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SCHINDHELM

EDITORIAL

Dear Reader,

Welcome to the 16th edition of our international newsletter, which we have created together with the partner law firms of the Schindhelm Alliance. In this edition, we have also prepared a variety of current topics for you.

We hope you will find it an interesting read and look forward to your comments and suggestions for the next edition.

Your Schindhelm Team

TABLE OF CONTENT

EUROPE: EU MEMBER STATES AGREE TO TERMINATE THE INTRA-EU INVESTMENT PROTECTION AGREEMENT

I. BACKGROUND

Historically, a dense network of mutual investment protection agreements has developed among countries. Violations of investment protection are litigated before international arbitration courts, whose judgements are enforceable worldwide. Such investment protection agreements – still – exist between different states of the EU. One of the best known proceedings is the action brought by the Swedish Vattenfall Group against the Federal Republic of Germany due to the nuclear exit, which has been litigated before an arbitration court in Washington for years. So far, companies worldwide have a strong lever available in order to protect their investments abroad against state discrimination and arbitrariness.

II. WHAT'S NEW?

In an agreement dated 15 January 2019, the EU Member States have now decided to cancel all intra-European bilateral investment treaties (Intra-EU-BITs) by the end of 2019. They see this as a necessary consequence of the European Court of Justice decision dated 6 March 2018 in the Achmea matter, according to which investment-state arbitration proceedings, based on such intra-EU-BITs, were ruled a violation of European law. These include also so-called sunset clauses that grant protection to the investors for a long period of time even after termination of the contracts. Investors are requested not to begin new proceedings. Existing arbitration claims are no longer to be fulfilled and enforced. Already completed arbitration claims are not to be reopened again. Disagreement exists, however, with regard to the impact of the European Court of Justice decision on the Energy Charter Treaty (ECT), based on the Vattenfall/Germany case.

III. THE CONSEQUENCES FOR INVESTORS:

This decision is initially a step back for investors. As Europe is not known to be a sacred island in terms of investment protection: Discrimination, unfair treatment and legal protection deficiencies do not just exist in the Central and Eastern European countries. Also the brutality by which the exit from nuclear energy in Germany was enforced in 2011 may have surprised many. European investors have also made their investments trusting they were protected from unfair treatment and expropriation not only by internal market law, but also by the Intra-EU-BITs and being able to enforce their rights in arbitration proceedings. Now, with the loss of this additional protection without a replacement, investors could bring their disputes locally and negatively influence the investment climate within the EU; the Council has not yet carried out the assignment of the Commission to develop an alternative legal protection instrument.

IV. CONCLUSION

Particularly in times of oscillating appreciation for the rule of law and independent courts, the de facto abolition of the investment arbitration jurisdiction, virtually overnight, is a regrettable step backward. Even in the case of investments within the EU, the risk of lack of legal protection must now be priced in.

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EUROPE: NEW EU PROPERTY REGULATIONS FOR MARRIAGES AND REGISTERED CIVIL PARTNERSHIPS

I. BACKGROUND

According to information from the Commission, there are currently approx. 16 million "cross-border" marriages and registered civil partnerships in the EU. With the so-called EU Property Regime Regulations (Regulations (EU) 2016/1103 and 2016/1104) that became effective on 29 January 2019 in the context of the so-called strengthened collaboration among the current 19 member states, the EU has set the goal for the creation of a uniform legal framework.

II. ESSENTIAL CONTENT OF THE REGULATION

The core point of the new regulation is the creation of a legal framework for cross-border marriages and registered civil partnerships that is as uniform as possible and by which couples can now select the law applicable to their property regime and also the place of jurisdiction and, for example, coordinate it with the law of succession:
Place of jurisdiction: In the event of the death of one of the partners, the court that now decides on his/her succession at the same time has jurisdiction for disputes over the property regime.
The same applies to the court that deals with divorce, separation or annulment of the marriage. This is to prevent the Plaintiff from gaining an unjustified advantage by the tactical selection of different jurisdictions.
Subsidiarily, the jurisdiction is governed by a series of additional criteria such as the usual residence or the joint citizenship of the couple.
Applicable law: According to the new regulation, the couple can now select a common uniform law that regulates their property regime to the extent it relates to the life situation of the couple, i.e. either the law of the usual residence or the law of the nationality of both or one of them which does not have to be the law of a member state. It must be observed that a choice of law, once it is made, can be changed according to both regulations: This applies without limitation for the future and for the past to the extent that no rights of third parties are affected by this.
In the case of a lack of choice of law, the law of the state in which the couple have their usual residence after marriage/registration applies, in principle.
Form: The corresponding agreement is subject to the written form, must be provided with the respective date and signed by both persons; in addition, member states can introduce additional form requirements, such as mandatory notarisation.

III. EVALUATION

Despite these standardisations, the legal basis continues to be complex. This is due to the multifaceted regulations of property law and the necessary coordination with the additional existing family law regulations. Due to this complexity, it is always advisable to ask an expert about the consequences of selecting a property regime.

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EUROPE: GROUNDHOG DAY – ANOTHER FINE IN THE BILLIONS FOR GOOGLE

I. THIRD PENALTY IN BILLIONS

After the penalty due to abuse of the market-dominating position of Google search engine in 2017 as well as the fine due to illegal practices on Android mobile devices in July 2018, the EU Commission imposed another fine against Google and/or its parent group Alphabet on 20 March 2019 – this time in connection with the product AdSense for Search. Google was ordered to pay a fine of EUR 1.49 billion.

II. ADSENSE FOR SEARCH

Via AdSense for Search Google brokers advertisements to owners of websites (publisher) that operate a search function on their website and want to use the areas around their search results commercially. Google is thus acting as a broker of search engine advertising.

III. CARTEL VIOLATIONS

In the relevant period – between 2006 and 2016 – Google had a dominant market position of over 90% market share in the EEA space in the market for brokers of search engine advertising.

Starting in 2006, Google prevented publishers from placing advertisements of competitors on their search results by adopting exclusivity clauses into the contracts.

Little by little, starting in 2009, these exclusivity clauses were replaced by clauses about the so-called "premium placement". These clauses obligated publishers to reserve the most visible and most frequently clicked locations on their search results pages for Google and to place a minimum number of Google ads.

In addition, from 2009, Google adopted clauses into contracts with the publishers according to which the publisher's right to change the search engine advertising to Google competitors was dependent on the approval of Google. Google could therefore influence which advertisements of competitors were displayed and how often they were clicked.

By this practice other companies were prevented from competing with Google in the market for brokering search engine advertising. Google therefore misused its market-dominating position in this market.

IV. IMPACT

In July 2016, the Commission demanded Google stop the unlawful conduct, whereupon Google terminated the practices that violated cartel law.

Persons and companies that are affected by the anti-competitive behaviour (competitors of Google and possibly also publishers) have the possibility to file lawsuits for damages against Google before the courts of the member states.

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BULGARIA: THE AMENDMENT OF THE DATA PROTECTION LAW

I. BACKGROUND

With the entry into force of the General Data Protection Regulation (EU) 2016/679 (GDPR), the data protection directive 95/46/EC applicable at that time was repealed. The applicable Bulgarian Data Protection Act had to be revised and adapted to the new requirements. For this purpose, a comprehensive amendment was adopted (state gazette 17 of 2019), through which, amongst other things, the concretisation of the provisions of the GDPR are introduced.

II. NEW RULES FOR THE CONTROLLER

People acting as a controller within the meaning of the GDPR are no longer obligated to register with the Bulgarian Data Protection Commission when assuming their work, whereby they naturally have to comply with the legal provisions. The controller may only keep copies of personnel ID if it is provided for in the law. In addition, personal data of deceased persons may only be processed based on an existing legal basis. Measures must be taken to preserve the rights and freedoms of third parties. Free public access to identity numbers of Bulgarian or foreign persons is only permitted in legally regulated cases. The processing of personal data of minors due to consent is only valid if the consent is granted by the respective legal representative or guardian. Processing personal data for journalistic, scientific, artistic or literary purposes may not violate the right to private life. The disclosure of data processed for such purposes by transfer or in another way is permitted only under certain conditions.

III. NEW FOR EMPLOYERS

The employer must have rules and procedures relating to access control, the working hours, the violations, work discipline, amongst others. Both the employer and the HR specialists may only store application documents for longer than 6 months with the consent of the applicant. Original documents that indicate the psychological or physical status of applicants who were not employed must be returned to the data subject within 6 months after the end of the application procedure.

IV. THE DATA SUBJECTS

The amendment regulates in detail the exercising of the information rights of the data subjects towards the controller and the procedures for access to their personal data. A very large part of the amendment is dedicated to the procedure for filing legal remedies in the event of violations of the rights of data subjects. However, a complaint to the data protection commission is limited to 6 months after becoming aware of the violation and at the latest two years after the violation was committed. Anonymous complaints or complaints without signature are not processed by the Commission. Data subjects also have the right to compensation for damages. In addition, there is a detailed regulation for the protection of natural persons for data processing in the criminal proceedings.

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GERMANY: NEWS ON INFLUENCER MARKETING

I. BACKGROUND

Influencer marketing is now among the most common forms of advertising for many companies. Instagram and other social networks offer the "opinion makers" an ideal platform for (self-)presentation and effective advertising of products. According to a current survey of the German Association for the Digital Economy (Bundesverband Digitale Wirtschaft e.V.) dated 10 November 2018, 59 % of the companies surveyed use influencer marketing. However, the use of this advertising format established within the last years is associated with legal risks – both for the advertising companies and for the influencers themselves. Already in 2017, the Higher Regional Court of Celle dealt with the question of whether an influencer campaign of the drugstore chain Rossmann was to be classified as surreptitious advertising (ruling dated 8 June 2017, 13 U 53/17). Social media contributions with an advertising background must be identified as such (§ 5a UWG (Gesetz gegen den unlauteren Wettbewerb [Anti-Competition Law]), § 6 TMG (Telemediengesetz [Telemedia Act]), § 58 RStV (Rundfunkstaatsvertrag [Broadcasting Treaty])). The commercial purpose must be visible at first glance.

II. LABELLING OBLIGATION

The decisive question is: When is a posting of an influencer advertising? If the influencer receives a consideration in the form of fees or products for a contribution, it is assumed there is a labelling obligation. However, all other constellations are difficult to assess. After the recent increase in rulings against influencers and the Regional Court Berlin (ruling dated 24 May 2018, 52 O 101/18) made a distinction that was not detailed further between influencers with fewer or more than 50,000 followers, many influencers, as a precaution, identified every contribution as "advertising" – even if there were obviously no commercial purposes intended by the post. The Berlin Court of Appeal shed new light on it with its appeal ruling dated 8 January 2019 (5 U 83/18). Accordingly, contributions from influencers with links or tags to product providers are not generally considered to be advertising requiring labelling. Rather, it depends on the specific content and the special circumstances of the individual case. A general assumption that entrepreneurial influencers who present products or brands in their posts fundamentally carry out commercial communication is therefore not justified.

III. CONSEQUENCES FOR THE PRACTICE

If there is no consideration for a posting with links or tags to product providers and the contribution is of an editorial nature, it is generally not subject to mandatory labelling. The references to the manufacturers of the depicted products often serve to inform the interests of the followers. This is comparable with photographs in a fashion magazine. Companies who work with influencers, however, must pay special attention to the design of their contracts. The obligation to clearly label the posts as "advertising" or "display" is therefore an indispensable component of the contract. The hash tag "#ad" is not sufficient. In addition, any rights of third parties (e.g. a photographer or other depicted persons) should be observed. Also the inclusion of an obligation not to be active at the same time with the published contributions of direct competitors is recommended.

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ITALY: REFORM OF TRADEMARK LAW

I. THE STARTING POINT

On 23 March 2019, a significant reform of the European Community trademark law took effect (legislative regulation no. 15 dated 20 February 2019 for implementation of Directive (EU) 2015/2436), by means of which a series of significant changes is introduced for trademark holders.

II. THE CONTENT OF THE REFORM

Among the various innovations, the following aspects have practical significance:
i. The introduction of the so-called "certificate mark" (warranty mark), by means of which the origin, the nature or quality of specific products or services is certified, provided, that the applicant does not supply the goods and services that are in question.

ii. Change of rules concerning the persons authorised to request collective trademarks; stock corporations are now expressly excluded, after not previously being explicitly regulated.

iii. Abolition of the obligation to graphic representability of the mark. The signs can be presented in any form considered suitable using the available technology, in so far as the presentation is clear, permanent and easily accessible. It is also possible to use mixed forms of images and sounds as well as theoretically also odours; in addition, moving marks and multimedia marks or holograms are conceivable. Therefore, the registration application must also contain the reproduction instead of the "representation".

iv. Registration is prohibited for those signs whose form and other properties come directly from the nature of the product. Excluded from registration are signs concerning (i) the protection of the source and geographic information; (ii) the protection of traditional references for wines and (iii) the protection of protected traditional specialities. Finally, such signs that evoke misleading ideas are excluded from registration as marks.

In addition, the reform contains (i) new regulations with regard to the capacity of the licensee to sue to assert trademark violations, (ii) the introduction of an administrative procedure for the expiration and nullity of marks before the Italian trademark and patent office without instituting court proceedings, which was mandatory in the previous legal situation, (iii) in procedural terms changes to the burden of proof so that in the future in the context of annulment due to lack of use by the trademark holder, a corresponding use must be proven.
The Regulation contains more detailed transitional rules for holders of existing marks for adaptation to the new rules. After the transitional period of 1 year, there is thus a risk of trademark loss for the holders of pre-existing national collective marks with a lack of conversion of their own signs into a collective trademark according to the new rules or certificate mark.

III. EVALUATION

The comprehensive reform of trademark law leads to a series of benefits for companies by adapting the national rules to the specifications applicable within the EU and introducing new instruments to combat counterfeits. In particular, the elimination of the obligation to provide graphic representability opens up entirely new possibilities in the course of technological progress.

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AUSTRIA: NEW PROTECTION OF BUSINESS SECRETS – ENTREPRENEURS MUST ACT

I. BACKGROUND

Companies invest in know-how, from which there are important competitive advantages. Valuable information is the currency of the knowledge-based company. Maintaining confidentiality of business secrets is therefore a management instrument for competitiveness and research innovations. The loss of secrets can result in serious consequences, in particular, and generally can no longer be reversed. However, the existing protection of business and trade secrets is incomplete: Actions were often shunned, because it could be associated with the risky complete disclosure of confidential information.

II. THE NEW VERSION OF THE UWG

When the amendment to the "Law against Unfair Competition" (Gesetz gegen den unlauteren Wettbewerb, UWG) (UWG Amendment 2018) took effect in January 2019, the EU Regulation 2016/943 on the uniform protection of confidential know-how and secret business information was implemented in Austrian law and the special provisions of the protection of business secrets were issued.

For the first time, the term business secret is now defined: This is secret technological and/or commercial information of economic value that is subject to appropriate confidentiality measures. The term is broadly drafted and can include e.g. list of customers, sample collections, offers, purchasing conditions or formulas.

New and essential is: So that confidential information becomes a business secret in the first place, the person entitled to dispose over it must be active! Organisational measures also come into question as well as technical measures, employment law and other contractual arrangements. All that must be documented accordingly and kept up to date to enjoy protection!

A number of claims are available against the misuse of business secrets. In addition to orders to cease and desist and eliminate infringement, claims for damages and the surrender of enrichment are also possible. Temporary injunctions are possible to secure interventions in business secrets.

In addition, the previous legal deficiency in court proceedings is reduced. The court must preserve business secrets by means of suitable measures and orders. For example, an expert can be consulted, the inspection of the file restricted or the public excluded. Thus, the respondent to the proceedings is no longer automatically aware of the secret.

III. CONCLUSION

Curse and blessing are, as often, close to one another. Distinctive steps to protect business secrets are unspecific, depending on the obligations of action of the person authorised to have secret information in the individual case. Without active non-disclosure measures (keyword: protection concept), there is no protectable business secret even with valuable secret information. Efficient compliance measures are therefore a "must".

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POLAND: REVOLUTION IN PREPARING AND SUBMITTING ANNUAL FINANCIAL STATEMENTS BY COMMERCIAL COMPANIES

I. BACKGROUND

Polish commercial companies have been obligated since October 2018 to submit their annual financial statements and management reports exclusively electronically. This began the first phase of digitisation of registry proceedings in Poland. In a further step, the paper form has finally said goodbye. As of September 2020, changes to the facts registered in the company register or the registration of the company are to be processed completely electronically. New requirements in the accounting area affect all managing directors and board members, including foreigners.

II. ANNUAL FINANCIAL STATEMENTS ONLY WITH ELECTRONIC SIGNATURE

Annual financial statements and management reports which are prepared after 1 October 2018 must be prepared electronically and furnished with a qualified electronic signature or the so-called ePUAP signature. This is a free signature which is confirmed via the so-called ePUAP trust profile and is especially for the communication with the administrative authorities in Poland. For an effective submission, the documents must be signed electronically by all managing directors and/or management board members (or shareholders for partnerships). The annual financial statements must also be prepared according to the logical structure specified by the Polish Ministry of Finance and in the format provided.
Not affected by the obligation to electronic preparation are current resolutions for approving the annual financial statements and for the distribution of profits and/or covering loss which are still being prepared in paper form.

III. WHAT MUST BE OBSERVED IN THE ACCOUNTING?

For an effective submission of the annual financial statements and the management report, each managing director or management board (shareholders) of a company domiciled in Poland must have a qualified electronic signature or the so-called ePUAP signature. However, the latter can only be requested by a person who has a PESEL number (Polish personal ID number). The PESEL number is not required for the application of a qualified electronic signature for a Polish provider. A qualified certificate for the electronic signature can also be applied for by a trust service provider based in another member state if this is listed in the trust list of the European Commission (https://webgate.ec.europa.eu/tl-browser/#/). A certificate qualified in EU countries is then recognised by Polish courts.

IV. SUBMISSION OF THE ANNUAL FINANCIAL STATEMENTS TO THE TAX OFFICE IS NO LONGER REQUIRED

Since 1 October 2018, financial documents no longer have to be submitted to the tax office. The competent registry court will automatically forward the annual financial statements to the central tax data register.

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POLAND: SALE OF AGRICULTURAL LAND – THREE YEARS AFTER THE AMENDMENT

I. BACKGROUND

As of 1 May 2016, the same principles for acquisition of real estate in Poland apply to citizens and companies from member states of the European Economic Area and Switzerland as for Polish entities. These regulations also concern the acquisition of agricultural land. At the same time, on 30 April 2016, an amendment to the Polish law concerning the design of the agricultural system (hereinafter referred to as "law") took effect. In practice, the law restricts agricultural land market. According to the law, agricultural land (hereinafter referred to as "land") with an area of at least 1 hectare (until 25 June 2019 - 0.3 hectares) can fundamentally only be acquired by individual farmers. In other cases it is necessary to obtain approval from the General Director of the State Centre for Support of Agriculture (poln. *Krajowy Ośrodek Wsparcia Rolnictwa*, "KOWR").

II. RESTRICTIONS

In the application for granting consent, it must be demonstrated, inter alia, that the sale of the land to an individual farmer or other persons named in the law (inter alia, relatives, municipality) is impossible. The application must also indicate the area of land already owned by the future buyer. If the KOWR comes to the conclusion that the acquisition leads to an excessive ownership concentration, it can refuse to grant consent. In the case of refusal, the seller can demand that the KOWR buy the land. The price is to be determined by the KOWR and should correspond to the market value of the land. If the seller is not in agreement with the proposed price, he may waive the sale of the land or request that the court determine a corresponding price. The law also provides further restrictions. One of the most important is the right of first refusal of the KOWR to the shares of the companies who are the owners of agricultural land with an area of at least 5 hectares. However, the right of first refusal is excluded if the acquisition concerns the shares in a so-called parent company. If the subsidiary is the owner of land, the shares can be acquired in their parent company without legal restrictions.

III. A LITTLE STATISTIC[1]

In the years 2017-2018, 37,528 applications were made for granting approval. The KOWR issued approval in 31,024 cases (over 92 %, concerning 81,700 hectares) and refused them in 538 cases (approx. 1.73 %). The KOWR asserted the right of first refusal to the company shares in 2017 in 138 cases out of a total of 1,432 cases (approx. 9.5 %). In 2018, the KOWR had already asserted its right of first refusal in 926 out of a total of 2,836 cases (approx. 32.5 %, related to transactions in the amount of 30 million PLN, whereby the total value of the transactions in 2018 was 1.4 billion PLN).

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[1] Report on the activity of the State Centre for Support of Agriculture for 2017; information from the State Centre for Support of Agriculture dated 11 February 2019 and 1 March 2019

ROMANIA: CHANGES TO THE LAW CONCERNING ADMINISTRATIVE DISPUTES

I. BACKGROUND

The law on administrative disputes (law 554/2004) has undergone relevant changes which will have a significant impact on administrative procedural law. Some of the relevant changes are to be shown below.

II. RELEVANT CHANGES TO THE LAW 554/2004

According to the amended law, a person who was damaged by an administrative act that was not issued against this person can now file an objection against the corresponding administrative act within 6 months from the time of being notified by the authority that issued the administrative act.
Another relevant amendment to the law concerns the procedure for lawsuits and regulates that such grounds for contestation can also be submitted within the framework of the court proceedings which were not already submitted during the objection proceedings.

Measures were also taken that aim to accelerate the court proceedings. The first court date must now be determined on the day the suit is filed. The court preliminary proceedings must be carried out by the date determined by the court on the day of filing. In addition, the authorities are now obligated to submit all of these supporting documents or documents to the court together with the statement of defence.

III. CONCLUSION

The changes made by the legislator and other above-mentioned changes are assessed to be positive. In particular, the process-accelerating measures should contribute to shortening corresponding proceedings that are often very lengthy in practice.

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SLOVAKIA: CONTRIBUTION TO THE HOLIDAY OF EMPLOYEE

I. BACKGROUND

With the amendment to the law on the promotion of tourism and the indirect change in the Labour Code, a new institution - a contribution to the holiday of employees ("holiday contribution") – was introduced into the Slovakian legal system effective on 01/01/2019.

II. CONDITIONS FOR THE PAYMENT OF THE HOLIDAY CONTRIBUTION

Employers who employ more than 49 employees are obliged to grant their employees a holiday contribution. Other employers can pay a voluntary holiday contribution.

The employee is entitled to a holiday contribution every year as long as the employment relationship with the employer has existed for at least 24 months. The fulfilment of this requirement is reviewed by the employee at the start of the holiday.

The amount of the holiday contribution is 55 % of the documented reimbursable holiday expenses, but no more than EUR 275.00 annually.

In particular, an employee's expenses for a "holiday package" or tourist services are eligible for funding that are associated with at least two night's accommodation or with meals and other holiday services in the Slovak Republic, as well as multi-day activities in the Slovak Republic during school holidays for the employee's school children, insofar as the employee pays the costs for himself/herself, his/her spouse participating in the holiday, child or another closely related person.

The employee pays his/her holiday from his/her own funds. The booking documents are then submitted to the employer, at the latest 30 days after the end of holiday, and up to 55 % of the costs, but not more than EUR 275.00 annually, are reimbursed by the employer.

The employer can grant the employee the holiday contribution in the form of a holiday voucher, and in accordance with the same principle as the meal vouchers.

The holiday contribution granted by the employer is not taxable as income and is not subject to any taxes for health and social insurance. The obligatory holiday contributions are tax-recognised expenditures of the employer.

SLOVAKIA: E-CASH REGISTER

As part of fighting tax fraud, the tax administration of the Slovak Republic manages a project for online connection of all electronic cash registers to the tax administration portal (E-cash register).

In this way, existing electronic cash registers become online cash registers. The tax office thus has the information about each purchase and every transaction in real time, since the emitted cash register receipt is saved in central E-cash register storage.
All compa
nies must connect completely to this system starting on 1 July 2019.

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SPAIN: SIMPLIFICATION OF ESTABLISHING A COMPANY

I. BACKGROUND

The law 11/2018 dated 28 December has been in force since the beginning of the year. This selectively modifies the Commercial Code, the Stock Corporation Act and the Law on Auditing.
The background for this legal amendment is the continuing efforts of the Spanish government to reduce the administrative expenses for establishing a company and thus to promote the establishment of new companies.
The most important change concerns the standard obligation in Art. 62 of the Stock Corporation Act that the opening of a bank account and the full payment of the share capital must be proven at the time of the founding of the company.
Until now, it was mandatory for the establishment of a Spanish company with limited liability that it be proven to the notary and finally the commercial register, that the company has a bank account in Spain and the shareholders have fully paid in the share capital. This circumstance had to be documented in the founding documents by a corresponding certificate by the bank holding the account. As long as this certificate was not submitted, it was not possible to enter the company in the commercial register.

II. ASSURANCE OF ACCOUNT OPENING AND PAYMENT

The law 11/2018 dated 28 December now supplements Art. 62 of the Stock Corporation Act with a second paragraph. Accordingly, this obligation, in principle, still remains valid for the shareholders, however, the company founders can now, as an alternative, assure to the notary that they have paid in the share capital, without requiring a certificate issued by the bank.
If the founding shareholders want to take this route, they must explicitly declare in the founding certificate that they are jointly and severally liable towards the company as well as the creditors with regard to this circumstance.

III. PRACTICAL EFFECTS

This statutory revision has practical benefits for foreign companies that want to establish a subsidiary in Spain. Until now, the opening of a bank account and the payment of the share capital for the future subsidiary was often associated with time-consuming formalities, because, for example, numerous banks in Spain continue to insist that the shareholders travel to Spain themselves to sign the contracts with the bank on site so that the account can be opened. Opening a company account outside Spain is also difficult in practice because it is a company in formation.
The new regulation now gives the company founders an alternative to accelerate the process of establishing the company. In view of the existing liability risk for the shareholders, however, this variant should only be used if the establishment is absolutely to be carried out in a timely manner.

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SPAIN: VALIDITY OF THE EXPLOITATION CLAUSE ("PACTUM MARCIANUM") IN THE ENFORCEMENT OF PHYSICAL COLLATERAL

I. SUMMARY

The Directorate General for Registrars and Notaries, in a brief decision, has recognised the validity of the so-called "*pactum marcianum*", an exploitation clause, on the basis of which the creditor can directly exploit the object himself/herself and/or can assign it to himself/herself.

II. THE CASE

"Madrid Spirit", an oil tanker sailing under Spanish flag had a ship mortgage entered with the above described "pactum marcianum". The moveables register of Tenerife rejected the entry of this clause, whereupon the General Directorate, in the appeal proceedings decision dated 26 December 2018, in principle recognised its validity in Spain for the first time and established its validity requirements in detail (which were not given in the present case). The requirement is that the exploitation must at least occur at the value which is determined by two independent experts and, if this is above the value of the collateralised receivable, the difference is provided to the remaining creditors by court or notary (or, failing this, the secured debtor itself).

III. LEGAL BACKGROUND

The "*pactum marcianum*" is an exception to the ban on the exploitation agreement (*pactum commissorium*). Spanish law prohibits the mortgage creditor, in the event of non-performance of the debtor in principle, from directly appropriating the property (Art. 1859 Código Civil [Civil Code]), instead of its sale via a public auction in the framework of a court or notarial procedure: Firstly, because it can lead to an unjust enrichment of the creditor (if the collateral has a higher value than the collateralised sum) and secondly to protect the successive creditors, who may not be able to satisfy their receivables from the surplus achieved by the exploitation. There have already been isolated exceptions to this principle, for example within the Cape Town Convention of 16 November 2001 on international security rights to movable equipment, by the royal decree-law 5/2005 when the security is money, marketable securities or credit rights exist, as well as *e contrario* according to decisions by the Supreme Court of Justice of 24 June 2010 and 21 February 2017, if an objective evaluation procedure takes place.

IV. CONCLUSION

Although the cited decision refers to a ship mortgage, there is no reason not to also apply the decision to other collateral rights. Taking into account the costs and duration of judicial proceedings for the enforcement of security rights and the low prices regularly achieved at auction, the admissibility of the "*pactum marcianum*" means an added value for this type of security and acceleration of its enforcement, especially if it concerns assets whose value can be assessed objectively.

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SPAIN: RESIDUAL DEBT DISCHARGE FOR NATURAL PERSONS

I. INTRODUCTION

The residual debt discharge (RDD) was introduced in 2015 as an exception from the principle of general asset liability of the debtor in the insolvency code. Through this procedure, natural persons (both entrepreneurs and consumers) can be discharged from the payment of debts, which they could not settle during insolvency proceedings, if they adhere to certain specifications.

II. PREREQUISITES

In order to be able to benefit from the RDD in Spain, the debtor must have been declared insolvent in Spain and the insolvency proceedings must have ended, either by liquidation or due to a lack of assets. In order to enable the declaration of insolvency in Spain, the main focus of interest of the debtor must be in Spain, i.e. in the case of a consumer, this must be the usual place of residence, or in the case of an individual entrepreneur, this must be the main establishment.

The RDD can only be granted if there is no case of a so-called culpable insolvency (e.g. because the debtor does not file for the opening of insolvency proceedings within two months after becoming aware of the insolvency).

III. TWO ALTERNATIVES

The insolvency code envisages two alternatives for the request of RDD.

The first alternative is intended for insolvency proceedings in which debts incumbent on the assets and privileged insolvency claims have been satisfied. In these cases, the residual debt discharge means that simple and subordinated, non-settled insolvency claims (including liabilities at the tax office and social insurance) are deleted without requiring a payment plan. For this, it is necessary for the debtor to have settled at least 25 % of the simple insolvency claims (the last point is not required if an out-of-court payment plan has been decided or the debtor has offered it formally).

The second alternative is intended in all other situations. In these cases, simple and subordinated, non-settled insolvency claims are deleted, and any remaining claims (including debts incumbent on the assets and non-settled, privileged insolvency claims) will be subject to a payment plan proposed by the debtor and approved by the court. This alternative requires that the debtor has agreed to an out-of-court payment plan and has offered it formally, before the declaration of insolvency. He must satisfy the debts incumbent on the assets and the unsatisfied, privileged insolvency claims within five years after the end of the insolvency proceedings, whereby no interest is incurred for this time. Liabilities at the tax office, social insurance and for maintenance are not deleted, but included in the payment plan.

IV. CONCLUSION

The RDD is a real second chance for the person concerned, but in situations where insolvency is imminent, it is particularly important to heed the strict deadlines in order to be able to benefit from the procedure.

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THE CZECH REPUBLIC: SEIZURE ORDERS BY THE FINANCIAL ADMINISTRATION

I. BACKGROUND

The topic of the seizure orders by the financial administration was discussed intensively in the last months in the Czech Republic both by experts and in the public. In essence, it involves the provision of § 167 of law no. 280/2009 Coll., ("Tax Procedure Code"), which gives the right to the financial administration, under certain conditions, to issue a so-called seizure order.

The purpose of the seizure order is to fight tax evasion and in the form of facilitating receipt of the expected tax in advance. Although, according to the legislative concept, the seizure order should only be used as an ultima ratio, they were regularly applied in practice and are de facto misused. In individual cases, the companies affected by this measure fall into insolvency.

In the meantime, several cases were even heard before the highest Czech administrative court and it lifted some of the seizure orders that were granted because they were illegal and the affected companies have been awarded compensation for damages. The explicit objection was that the Czech tax administration has used this measure in practice more frequently than on average and prematurely.

II. SEIZURE ORDER IN PRACTICE

The seizure order allows the tax administration to collect taxes, which are not yet due or not yet determined, where the tax administration assumes that these will be determined and collected in the future. The seizure order can always be issued if it is feared that the tax debtor cannot, or does not want to, pay the determined tax amount.

Upon the issuance of the seizure order, the taxpayer is then obliged to transfer the tax amount specified (in advance) within three working days to the custody account of the tax administration (sometimes even earlier), where this is secured. It is of course possible to raise objections against the decision, but this has no suspensive effect.

III. REQUIREMENTS FOR THE ISSUANCE OF THE SEIZURE ORDER

According to the current case law, there are basically two requirements for the issuance of a seizure order, namely justified concern (appropriate probability) (i) of the future determination of the tax and (ii) the lower probability of the collectability of the tax over the course of time. This should be justified in detail by the financial administration in their decision and in consideration of the circumstances of the individual case.

The future tax assessment concerns either (i) not yet due, but already determined tax or (ii) not yet determined tax. The lower probability of the collectability of the tax must always be assessed individually, which can involve, inter alia, the following situations which can justify the suspicion of the financial administration: Liquidation of the legal entity, the legal entity is not at the registered office and its actual registered office is unknown, unusual business transactions with extremely disadvantageous conditions for the taxpayer or the use of third-party bank accounts for business activities.

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HUNGARY: COURT REFORM – ESTABLISHMENT OF ADMINISTRATIVE SPECIAL COURTS

I. INTRODUCTION

The Hungarian Parliament adopted the law on the restructuring of the administrative courts in December 2018. The new law will take effect on 1 January 2020.

II. RADICAL CHANGE

According to the currently still valid law, the administrative courts are part of the ordinary court system. With the new law, this will be changed radically: The administrative courts will function as special courts and therefore be fully separated from the ordinary court system.
In the new system, the Administrative Court has jurisdiction in the first instance and the Supreme Administrative Court has jurisdiction in the second instance. Two parallel case law systems are created with the new regulations. For the ordinary jurisdiction the Supreme Court (Curia) is the highest court and for the administrative jurisdiction the highest court is the Supreme Administrative Court.

III. INFLUENCE OF THE JUSTICE MINISTER

The administrative courts have jurisdiction in legal disputes regarding decisions of the state bodies (such as decisions by the tax authority or the competition authority).
The Minister of Justice is the central administrator for the administrative courts. He has extensive authority to determine the personnel, budget and organisational and operational regulations. The Minister of Justice is even entitled to appoint the administrative judge. These powers could threaten the independence of the courts and in general the principle of the rule of law. Although an independent self-administration body consisting of judges is set up by the new law, the powers of this body are limited to the right to respond and consultation. Therefore it is clear that the new law grants the Justice Minister extensive potential influence. In view of the aforementioned statements, it is evident that the new law threatens the independence of the courts and the principle of separation of powers.

IV. STATEMENT OF THE VENICE COMMISSION

The constitutional experts of the Venice Commission of the Council of Europe have reviewed the provisions of the draft of the new law and have criticised the far-reaching potential influence of the justice minister that, in their opinion, combines the most important areas of authority in one place with no effective control. In addition to the criticism, the Commission has also included several proposals in their opinion. The task of the Venice Commission is to review whether the individual national standards correspond to the European constitutional law. It is not to be expected that the Hungarian government will make changes to the law based on these proposals.

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