmen and architects involved in the respective building measure.
- The chimney sweeper of the district will monitor the fulfilment of the EnEV.

B. Specific consequences for owners

1. Alterations to existing buildings

The tightened requirements for the energy balance of a building in accordance with the EnEV 2009 do not automatically apply to existing properties, but the owner will be obliged – like under the EnEV 2007 - to meet the respective requirements only in case of certain construction works, modifications and renovations on certain structural elements (such as exterior walls, windows, exterior doors, ceilings, roofs and pitched roof areas as well as on walls and ceilings that adjoin unheated rooms, the ground and to outdoors downwards). In the future, the Federal Government of Germany will be able to decide by ordinance with the approval of the Federal Council of Germany on additional obligations to modernise as well as on obligations for owners regarding shutdown of facilities, which they have to fulfil irrespective of their own plans such as planned construction measures.

2. New heating, air-conditioning and ventilation systems

The EnEV 2009 does no longer restrict the plant-specific minimum requirements to gas-fired and central-heating boilers but expands them to all heat-generator systems (such as heat pump systems). Only existing buildings that fall short of the allowed primary energy demand value by more than 40 % are exempted from the tightened regulation. Larger air conditioning and ventilation systems (air conditioning systems with a nominal power of over 12 kilowatts and ventilation systems with a volume flow rate of at least 4,000 cubic metres per hour) which will be newly installed will have to be equipped with a heat recovery de-

vice; existing systems of this kind have to be upgraded with electronic control devices regulating the set value for humidification and dehumidification separately. In case an air conditioning system is newly installed, a (reasonable) duty to provide insulation is introduced.

3. Enforcement of the EnEV 2009

a) Fines

A harmonization of the regulations regarding fines is planned although the exact structuring and wording of the regulations regarding fines will take place a later stage of the legislative process. However, under the current draft regulation, only intentional or grossly negligent (serious cases of infringements of the duty to take care by the owner) breaches of the EnEV 2009 will result in a fine in the future. This is a limitation of the liability of the owner compared to the liability provision of the existing EnEV 2007 which stipulates a fine also in cases of slight negligence.

b) Monitoring

In the future, district master chimney sweeper will examine whether the renovation duties and the requirements which apply to the installation of new systems have been met. This monitoring shall take place only once at the time of the first fireplace inspection after the EnEV comes into effect. If the district master chimney sweeper discovers violations of the EnEV 2009 he will set the owner a reasonable period for supplementary performance. If this period expires without a result, the district master chimney sweeper has to inform the competent federal state authorities.

C. Possibilities for owners

The owner in his capacity as landlord is, under certain conditions, entitled to allocate the modernisation costs to the tenant by increasing the rent. However, since this possibility is limited to an amount of 11% per year of the respective modernisation costs and therefore the landlord has to pay such costs in advance, another option could be the transfer of the energy supply to an energy service provider ("**Energy-Contracting**") (please see also our article of April 2008). Furthermore, there are several ways to receive financial aid for modernisation projects from the state-own bank KfW (such as CO₂ building refurbishment program ["CO₂-Gebäudesanierungsprogramm"], housing space modernising program ["Programm Wohnraum Modernisieren"], ERP energy efficiency program ["ERP-Energieeffizienzprogramm"] - energy saving measures for small and medium-sized companies) as well as public subsidies on the basis of several support programs of the individual federal states for the execution of energetic building measures. Under certain conditions it is also possible to combine different programs. It is planned to provide further possibilities for public subsidies in the future. As a first step, the Federal Government of Germany has allocated a further 500 million Euros to the CO₂ building refurbishment program due to the high demand.

D. Specific consequences for the tenant

The tenant of an existing building will still have no right to demand the execution of specific energetic measures from the landlord. In order to determine the contractually agreed condition of the building, only the state of the technology at the time when the building was constructed is relevant. If no precise characteristics of the rented property (such as "in compliance with the EnEV regulations") have been stipulated in the lease agreement, the tenant would be entitled to reduce the rent only in case of newly built properties, which were completed after the EnEV (2007 or 2009 respectively) came into effect, if the building does not comply with the energetic standards of the EnEV (2007 or 2009 respectively). The tenant's right to reduce the rent in case of excessive heating costs (due to the low energetic quality of the building), which was included in the original draft of the amendment of the Ordinance on Heating Cost Allocation (*Heizkostenverordnung*), was taken out in the final draft during the final government consultations.

E. Future prospects

One has to wait whether the Federal Council of Germany will make any proposals for amendment regarding the draft new regulations. From today's perspective it is not yet quite sure whether the new EnEV 2009 will actually come into force by 1 January 2009. Pursuant to the climate change package established by the Federal Government of Germany in 2007 in Meseberg further tightening of the requirements regarding the energy demand for new buildings and modernisations of old buildings by 30 % are planned by 2012.

Enforcement

The Validity of Declarations of Submission to immediate enforcement in general terms and conditions



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The Regional Court (*Landgericht - LG*) of Hamburg - in deviation of the jurisdiction of the Federal Court of Justice (*Bundesgerichtshof - BGH*) – has decided that the declaration of submission to immediate enforcement in general terms and conditions is invalid (decision dated 09 July 2008). The decision is mainly driven by the effort to counteract the risks which result from the increase in transfers of loans and the connected securities by banks to third parties. It remains open whether the considerations, on which the decision is based, will be accepted by the higher courts.

In the case decided by LG Hamburg, the declaration of submission to immediate enforcement was given in conjunction with the granting of a land charge on real estate and in relation to the claims under the loan agreement into the notarized land charge deed and the submission to immediate enforcement contained therein was to be qualified as general terms and conditions, which are contractual terms drafted for a multitude (more than two) of contracts which one party to the contract (the user) presents to the other party upon conclusion of the contract. The decision of LG Hamburg therefore is of importance for the banking practice in relation to the granting of loans.

General terms and conditions providing for an inappropriate disadvantage for the contractual party of the user are invalid. The LG was of the opinion that the declaration of submission to immediate enforcement in the present case is of such inappropriate disadvantage and declared the clause void. The court deviates with its decision from the decisions of the BGH which has not objected against such clauses up to now. According to the court these decisions of the BGH are, however, to be seen in the light of the fact that transfers of loans so far were not carried out to a considerable extent. The disadvantage for the obligor that its creditor can enforce its securities without judicial review was seen as justified in many decisions of the BGH (e.g. decision dated 18 December 1986) since it allows for the need of the banks to react quickly in case the financial situation of the obligor deteriorates. LG Hamburg states that this need does not justify the disadvantages resulting from the declarations of submission if the securities are "freely" assigned to "discretionary third parties" who are not interested in a long-term business relationship with the obligor but in a quick realization of the securities. LG Hamburg fears that the potential for misuse of the securities by finance investors who are not subject to the banking supervisory authorities is much bigger than if the securities are held by banks and if it is left to the obligor to initiate the judicial review instead of the creditor. Although misuse of securities can be remedied with damages, LG Hamburg is of the opinion that such damages are harder to pursue if the creditor is an investor and not a bank.

The decision is to be declined for a number of reasons:

The BGH has emphasized in its decisions that the obligor is not unprotected. Declarations of submission to immediate enforcement require notarization in the course of which the obligor is to be made aware by the notary of the content of the document requiring notarization and the risks involved. Further, the obligor can initiate legal remedies if enforcement proceedings have already been initiated. The BGH explained in particular in its decision dated 18 December 1986 that the statutory law allows for enforcement with enforceable notarial deeds without prior judicial review and sees this as an equivalent to enforcement with an enforceable judgment after judicial review. These arguments are still valid. Also, from a more recent decision of the BGH (dated 22 May 2007) it can be gathered that the BGH will most likely not reconsider its position in this matter since the judgment on a similar topic was passed at a time when the BGH was

already aware of the increasing banking practice to transfer loans.

The argument of LG Hamburg that the misuse potential is increased if securities are assigned to a finance investor, does not convince either. To avoid misuse, banks are obliged to transfer the restrictions on the enforcement of securities imposed by agreements on security purpose together with the securities (BGH decision dated 04 July 1986). If the bank does not act in accordance with this obligation, it becomes liable for damages towards the obligor. The National Association of Notaries (*Bundesnotarkammer*) is even of the opinion that such damages would cover the loss resulting from unjustified enforcement of securities by an investor to which the bank assigned the securities (circular letter dated 26 August 2008). In any event the obligor would be entitled to damages against the investor if the investor abusively enforces securities. In addition the obligor is protected by the new rules introduced by the so-called Risk Limitation Act (*Risikobegrenzungsgesetz*) pursuant to which - amongst others - land charges, which are notarized in future, can only be enforced after lapse of a six months' termination period.

Therefore we do not expect that the considerations, on which the decision of the LG is based, will be accepted by the higher courts.

Tax

VAT treatment of real estate transactions



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In case real property is transferred – either as a single asset or as part of the acquisition of a whole business – the contracting parties are usually confronted with the question which taxes are triggered by the transaction and how these shall be treated in their agreement. One of the most important taxes in this context, in addition to real estate transfer tax, is value added tax (VAT). Frequent changes and precisions resulting from case law of the federal finance court (*Bundesfinanzhof*) and of the practice of tax authorities should be taken into account when negotiating a transfer agreement.

With regard to VAT, the first question will be whether the real estate transaction is a so called transfer of an entire business, e.g. in case of the sale of a let property. If an entire business is transferred, the transfer is not subject to VAT. What seems advantageous at first glance bears nevertheless some risks, especially for the buyer. If during the ten years preceding the transfer the seller has deducted input tax with regard to expenses for, e.g., the acquisition or the refurbishment of the property, the buyer might have to (partly) repay such input tax deducted by the seller to the tax authorities in case the buyer does not continue to use the property for purposes that are subject to VAT. This is due to the fact that in case of a transfer of an entire business the buyer is deemed to take over the legal position of the seller among others with regard to the adjustment period for input tax deductions. Therefore, the buyer should inquire possible risks in this regard. This is important especially because the application of the rules for the transfer of an entire business is automatic when its conditions are met and is not subject to any election by the parties.

The conditions for a transfer of an entire business are met when a business or a business unit conducted separately within the whole business is transferred with or without consideration or contributed to another business. For example, the transfer of a let property including the transfer of the lease agreements constitutes such transfer of an entire business. The respective conditions are constantly redefined in more detail by tax case law. On 11 October 2007 the federal fiscal court (file No: V R 57/06) has ruled upon the question, whether there is transfer of an entire business in case a let property is sold and the lease agreement ends before the property is actually delivered to the buyer, the lease agreement not being transferred to the buyer. Even though in this case the buyer had concluded a new lease agreement with a new lessee on the day before the delivery of the property, the federal finance court did not consider that there was transfer of an entire business. The court stated that neither the transfer of let premises without transfer of the lease agreements nor the transfer of an unrented property constituted the transfer of an entire business. The decisive question is whether the transferred assets allow the continuation of the business operated by the seller.

If the transfer does not constitute a transfer of an entire business, it is nevertheless exempt from VAT according to § 4 No. 9a German VAT Code to the ex-

tent the transfer is subject to real estate transfer tax. In this regard, the parties must especially be aware that a transfer of machines and operating facilities is not subject to real estate transfer tax, even if these assets are considered a part of the real property for civil law purposes. Thus, to the extent that such assets are transferred together with the real property, VAT is applicable. Therefore, the parties should define what part of the purchase price is apportioned to assets triggering VAT when transferred.

Even the tax exemption according to § 4 No. 9a German VAT Code can be disadvantageous, especially for the seller. If the seller has deducted input tax with regard to the transferred property during the ten years preceding the transfer, the seller's right to input tax deduction retroactively ceases to exist in case of a tax exempt transfer. The seller then has to repay the respective input tax to the tax authorities.

Thus, the seller often has an interest to transfer a real property without tax exemption. Unlike in case of a transfer of an entire business the tax exemption according to § 4 No. 9a German VAT Code can be waived. This waiver is also known under the expression "option for VAT". By exercising an option for VAT the seller can avoid the aforementioned adjustment of the input tax deduction. The option for VAT must be declared by the seller in the notarised transfer deed. It also seems to be possible to make this declaration in a notarised amendment of such deed. In any other case, the option is not validly exercised.

The buyer on his part should examine whether it is reasonable for him to accept such option. In case the property transfer becomes subject to VAT due to the option, the buyer and not the seller is liable for VAT. VAT, as owed by the buyer, is not part of the purchase price and is consequently not invoiced by the seller to the buyer. For the buyer, a tax exempt property transfer is at the best tax neutral, this is in case he utilises the purchased property for purposes subject to VAT and can therefore deduct the VAT on the purchase price as input tax. On the other hand, to the extent that the buyer ceases such utilisation in whole or in part during the ten years following the purchase, he has to (partly) repay the deducted input tax to the tax authorities. Such change of utilisation occurs for example when the buyer on his part cannot let the property VAT-taxable (e.g. mostly if the tenant is a doctor, a bank or an insurance company or any other business entity not generating VAT-taxable income). In case the buyer on his side wants to resell the property to another purchaser, the buyer must achieve that his respective purchaser on his turn accepts an option for VAT in the transfer agreement.

The issues discussed above show that standard clauses frequently found in property transfer agreements should always be diligently examined by the parties. When buyer and purchaser timely analyse the potential risks, it is usually possible to find a wording in the agreement satisfying both parties.

Contacts

For further information, please contact your usual Eversheds contact or

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Wo?

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

Wann?

Dienstag 7. Oktober 2008
16.00 bis 21.00 Uhr

u.A.w.g.

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Entrance-West, directly at underground
station Messestadt West)

When?

Tuesday 7 October 2008
between 4pm and 9pm

RSVP

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You are also able to register
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Einladung

Sie planen bereits Ihre Termine für die Expo Real 2008 in München?
Verpassen Sie nicht die Drink Reception von Heisse Kursawe Eversheds!

Treffen Sie in ungezwungener Atmosphäre bei Cocktails und Canapés
interessante Gesprächspartner aus den Bereichen Bauen, Immobilien und
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Die Experten aus dem Münchner Büro von Heisse Kursawe Eversheds sowie
aus den internationalen Eversheds Büros freuen sich auf Ihr Kommen.

Invitation

You are already arranging your appointments for Expo Real 2008 in Munich?
Don't miss the drink reception of Heisse Kursawe Eversheds!

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

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

