NORTON ROSE FULBRIGHT

The Art of Dispute

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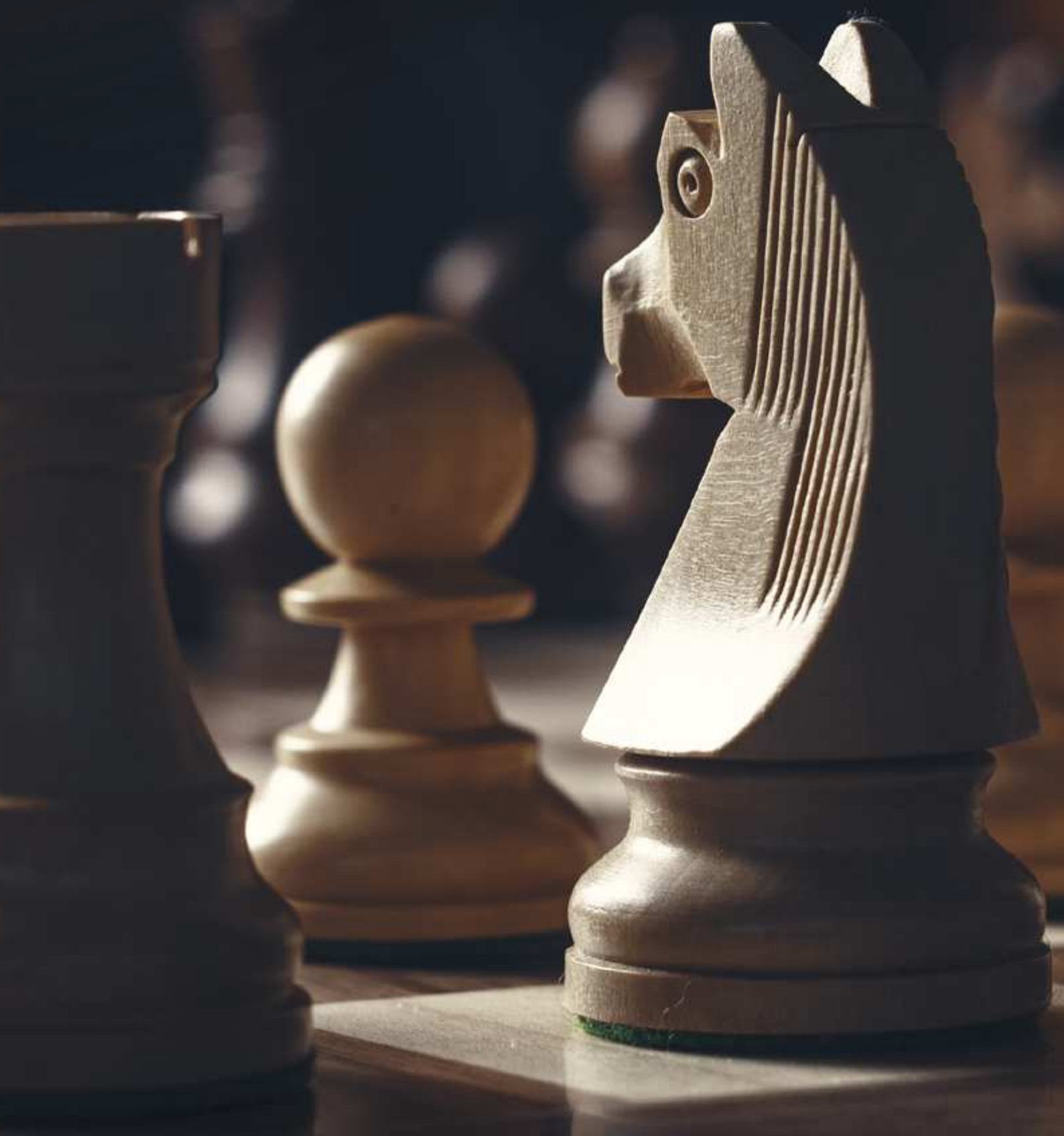

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Editorial

Dear reader,

The Art of Dispute comprises, amongst other things, the ability to assess a situation correctly and act proactively and with the right strategy. Our newsletter provides practical advice and a concise analysis of key case law and recent developments in dispute resolution.

In this issue, we cover the latest developments in litigation funding and class actions, patent infringement and money laundering offences. We also look at the legal changes in warning letters and how the German courts have been viewing arbitration clauses.

Moreover, we present to you our award-winning legal tech offering *NRF Transform* and explain the NRF Litigation Manager.

We endeavor to offer you specific legal advice and to represent and protect your interests in the best possible way. We look forward to exchanging ideas with you and are happy to answer any questions that you may have. Finally, we take you through all of the services and products we have to offer to best support you in answering your concerns. For further support on your queries please contact any member of our team, details at the end of our brochure.

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Lawsuits without risk: Litigation funders discover the German market

By Dr. Christian Wolf and Thorben Schläfer

Following the latest developments on what was referred to as the "dieselgate scandal", foreign litigation funders have now discovered the German litigation market. The scandal about manipulated exhaust values showed once again that a large number of potential claimants shy away from legal enforcement in view of the considerable cost risks. Although various litigation financing models have emerged, there are, from a legal perspective, various weaknesses to be considered depending on their particular structure.

1. Starting point

Litigation funders quickly noticed these fragilities in German procedural law and amassed large numbers of diesel vehicle owners, whose claims they took to court in return for a share of the profits. As a result of the flood of dieselgate lawsuits, the German legislator created what is referred to as the model declaratory action (*Musterfeststellungsklage* – MFK) under which potential claimants can register their claims in a class action to establish a factual and legal basis for their claims. However, since the MFK is only available to consumers and, moreover, does not result in a court order to pay (*Zahlungstitel*) being obtained, its introduction did little to dampen the business of litigation funders and new providers that had entered the market.

2. Financing models and their legal classification

Litigation funders specialising in the collection of similar claims on a large scale operate in a legally uncertain environment. Various models have emerged which seek to counteract this but, depending on how they are structured, they are still vulnerable to attack.

a) Assignment model

Under the assignment model, the claimant assigns its claims to a legal service provider registered for debt collection services under the Legal Services Act (*Rechtsdienstleistungsgesetz* – RDG) who acts as its trustee. The legal service provider assumes responsibility for the enforcement of the large number of claims. The individual claims are combined by a law firm instructed by the legal service provider. The legal service provider is financed by a litigation funder who is responsible for the legal costs and usually also the marketing costs for attracting clients. Legal service providers, financed in this way, appeal to claimants as they provide them with an opportunity to take legal action without any risk to them. The claimant is not liable for any of the costs of the claim and the legal service provider only receives a commission if the claim is successful (often amounting to around 25-30% of the claim awarded by the court).

The assignment model initially enjoyed great popularity as, in principle, it had already been approved by the German Federal Supreme Court (*Bundesgerichtshof* – BGH) in 2019 in the "Lexfox" (wenigermiete.de) case (BGH, November 27, 2019 - VIII ZR 285/18). The BGH assumed that the legislator had intended that the term "debt collection service" be construed rather broadly and did also not object to the agreement of a contingency fee.

Whether a specific assignment model is permissible, however, depends on the individual case. Depending on the facts and circumstances of the case, there are still various issues that may arise which have not been considered by the highest courts. A central issue is always the scope of the authority to collect debt and enforce judgement under the RDG. In the cases that have been tried, the Regional Courts in Munich and Ingolstadt came to the conclusion that the respective litigation vehicles had exceeded their debt collection authority under the RDG and that the respective assignments of claims to the legal service

provider were therefore void (Regional Court of Munich I, February 7, 2020 – 37 O 18934/17 – "*LKW-Kartell*"; Regional Court of Ingolstadt, August 7, 2020 – 41 O 1745/18 – "*Diesel-Skandal* (VW/Audi)"). One of the reasons given for this conclusion was that the focus of the RDG is on the out-of-court enforcement of claims, whereas the assignments made were aimed at judicial enforcement from the outset. In addition, the courts also flagged the potential for a conflict of interest to arise for the legal service provider vis-à-vis the litigation funder and the claimant.

However, as a result of the subsequent ruling of the BGH in the "Airdeal" case (BGH, July 13, 2021 – II ZR 84/20), a collection model aimed exclusively or primarily at the judicial enforcement of claims will not generally lead to inadmissibility under the RDG. If, taking this ruling into account, the nullity of these assignments is nevertheless reinstated in the higher court following appeals of the aforementioned proceedings, this would result in the claims becoming time-barred. Whether or not assignment models have a future will continue to depend on the structure of the respective model.

b) Individual claim model

Despite the uncertainties surrounding the assignment model, litigation funders did not abandon the German market but turned to the less cost-efficient but more legally secure individual claim model instead. Under this model, each claimant conducts its own lawsuit with the litigation funder assuming the costs of enforcing the claim and potentially receiving a success-based commission in return.

Although it is true that the legal risks of a possible assignment are eliminated in the individual claim model, this model is much more expensive for litigation funders, because their lawyer and court fees are substantial. Those affected often try to compensate for this disadvantage by requiring the commissioned law firms to pay fees to the litigation funder for legal tech solutions, but this is only possible to a limited extent for reasons of data protection and professional law.

In addition, the individual claim model can also have weaknesses, especially if the litigation funder is granted too much influence over the proceedings. For the arrangement between litigation funder and claimant to be effective, it is important to ensure that the litigation funder does not de facto control the proceedings and that the claimants' lawyers act solely in the interest of their client. In practice, maintaining the independence of lawyers is a delicate issue because law firms are often already liaising with a litigation funder at the outset of the action in order to attract claimants with the promise of risk-free litigation, and, from the litigation funder's point of view, customers.

In contrast to the assignment model, a large number of law firms are involved with the enforcement of claims in the individual action model for client care reasons. As a result, in addition to the financial effort, the logistical effort of the litigation funder also increases significantly in the individual action model.

c) Class action model

The class action model offers the possibility to minimise costs without requiring the assignment of the claim to a litigation vehicle of a legal service provider. Various individual claimants form a joinder of parties (*Streitgenossenschaft*) and bring their claims jointly by way of "subjective" aggregation of claims.

The litigation funder finances the legal costs of each of the claimants' claims, who are all represented by the same partner law firm of the litigation funder. In addition to reduced lawyer's and court fees, this model has advantages for the litigation funders. It can be economically profitable to assume the costs of a specialised law firm that charges fees significantly higher than the statutory fees. Nevertheless, it must also be ensured with this model that the law firm acts only in the interest of the individual claimant; otherwise, as with the individual claim model, there is a risk of the legal costs assumption agreement being invalid.

d) Claim purchase model

A variation of the class action model is the claim purchase model, in which a litigation vehicle financed by a litigation funder purchases claims from claimants. The litigation vehicle buys a (possibly) existing claim below its nominal value and has it assigned to it by the claimant. The claimant is not liable for the recoverability of the claim and receives immediate payment irrespective of success. The litigation funder, in turn, assumes the economic risk of the value and enforceability of the claim. This is also the reason why – unlike the assignment model – the claim purchase model does not require a debt collection licence under the RDG.

With the claim purchase model, the litigation funder ultimately assumes a higher cost risk in order to avoid the procedural risks of the assignment model. In contrast to the individual claim model, however, this model enables the litigation funder to bundle costs efficiently and engage specialised lawyers who charge fees above the statutory fees but act exclusively in the financier's interest. Where in particular, the chances of success are good, the claim purchase model is a good choice for litigation funders, provided that enough claimants can be found who, in light of such prospects, will accept a considerable discount on their claim.

3. Outlook

Litigation financing has become an integral part of the German litigation landscape in relation to the enforcement of a large number of similar cases. It is a popular alternative to the model declaratory action, especially for consumers, and is likely to remain so in the future. For example, the new European representative action, which will come into force by mid-2023 at the latest (see page 07), explicitly provides for the possibility of litigation financing - which will further expand the existing market. It can therefore be assumed that in the future companies will increasingly face proceedings which are in fact controlled by litigation funders. A company should always be aware of the strengths and weaknesses of the respective litigation financing models and adapt its defence strategies accordingly.

The European representative action – new litigation risks for companies

By Jamie Nowak and George Stanka

After decades of negotiations, the European Union is implementing a means of collective redress with far-reaching consequences for practice with the European representative action as part of its "New Deal for Consumers". Member States must implement the directive into national law by December 25, 2022 and apply these provisions from mid-2023. However, companies should already be familiarising themselves with the new representative action rules and implementing appropriate risk prevention mechanisms.

Strengthening consumer rights and fair competition

On December 25, 2020, the "Directive (EU) 2020/1828 of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC" (the "Directive") entered into force. The Directive aims to standardise the enforcement of consumer rights in the Member States and make it more effective overall. In an increasingly globalised and digitalised market, the danger that a large number of consumers will be harmed by one and the same unlawful business practice has increased considerably. The representative action is therefore intended to overcome, in particular, the lack of interest of individual consumers in pursuing claims for damages or reimbursement that are in themselves small (minor damage referred to as "*Bagatellschäden*"), where the damage can be considerable from the point of view of society as a whole. Finally, however, the Directive is also intended to counteract the distortion of competition between non-law-abiding and law-abiding businesses by promoting law-compliant behaviour and thus creating a level playing field for businesses operating in the EU Internal Market.

Material scope of application

The material scope of application of the Directive concerns infringements of the consumer regulations and directives of European Union law listed in Annex I of the Directive, including their transposition into national law. This list includes areas such as travel and tourism, energy, telecommunications, environment and health, data protection, financial services and product law. Consumers, for example, who are affected by a flight or train delay will have the opportunity to assert their rights collectively in a representative action in the future. But also manufacturers, importers and traders are exposed to new types of liability risks with regard to product safety and product liability.

Right to sue (*Aktivlegitimation*): qualified entities

Only "qualified entities", i.e. organisations or public bodies that represent consumer interests and have been designated by a Member State as qualified to bring collective actions, have the right to bring an action. In Germany, the consumer advice centers are a common example. In contrast, consumers affected by the infringement of European Union law by the business are not themselves entitled to bring a representative action. Businesses, on the other hand, can at most be defendants in a representative action.

Subject to contrary provisions of the Brussels Ia Regulation, the qualified entities are also entitled to pursue the representative actions in a Member State other than the one in which they have been appointed as "qualified entities". In principle, this gives them the strategic advantage of being able to choose the jurisdiction that is most favourable to them.

Two types of representative actions: injunction and redress

The Directive distinguishes between a representative action for injunctive relief and a representative action for legal redress. Applications for injunctions were already regulated, although less extensively, in Directive 2009/22/EC, which has now been repealed. It was aimed at forbidding the defendant company, within the framework of interlocutory proceedings or main proceedings on the merits, to engage in commercial practices that violate European consumer law. The newly introduced representative action is aimed encouraging businesses to act in a certain way (action for redress measures). The type of remedy is dependent on the applicable European or national law and can accordingly include compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid. It is important that the remedy must directly benefit the consumer and that the consumer does not have to bring a separate individual action to demand performance.

Binding effect of redress measures: opt-in or opt-out?

In principle, the Directive gives discretion to the Member States to decide whether only those consumers who have expressly or tacitly expressed that they wish to be represented by the qualified entity (opt-in model) or only those who have not declared that they do not wish to be represented (opt-out model) are bound by the redress measures. The opt-in mechanism is mandatory in the event that consumers affected by the infringement do not habitually reside in the Member State of the court or administrative authority before which the action for redress measures is brought.

Funding of representative actions for redress measures

The funding of representative actions for redress measures by third parties is possible, to the extent permitted by national law, and is likely to raise further interest from commercial litigation funders (see page 04). In this case, however, it is important to ensure that the protection of the collective interests of consumers does not drift out of focus in the context of representative actions and that conflicts of interest are avoided. For example, the recitals of the Directive on representative actions preclude the financing of a particular representative action by a trader if the trader is operating in the same market as the defendant company.

Protective measures for businesses against abusive representative actions

In order to protect businesses from potential abuse of the representative action, the Directive provides, in addition to the reservation of the right to sue for qualified entities, for the following procedural particularities. Firstly, the unsuccessful party has to bear the costs of the proceedings (*loser pays principle*). Secondly, the assertion of punitive damages is expressly excluded. Finally, it should be possible to dismiss obviously unfounded representative actions at the earliest possible stage of the proceedings in order to keep the (cost) burden on the company as low as possible.

Relationship to the German model declaratory action

With its model declaratory action, Germany already has a legal action regime with which consumers can collectively assert their rights. As in the case of the European representative action, at a first stage only qualified entities are entitled to bring an action, the purpose of which can only be a declaratory judgment, which will then serve as a "model judgment" for the further course. At a second level, consumers can assert their rights in an individual action based on the declaratory judgment. The prerequisite is that the respective consumers have previously registered in the register of actions of the German Federal Office of Justice (opt-in model).

The representative action, on the other hand, promises a more efficient procedural structure, for example by not applying the much-criticised two-stage procedure of the model declaratory action. Moreover, the representative action may now also be aimed at a specific performance, in addition to injunctive measures. It is thus a much sharper sword than the model declaratory action and strengthens consumers in enforcing their rights.

Outlook

A lot will depend on how the Member States will actually implement the Directive on representative actions. The provisions of the Directive must be transposed into national law by December 25, 2022 and applied by June 25, 2023 at the latest. At present, it can be assumed that the German legislator will only deal with this issue in the coming legislative period. It remains to be seen whether it will take this as an opportunity to improve or even repeal the much-criticised model declaratory action. In any case, it should be noted that the implementation of the Directive on representative actions will considerably increase the litigation risks for companies, especially with regard to alleged minor damage and that appropriate mechanisms for risk prevention should therefore be implemented as soon as possible.

Legal Tech in practice – the NRF Litigation Manager

By Dr. Constanze Bandilla-Dany and Lena Haffner

Transformation dynamics have recently increased in the legal market. The latest technologies and recent amendments to the German Legal Services Act are increasingly bringing legal tech solutions into the focus of advisory practice. The example of the NRF Litigation Manager shows how our law firm uses the advantages of technological solutions in the field of litigation management to the benefit of clients.

1. NRF Transform – legal tech solutions from a one-stop shop

Our clients benefit from customised technological solutions developed by NRF Transform, our global innovation initiative (see also www.nrftransform.law). Our German practice groups work closely with our global legal tech hubs in Newcastle and Houston in interdisciplinary teams, which enables them to identify different aspects at an early stage and take into account change requests of a technical or content-related nature. By using state-of-the-art software and agile working methods, we are able to develop award-winning legal tech products that are precisely tailored to our clients' needs, such as NT Analyzer, N-Accelerate or NRF Litigation Manager.

2. Agile collaboration – time-saving, efficient, legally secure

Until now, litigation management has been time-consuming and error-prone when dealing with large volumes of cases, especially with regard to the exchange of information with clients on changing claim statuses and associated litigation strategies. With the NRF Litigation Manager, it is now possible to significantly simplify the processing of large volumes of cases. This app, developed together with clients, transforms the traditional image of legal services and working in collaboration with clients increases the efficiency and the legal certainty of the technological solutions. Agile project management and the understanding of legal tech both play a significant role in our legal practice and form an integral part of the training of our associates for this reason.

3. Best possible service

a) Completeness through continuous data synchronisation

Clients provide the necessary case data, such as the amount of individual outstanding debts, via electronic means. This data is then synchronised with the law firm's own DATEV-compatible data systems by using a data interface, whereupon a fully automated file is created on NRF's system and the lawyer handling the case is automatically notified. The data records or files can later be supplemented with accompanying documents and information. This ensures that all case-relevant information is available and that no decision-relevant data is lost.

b) Improved decision-making

The data on the procedural status of the individual case files is then integrated into a platform solution that sorts and consolidates the data sets and displays them in a user-friendly dashboard that can also be viewed via mobile app. Clients can thus obtain information on the current status of proceedings in real time (e.g. action filed, oral proceedings, judgment, execution) in compliance with all data protection and confidentiality requirements. Documents such as lawyers' pleadings or court titles are also available via the data interface. As both sides have an equally broad information base, it is possible to make more informed and, as a result, better decisions on a regular basis.

c) Timely corporate management

The app is characterised by its comprehensive information management. The available case data is visualised in an appealing way and gives the user an optimal overview of the entire proceedings. Data sets can be prepared and filtered with regard to various statistics in a user-friendly way. For example, an overview of the duration of the entire proceedings (from the first demand to the completion of enforcement measures) or of individual sections of proceedings (e.g. only enforcement measures) can be created. This provides the clients with transparent success statistics and enables them to adjust their receivables management and liquidity management in a timely manner.

d) Resource efficiency through automation

Valuable resources are saved by automating repetitive processes. With the help of fully electronic file management, document templates developed by NRF can be individualised error-free within seconds. Quality losses in the creation of standardised mass documents are avoided. The resources saved, especially in terms of personnel, are available for other tasks.

4. A new approach to legal services

The NRF Litigation Manager is a good example of how NRF Transform is revolutionising existing mandate work in the field of lawsuits and bringing to light new, agile forms of collaboration in a digital world. The separation of standard and complex issues and the involvement of non-lawyers guarantees an optimal allocation of resources, better services, higher productivity and ultimately the best price-performance ratio. We don't just talk about legal tech, we live it. This is how we establish ourselves as a reliable contact for clients who increasingly rely on legal tech solutions.

5. Conclusion and outlook

NRF Transform combines the latest technology with the strong expertise of our lawyers so that we continue to actively shape the legal tech transformation of the legal market. In doing so, many other opportunities, particularly in relation to big data analytics and the use of artificial intelligence, are already available for use and are being developed on an ongoing basis. Norton Rose Fulbright is ready to serve as a supporting pillar in the management of legal risks by legal departments and, as a result, in ensuring corporate success by managements.

Accolades

2021

Innovation of the Year (International Law Firm)
Legal Innovation Awards, Legal Week –
Cyber litigation response

The new money laundering offence (s261 German Criminal Code) and the implications of the all-crimes approach for practices

By Dr. Alexander Cappel and Dr. Christina Hund

Money laundering prevention has been a key area of concern for years, gaining greater importance for the competent supervisory authorities. New money laundering directives are adopted by the European Union on a regular basis, and implemented, in particular in the German Money Laundering Act (Geldwäschegesetz – GwG), so that the obligations with regard to compliance systems under money laundering law become increasingly stringent. The repressive provisions in the German Criminal Code (Strafgesetzbuch – StGB) are also following this trend. Indeed, since March 18, 2021, a new and stricter money laundering criminal regime has been in force, the consequences of which are far-reaching.

1. Introduction

The offence of money laundering in section 261 German Criminal Code has always been one of the most complex and confusing offences. After numerous amendments, section 261 German Criminal Code – which in fact is the most frequently amended provision in the German Criminal Code – in its current version is almost futile in terms of wording and legal dogma and has brought no significant successes since its introduction in 1992. According to the annual report of the Financial Intelligence Unit (FIU) for 2019, there were only 54 convictions and 133 penalties for money laundering activities during the reporting period (after June 26, 2017). Against the background that the sum of assets laundered in Germany was estimated at €100 billion annually in 2016, according to a study conducted by the Martin Luther University Halle-Wittenberg for the Ministry of Finance, the figures presented by the FIU imply that the current regime is not effective.

2. Essential changes

Particularly for the purpose of making section 261 German Criminal Code more suitable and relevant in practice, the legislature fundamentally redrafted this provision as of March 18, 2021. The changes are intended to facilitate the use of evidence, and thus integrate the legislation more strongly into the practice of the prosecuting authorities. The main change is the implementation of the "all-crimes approach".

a) The all-crimes approach

Until March 18, 2021, money laundering was only punishable if the money laundering offence related to an object of crime derived from a specific "predicate" (underlying) offence. These "predicate" offences suitable for money laundering were exhaustively listed in a schedule in section 261 German Criminal Code. This limited the scope of application both legally and factually, since numerous everyday offences (e.g. theft or fraud, if not committed commercially or by a gang) could not produce suitable money laundering objects and the "predicate" offences – if they existed – were often difficult to prove. These restrictions have now been eliminated, as the new section 261 dispenses entirely with the list of "predicate" offences. This means that since March 18, 2021, any criminal offence

can qualify as "predicate" offence for money laundering ("all-crimes approach"). The scope of application has thus been massively expanded and requirements for use of evidence have been completely eliminated. Businesses must now be aware that any single offence that produces an asset – even if it is only an outlier or a case of minor unlawfulness – can open the door to criminal liability under section 261 German Criminal Code.

b) Criminal liability even in the case of reckless commission

Pursuant to section 261 (6) German Criminal Code, anyone who, when committing a suitable offence (within the meaning of section 261 (1) German Criminal Code), recklessly fails to recognise that it is a suitable money laundering offence is also liable to prosecution for money laundering. Although the reckless commission of money laundering was already punishable under the old legal regime, the implementation of the "all-crimes" approach gives it a completely new force. The "all-crimes" approach alone has already extended the scope of punishable money laundering further than necessary, to the areas of petty crime. Through the combination with the criminal liability for reckless commission, the applicability of section 261 now threatens to become difficult to govern.

c) Other selected amendments

It is to be welcomed that the "defense lawyer's privilege" has expressly found its way into the Act. A defense lawyer who accepts a fee for his work is only liable to be prosecuted if he or she had actual knowledge of the origin of the fee at the time of accepting it (section 261 (2) sentence 3, (6) sentence 2 German Criminal Code).

Brief reference should also be made at this point to the amended right of confiscation. According to section 261 (10) sentence 1 German Criminal Code, the object or goal of the offence and the benefits derived from them may be confiscated by way of independent confiscation – i.e. even if no specific person has been prosecuted or convicted (section 76a (4) no. 1 lit. f German Criminal Code).

3. Conclusion

By implementing the "all-crimes" approach in section 261 German Criminal Code and at the same time maintaining reckless commission as a punishable offence, the scope of application of money laundering offences has been vastly extended. It is unclear which specific objective the legislature wanted to achieve by this, as it is very doubtful that money laundering can be effectively combated by the extension of criminal liability to everyday petty offences. In view of the fact that the German law enforcement authorities are already overburdened, it remains to be seen how the authorities will deal with their new obligation in prosecution work to investigate masses of petty offences with regard to potential money laundering activities. The extension of criminal liability will in any case entail massive risks for companies, of which those affected must be aware. It must therefore be ensured that effective compliance processes are in place in order to be able to rebut the accusation of recklessness from the outset. Companies should also consider how to react if criminal acts are discovered within the company through which assets may have been obtained and what measures need to be taken in such a case to minimise risks of criminal liability.

Update on product compliance: The EU Market Surveillance Regulation

By Dr. Nikolas Smirra

On July 16, 2021, Regulation (EU) 2019/1020 of the European Parliament and of the Council of June 20, 2019 on market surveillance and compliance of products (EU Market Surveillance Regulation – "Regulation") fully came into force. It will form the core of European market surveillance law and is intended to provide a uniform and efficient implementation and enforcement regime of product regulatory requirements. The market surveillance authorities will be granted additional powers and the international exchange of information between regulators will be strengthened. This increases product compliance related risks for market participants. In addition to increased product regulatory obligations, the Regulation includes within its scope "new" economic operators – in particular, "fulfillment service providers" – and also focuses on online trade.

1. Background

As part of its Single Market Strategy, the European Commission aims, among other things, to expand the single market for goods by increasing efforts to keep non-compliant products out of the EU market. In its Communication of October 28, 2015, the Commission announced in this context that it would "introduce an initiative to strengthen product compliance by (…) intensifying compliance checks and promoting closer cross-border cooperation among enforcement authorities, including through cooperation with customs authorities" (page 19 of the Communication). After extensive consultations, the Regulation was finally adopted on June 25, 2019 (Official Journal of the EU of 25.06.2019, L 169/1). It aims to ensure a high level of safety, health, consumer and environmental protection, mainly by strengthening market surveillance, increasing the control of goods imported into the EU internal market and imposing additional requirements on economic operators. In this context, the legislator is also focusing on e-commerce, as online sales of non-compliant (e.g. unsafe or incorrectly labelled) products, for which a responsible source cannot be identified, is seen as a major source of unfair commercial behavior and safety concerns. On a national level, the German Market Surveillance Act (*Marktüberwachungsgesetz* – MÜG) also came into force on July 16, 2021, and implements the relevant provisions from the Regulation for the non-harmonised non-food sector into German law (section 1 (2) German Market Surveillance Act).

2. The Market Surveillance Regulation in a nutshell

The Regulation follows an industry-neutral and cross-sectoral approach and concerns a large number of goods, product categories and product groups. Specifically, it covers all products subject to one of the product-related harmonisation laws defined in Annex I (Art. 2 para. 2 of Regulation (EU) 2019/1020). Amongst other things this includes toys, batteries, cosmetic products, textiles, personal protective equipment or medical devices. Furthermore, the catalogue contains a wide range of e.g. packaging or substance related provisions as well as type-approval and road traffic regulations. However, in accordance with the *lex specialis* principle, more specific provisions of the referenced harmonisation legislation always take precedence. The Regulation also explicitly does not impede more specific measures of the market surveillance authorities under the Product Safety Directive 2001/95/EC (Art. 2 (3) of Regulation (EU) 2019/1020).

The Regulation was published on June 20, 2019. Under Article 44 certain rules directed at authorities applied as from January 1, 2021. In contrast, obligations on economic operators only apply from July 16, 2021 (Art. 44 of the Regulation). Therefore, products that are placed on the market in the EU from that date onwards – i.e. are "supplied for the first time for distribution, consumption or use on the Union market in the course of a business activity, whether in return for payment or free of charge" (Art. 3 No. 2, 1 of Regulation (EU) 2019/1020) – fall under the Regulation.

"Economic operators" are included within the scope of the Regulation. They are, in particular, required to cooperate with market surveillance authorities regarding risk prevention measures (Art. 7 (1) of Regulation (EU) 2019/1020) and can be subject to comprehensive official actions (see below). The type of economic operators defined in the legislation is very broad: it includes "manufacturers, authorised representatives, importers, distributors, fulfillment service providers or any other natural or legal person who is subject to obligations in connection with the manufacture of products, their making available on the market or their putting into service in accordance with the relevant harmonisation legislation of the Union" (Art. 3 No. 13 of Regulation (EU) 2019/1020). The explicit inclusion of fulfilment service providers – i.e. "natural or legal persons who offer at least two of the following services in the course of their business activities: warehousing, packaging, addressing and shipping of products in which it has no ownership rights" (with the exception of postal, parcel delivery and other freight services, Art. 3 No. 11 of Regulation (EU) 2019/1020) – closes currently existing responsibility gaps in the supply chain.

Notwithstanding any more specific obligations arising from the harmonization legislation, certain goods covered by one of the 18 European regulations and directives mentioned in Article 4 (5) – for example toys, construction products or personal protective equipment – may only be placed on the market if an economic operator established in the European Union is responsible for tasks stipulated by the Regulation (Art. 4 (1) of Regulation (EU) 2019/1020). Depending on the product, this may include the obligation to verify and keep available EU declarations of conformity and technical documents, to transmit any documentation required to demonstrate conformity, to inform market surveillance authorities in case of identified product risks and/or to ensure necessary corrective actions in case of non-compliance. Further, new labelling obligations are introduced for the aforementioned products. Under Art. 4 (4), information on the responsible economic operator, including contact details, must be made clear on "the product or on its packaging, the parcel or an accompanying document." The definition of placing a product on the market is also broad, meaning "the first making available (…) on the Union market" (Art. 3 No. 1), whereas such "making available" means the supply of "a product for distribution, consumption or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge" (Art. 3 No. 1 of Regulation (EU) 2019/1020). In the context of e-commerce, a product offered for sale is already considered to be "made available on the market" if an offer is targeted at end users in the Union, which should always be the case if "the economic operator directs, by any means, its activities to a Member State" (Art. 6 of Regulation (EU) 2019/1020).

In order to comply with and enforce the harmonised EU acts as well as the Regulation itself, the authorities must ensure effective market surveillance and carry out inspections (Art. 11 of Regulation (EU) 2019/1020). To this end, they are provided with extensive powers. This ranges, for example, from ordering product recalls (Art. 19 of Regulation (EU) 2019/1020) or corrective and risk mitigation measures (Art. 16 (3) of Regulation (EU) 2019/1020) to the ability to make comprehensive information and disclosure claims against economic operators. In addition, the Regulation stipulates rather "unusual" measures that may be applied by the authorities, such as carrying out mystery shopping or reverse-engineering activities (Art. 14 of Regulation (EU) 2019/1020). In relation to online trade, "online interfaces" (essentially sales platforms) may also be ordered by regulators to display mandatory warnings or to remove certain content (Art. 14 (4) (k) of Regulation (EU) 2019/1020).

The German Market Surveillance Act additionally introduces new administrative offences (section 21 German Market Surveillance Act) and criminal offences (section 22 German Market Surveillance Act) at national level in order to implement the "effective, proportionate and dissuasive" sanctions required by the usual EU jargon (cf. Art. 41 of Regulation (EU) 2019/1020).

Finally, the EU Market Surveillance Regulation provides for comprehensive regulations on the exchange of information between authorities, on international cooperation (Art. 22 et seq. of Regulation (EU) 2019/1020) as well as on import controls (Art. 25 et seq. of Regulation (EU) 2019/1020).

3. Outlook

Although the Regulation itself does not impose any technical requirements on products, manufacturers (or their authorised representatives), importers and traders as well as fulfilment service providers will, in practice, be confronted with significantly increased market surveillance and possible measures being taken by the competent authorities. On the other hand, it can be assumed that compliant economic operators will benefit directly from the Regulation, as the (online) distribution of non-compliant competing products from non-EU countries will be restricted more effectively. In particular, operators of business models such as dropshipping or involving fulfilment service providers, as well as suppliers from non-EU countries, who sell their products online directly into the European Union, will have to consider potential implications under the Regulation.

The end of the warning system as we knew it

By Daniel Marschollek and Manuel Merling

By adopting the "Act to Strengthen Fair Competition", the legislature reacted to the demand for stronger regulation of the warning system under unfair competition law. It had increasingly fallen into disrepute over recent years because harsh competition law rules had, in some cases, been used to enforce extraneous objectives, especially in case of minor infringements of labelling and information requirements on the internet. The legislature has now increased the requirements for an entitlement to enforce claims while reducing (financial) incentives.

1. Improvement of protection against abusive warnings

With the "Act to Strengthen Fair Competition", which came into force on December 1, 2020, the legislature amended existing legal provisions with the aim of ensuring that claims arising from violations of competition law are enforced by means of a warning exclusively "in the interest of lawful competition rather than to generate fees and contractual penalties". The German Act to Strengthen Fair Competition now provides for an effective catalogue of measures to improve protection against abusive warning notices by increasing the requirements to be complied with to be entitled to enforce claims while reducing financial incentives for warning notices and simplifying the assertion of counterclaims.

2. Main changes in detail

The introduction of the protection mechanisms is based on four main pillars. First, the requirements for the warning parties to prove that they were "competitors" and for the associations to prove that they acted as "guardians of competition" were increased. Thus, section 13 (2) no. 2 of the German Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb* – UWG) (new version) now provides that the warning party has to substantiate its entitlement in the warning notice itself, i.e. it has to provide information on the facts from which its position as a "competitor" within the meaning of section 8 (3) no. 1 UWG (new version) arises. As of 1 September 2021, incorporated associations (*rechtsfähige Verbände*) pursuant to section 8 (3) no. 2 UWG (new version), which represent the interests of their members, will only be entitled to assert and enforce claims if they are registered in the list of qualified trade associations pursuant to section 8b UWG (new version) and if they demonstrate how the asserted infringements affect the interests of their members.

Secondly, sections 13, 13a UWG (new version) now also provide for a cap on claims for reimbursement and contractual penalties in certain cases. The intention behind the "capping" of these claims against the person being warned is to exclude extraneous objectives for those bringing the claim, namely, the financial incentive for the enforcement of such claims, in particular, in case of minor infringements against information and labelling obligations on the internet.

Thirdly, the requirements for the entitlement to assert counterclaims were reduced by way of section 8c (3) UWG (new version) and section 13 (5) UWG (new version). Thus, there is now a financial risk for the warning party itself should the motives for issuing the warning notice prove to be abusive or should the warning contain technical errors.

Fourthly, what is referred to as the "itinerant jurisdiction" (*fliegender Gerichtsstand*), i.e. the de facto right of the warning party to choose the competent court in case of infringements on the internet, was largely restricted by section 14 (2) UWG (new version). Now, alleged infringements can exclusively be asserted before the competent court (a) at the general place of jurisdiction of the person to whom the warning notice is given or (b) in the district in which the infringement was committed.

According to section 14 (2) sentence 3 UWG (new version), however, the second option does, in particular, not apply to "legal disputes concerning infringements in electronic commerce or in telemedia". As a consequence, the warning party may no longer assert claims against the person to whom a warning notice was given (who might be located far away) at the court of its own domicile or it's lawyer's place of business.

3. Inconsistencies

As is shown by the wording of section 14 (2) sentence 3 no. 1 UWG (new version), it has not been fully clarified yet in which cases the "itinerant jurisdiction" shall actually apply. Some courts are of the opinion that there should be a purposive interpretation to the effect that the exclusion only applies if the infringement in question also relates to actions in electronic commerce or telemedia rather than only having an effect in relation thereto (as is the case with advertising statements via the internet, cf. Regional Court of Düsseldorf, February 26, 2021 – 38 O 19/21). However, such a reduction has been rejected by other courts with reference to the will of the legislator (e.g. Higher Regional Court of Düsseldorf, February 16, 2021 – 20 W 11/21). A clear and uniform position regarding this issue has not yet emerged from the courts.

4. Criticism of the restriction of the itinerant jurisdiction

Already in the run-up to its implementation, the restriction of the itinerant jurisdiction had caused much criticism. An argument in favour of the restriction is that it may be a reasonable means of stopping the previous abuse of warning notices. Hitherto the resistance of the person to whom a warning notice was given was often broken by the fact that it had to answer from its actual place of business which could be located far away. If so, it would have to reimburse the possibly questionable fees of the opposing lawyer in advance. Now the warning party (or its lawyer) has to travel to the place of jurisdiction of the person being warned in case of a court hearing. The warning party's option to specifically establish jurisdiction in a location favourable to it in relation to a critical legal issue by exercising its right to choose no longer exists.

On the other hand, critics argue that the possibility of resolving urgent and difficult legal issues that require clarification in the interest of both parties, such as advertising disputes between large corporations, at renowned specialised courts has thus been eliminated. In the past, as a result of the itinerant jurisdiction, specialised courts had developed, which were capable of deciding such particular legal issues with utmost expertise. This possibility has now been limited to the detriment of both parties, who now have to litigate with specialised lawyers before (in some cases) inexperienced courts. This is not likely to be conducive to fair competition. Whether or not the legislature will achieve its aim of preventing abusive warnings by way of the aforementioned legal changes of requirements and incentives will have to be seen in practice.

5. Conclusion

In conclusion, it remains questionable whether the legislaturer's objective has been successfully achieved. At least there is consensus on the fact that, as a result of the fight against individual "black sheep", enforcement of claims arising from violations of competition law has become more difficult. The obstacles thus created are detrimental to fair competition, among other things, because the legislature has deliberately assigned the monitoring of compliance with the principles of fair competition (also) to competing companies. It will take some time before it can finally be assessed whether the advantages of the new regulations will outweigh the deliberately accepted disadvantages in favour of fair competition.

The German Patent Modernisation Act: Changes for Patent Litigation

By Clemens Rübel, Tiffany Zilliox and Maximilian Schmitz

Products and processes are becoming increasingly complex in the age of the Internet of Things, artificial intelligence, digitalisation and global networking. They often make use of software and a difficult-to-manage number of inventions, for example from the telecommunications sector. Therefore, such products and processes pose a growing risk of infringing third-party patents. Courts in Germany have always been extremely popular with patent owners who want to enforce their patents effectively against patent infringers, as patent infringement proceedings in Germany are considered relatively fast, predictable, effective and inexpensive in international comparison. Despite this, the new Patent Modernisation Act introduces some changes aimed at improving the interplay between infringement and nullity proceedings and at mitigating unreasonable hardship for the defendant accused of patent infringement.

1. New procedural rules

On June 10, 2021, the German Bundestag passed the Second Act on the Simplification and Modernisation of Patent Law (*Zweites Gesetz zur Vereinfachung und Modernisierung des Patentrechts* – Patent Modernisation Act) with, in particular, the following principal amendments:

- the introduction of a proportionality requirement regarding the injunction claim;
- provision of an early preliminary opinion on validity from the German Federal Patent Court; and
- the introduction of procedural rules regarding trade secrets in court proceedings.

2. Requirement of proportionality

The most intensely discussed part of the Patent Modernisation Act was the limitation of the injunction claim of the patentee by way of introduction of a proportionality requirement. Up until now, the "automatic injunction" has been the claim in the German patent law, which has put the most pressure on the defendant, as every confirmed infringement of a patent was awarded with an injunction by the German courts. However, the automatic injunction became subject to the discussion when the German Federal Supreme Court in its famous "*Wärmetauscher*"-decision (BGH, May 10, 2016 – X ZR 114/13) reflected on the potential necessity of an exhaustion period due to considerations of proportionality.

The growing threat of non-practising entities (NPEs) acting against the German automotive industry based on telecommunication patents pushed forward the discussion of a modernisation of the German patent law. The situation envisaged by the former creators of the patent law regime, when products were covered just by one or a few patents which could be searched and avoided, has changed tremendously in comparison to modern complex products such as connected cars or smartphones which use thousands of patents, each of which constitute a threat to stop supply chains and manufacturing lines.

The Patent Modernisation Act therefore modifies the German Patent Act (*Patentgesetz*) in a way that granting an injunction can, under certain circumstances, constitute an unjustified hardship to the infringer or third parties. In these rare cases, no injunction shall be awarded to the patentee. As some of the cases of the government's most significant concern are the insufficient availability of medications or medical equipment or the shutdown of critical infrastructure (e.g. mobile network), the interests of third parties have been expressly included in the legislature's drafting.

However, it has to be noted that the requirement of proportionality shall only suspend the injunction claim in exceptional cases, and only against payment of additional compensation further to the damages for use of the invention.

3. Closing the "injunction gap"

The provision of an early preliminary opinion from the Federal German Patent Court closes the so called "injunction gap" resulting from the German bifurcated system (infringement and validity proceedings are decided by different courts). Due to the fact that the infringement courts provide a decision in much shorter time than the German Federal Patent Court, which decides on validity, it is not unusual for the patentee to receive an enforceable injunction whilst the validity decision is pending. This regularly puts the defendant in a tough position, especially in cases where the only defence is challenging the validity.

However, the infringement courts can stay the proceedings pending the outcome of the validity proceedings in cases where the validity of the patent-in-suit is doubtful. To put the infringement courts in a better position to decide whether a stay of the proceedings has to be ordered, the Patent Modernisation Act states that an early preliminary opinion on validity by the German Federal Patent Court shall be provided to the infringement court within six months after the filing of the nullity action. The infringement courts will likely stay the proceedings if a clear preliminary opinion of invalidity has been rendered.

4. Procedural rules regarding trade secrets

Trade secrets are regularly affected by patent infringement and FRAND (Fair, reasonable, and non-discriminatory) determination proceedings. The parties are often conflicted in deciding whether to submit secret information as evidence in court proceedings, risking disclosure, or withholding disclosure, impairing their position.

To enable the affected party to provide all relevant facts without facing the issue of disclosing business secrets to the public, the Patent Modernization Act introduces new procedural rules for the protection of trade secrets. The parties can now request the court to declare specific information as confidential, which obliges the other party to use this information only for the purpose of the pending proceedings.

5. Outlook

Practitioners will closely monitor how the courts will apply the new principle of proportionality, whether a limitation of the injunction will remain a very rare exception, be difficult to prove or whether it will be applied more broadly. The twelve regional infringement courts may apply the new law differently at the beginning, which might lead to additional forum shopping.

It also has to be noted that there has always been the possibility in German patent law of stopping the injunction in exceptional cases where there is proven exceptional hardship for the defendant. However, this rule has rarely been applied by the courts because the parties have been reluctant to disclose evidence demonstrating extraordinary hardship which would be available to the public. This concern will also be mitigated by the new possibilities for protecting trade secrets in pending patent infringement proceedings.

Commercial courts in the State of Baden-Württemberg - German courts compete for international commercial cases

By George Stanka

The State of Baden-Württemberg has opened "commercial courts" at the Regional and Higher Regional Courts in Stuttgart and Mannheim for handling (international) large-scale commercial disputes to strengthen state courts' attractiveness as they compete with arbitration tribunals. Although commercial courts provide an alternative to arbitration, at least for German companies wishing to enforce their title in the European Union, a further modernisation of litigation is necessary to increase the civil courts' attractiveness as a hub for (inter)national dispute matters.

1. New civil courts for Stuttgart and Mannheim

Beyond Germany's borders, German courts enjoy an excellent reputation for their public acceptance, the quality of their judges and the comparatively low costs. On the other hand, it must be noted that companies prefer to have complex and large-scale commercial cases decided by arbitral tribunals. M&A disputes, for example, are almost exclusively settled before arbitral tribunals. The main reasons cited for this are the non-public and confidential nature of arbitration proceedings, the efficient and transparent conduct of proceedings and the lack of appeal process (with the exception of state annulment proceedings). Moreover, parties appreciate the possibility of appointing competent arbitrators who, if agreed, may hear cases in English.

With the opening of the commercial courts in Baden-Württemberg, the state courts' attractiveness as a hub for international legal disputes and commercial litigation, especially with foreign parties, is to be strengthened. In this respect, Baden-Württemberg is following a worldwide trend. For a long time, the Commercial Court of England and Wales in London has been considered the major centre for international litigation. But, in recent years, Paris, Brussels and Amsterdam have also opened such specialised courts. This trend can also be seen in Singapore, China, Dubai and Qatar.

The commercial courts in Baden-Württemberg each consist of a commercial civil division (three professional judges) and a division for commercial matters (one professional judge, two commercial judges). They mainly handle corporate disputes, company acquisitions, banking and financial transaction disputes and commercial transaction disputes with a minimum dispute value of two million euros. The courts' local jurisdiction follows from the general provisions of the German Code of Civil Procedure (*Zivilprozessordnung* – ZPO), i.e. in any case if the defendant's registered office or the place of performance of the service lies in the court's jurisdiction. But parties which have their registered offices outside the jurisdiction may also agree on jurisdiction at the beginning of their business relationship or as disputes emerge (nationally according to section 38 German Code of Civil Procedure or internationally according to Article 25 Council Regulation (EC) No 44/2001.

2. An approach toward arbitration

Commercial courts market their ability to combine the benefits of arbitration with existing procedural law, thus ensuring that proceedings are conducted efficiently and in a manner that is focused on the parties' needs.

The judges on the panels have many years of professional experience, some of them in major international law firms, and special expertise in the relevant areas of business law. Parties can view the CVs of the professional judges on the commercial courts' website to get an overview of who might decide their case. Moreover, all judges have an excellent command of English, so that proceedings can also be conducted in English and English-language documents can be used in the proceedings without the need to submit (certified) translations.

If the parties so wish, a pre-hearing meeting can be held in advance to frame the later stages of the proceedings. This meeting – which is modelled on the case management conference customary in arbitration proceedings – is intended to improve procedural certainty and to ensure a proper conduct of the proceedings.

Also, great importance is attached to the fact that commercial courts are technically well equipped so that video conferences or video testimonies of witnesses and experts, who may reside outside Germany, can be carried out easily.

To ensure that these advantages are not lost in the appeal process, specialised appellate courts (Commercial Courts of Appeal) have been established at the Stuttgart and Mannheim Higher Regional Courts. Nevertheless, parties are still free to waive legal remedies, for example, already when agreeing on the place of jurisdiction, if they wish to settle the legal dispute in only one instance.

3. Advantages of state courts

The advantages of state court proceedings over arbitration remain. For example, parties gain time by not having to wait for the constitution of the arbitral tribunal. The judges are independent per se, so there are no concerns about any bias or partiality. Also, state proceedings can be the more cost-effective option as court fees are capped when the value in dispute reaches EUR 30 million. Moreover, interim relief granted by state courts is more effective, as the execution of an arbitral interim measure always requires the authorisation of the competent state court. The same holds true in the context of evidence taking, where arbitral tribunals depend on the state courts' support to sanction witnesses who fail to appear with a fine or imprisonment.

4. Limits of state jurisdiction

On the other hand, state courts are bound by the provisions of the German Code of Civil Procedure and the Courts Constitution Act (*Gerichtsverfassungsgesetz* – GVG), which in some respects prohibit them from taking full advantage of arbitration.

For example, the Courts Constitution Act provides that the language of the proceedings is German. The commercial courts' ability to depart from this principle is limited. They can conduct hearings in English, waive the use of an interpreter, include specific statements in the minutes in parts in the original language or refrain from requiring submission of a German translation when foreign language documents are submitted. However, this does not change the fact that pleadings must continue to be filed in German and that the minutes and the court decision must be in German.

In addition, the principle of publicity still applies to hearings and the pronouncement of judgments and orders before commercial courts. While German procedural law and the German Act on the Protection of Trade Secrets provide for certain exceptions to this, commercial courts cannot grant comprehensive confidentiality as is guaranteed by arbitration proceedings.

Finally, arbitral awards can be enforced almost worldwide based on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. For commercial court decisions this applies only within the European Union (based on Council Regulation (EC) No 44/2001) or in the European Economic Area (based on the Lugano Convention of 2007). Outside Europe, there is no generally applicable agreement comparable to the New York Convention that guarantees the parties legal certainty as to the enforcement of German titles.

5. Conclusion and outlook

The establishment of commercial courts is, at any rate, a first important step towards increasing the attractiveness of Germany as a venue for major international proceedings especially in respect of the German companies who seek to protect their interests in the European Union. After all, it is also in the interest of legal certainty and the further development of the law to "*win back*" such proceedings. In June 2021, the German Federal Council introduced a further modernisation proposal for large-scale proceedings through the Act to Strengthen the Courts in Commercial Disputes (Federal Council printed matter 19/30745). It provides in particular that parties may agree on English as the court language, which would also extend to the filing of pleadings and the drafting of the court's decision. Also, courts are to be encouraged to agree on a pre-hearing meeting with the parties, which would also determine the order in which the subject matter of the proceedings is to be dealt with and the required programme of evidence. This modernisation incentive is to be welcomed and also necessary to sustainably increase the attractiveness of civil justice in (inter)national commercial matters as a whole.

Current case law

Action without obtaining a contractually agreed independant expert opinion

An action based on a claim the substance or pre-requisite of which are to be determined by independent expert proceedings and brought before an independent expert opinion has been obtained is not to be dismissed as final, but at best as premature.

Background

The parties are involved in a dispute about payment claims in connection with claims for the removal of defects in common property. The claimant, a condominium owners' association, had entered into a court settlement with the defendant, according to which any defects in the rectification work or defects that had not been rectified were to be determined and assessed by an expert upon acceptance and the defendant was to pay the claimant the amount so determined. Both parties submitted to the expert's findings. The expert appointed in the court settlement was subsequently replaced by mutual agreement by another expert who was the claimant's intervener. Several expert reports signed by him and his assistant confirmed the defects found, including an estimate of the costs of remedying the defects. An acceptance of the common property did not take place. In its action, the claimant demanded the amount stated by the expert. The Regional Court of Munich dismissed the action. The appeal on points of fact and law before the Higher Regional Court of Munich remained unsuccessful.

Decision

The appeal on points of law to the Federal Court of Justice was successful. The Court ruled that the action should not have been dismissed as finally unfounded. If the parties have agreed on independent expert proceedings regarding a claim or individual prerequisites of a claim, it must be assumed that obtaining an independent expert opinion in the cases specified in the agreement is a prerequisite of the claim. This was not the case here. The Court of Appeal had found, without any error of an appeal on points of law that the expert opinions submitted did not qualify as independent expert opinions for the purpose of the court settlement. This was because the expert had not determined the essential, supporting aspects himself on the basis of his own personal assessment, but had merely added his signature to the written explanations of his assistant's findings.

The Court of Appeal's decision to dismiss the action had to be interpreted, in the absence of any indications to the contrary, to the effect that the action had been dismissed as finally unfounded. It was within the discretion of the trial judge, instead of dismissing the action immediately "as currently unfounded", to first set a deadline for obtaining an independent expert opinion in accordance with sections 356, 431 German Code of Civil Procedure (*Zivilprozessordnung* – ZPO). However, in the absence of the conduct of independent expert proceedings agreed upon by the parties as a prerequisite for the claim, the action had been wrongly dismissed as finally unfounded. Furthermore, the dismissal of a claim based on the failure to submit an agreed independent expert opinion was ruled out if it turned out in the course of the proceedings that it had become impossible to obtain an independent expert opinion by the arbitrator provided for by the parties. In such case, section 319 (1) sentence 2 German Civil Code (*Bürgerliches Gesetzbuch* – BGB) was to be applied mutatis mutandis, according to which the court itself had to determine the performance, if necessary with the assistance of an expert, by way of a judgment. The decision leaves open whether the reimbursement of the expert costs incurred are covered by the court settlement in the absence of a clear provision.

(Federal Court of Justice, March 11, 2021 – VII ZR 196/18)

Practical Tip

- The decision clearly shows the difficulties associated with an agreement providing for the conduct of independent expert proceedings. In order to avoid surprises, such agreements should be drafted with utmost care.

Applicable law for the agreement and effective inclusion of an arbitration clause

In international trade, arbitration clauses may also be subject to the rules of the CISG under certain circumstances.

Background

The parties are in a dispute about the effective conclusion and form of arbitration agreements in international trade. The claimant's German policyholder purchased spices from the Netherlands-based defendant. The orders were confirmed by the defendant by a letter entitled "Sales Contract" which stated, inter alia: "Contract terms according to Nederlandse Vereniging voor de Specerijhandel (N.V.S)". The footer stated: "All sales and contracts are subject to general terms and conditions of sale and delivery." Neither the N.V.S. terms and conditions nor the general terms and conditions of sale and delivery were attached to the confirmation letter. The purchaser did not sign and return the letter.

Before the Regional Court of Bremen, the claimant sued on the basis of transferred rights for compensation for payments made by the policyholder to third parties due to the delivery of allegedly contaminated spices. The Regional Court had issued a partial default judgment against the defendant in the written preliminary proceedings. In the notice of opposition, the defendant raised the arbitration plea. The Regional Court dismissed the action on the grounds that the arbitration plea was validly included in the purchase agreements. The claimant's appeal on points of fact and law led to the case being referred back to the Regional Court. With its appeal on points of law, which the claimant requested to be dismissed, the defendant sought the restoration of the regional court's judgment.

Decision

The Federal Court of Justice dismissed the defendant's appeal on points of law and declared the decision of the Court of Appeal to be lawful, according to which the defendant's arbitration plea was deemed unfounded due to the lack of an effective arbitration agreement. It was true that the defendant had raised the arbitration plea in time in its notice of opposition. Pursuant to section 342 German Code of Civil Procedure, this admissible objection had returned the proceedings to the position they were in before the default, in this case before the commencement of the hearing.

However, the formal requirements of Art. II para. 2 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (UNC) applicable to the arbitration agreement at issue were not fulfilled. Neither the contract nor the arbitration agreement had been signed by the parties, nor had the N.V.S. terms and conditions been included in letters or telegrams exchanged between the parties. Even applying the more-favourable-right provision (Art. VII para. 1 UNC), the arbitration clause contained in the N.V.S. terms and conditions did not constitute an arbitration agreement validly concluded under national substantive law due to the absence of an exchange of letters (section 1031 (1) German Code of Civil Procedure). Admittedly, the defendant's confirmation constituted a commercial letter of confirmation referring to a document containing the arbitration clause (section 1031 (2) and (3) German Code of Civil Procedure). However, this reference had not been validly made and the clause had thus not become part of the purchase agreement. If an arbitration clause is contained in general terms and conditions to which reference is made, the general requirements for the inclusion of general terms and conditions must be met, which was not the case here.

As regards the conclusion of arbitration agreements being valid in terms of substantive law, the court affirmed the disputed question of the applicability of the UN Convention on Contracts for the International Sale of Goods (CISG) to arbitration agreements insofar as, in the absence of compliance with the form of Art. II para. 2 UNC, national substantive law or conflicts of law rules must be applied under the more-favourable-right provision (Art. VII para. 1 UNC). However, the court also states that the CISG does not apply to the issue of form as the latter was still governed by Art. II para. 2 UNC or, under the more-favourable-right provision, the national provisions on form. Thus, the contract formation rules of the CISG could be applied, which, according to national law, constitute the law applicable to international sales contracts. The Federal Court of Justice justifies its view, among other things, by reference to Art. 19 III CISG which provides that a deviating dispute resolution clause in the declaration of acceptance is deemed to be a

material change to the terms of the offer. Correspondingly, concurring party declarations would have to make such a clause an integral part of the contract. The autonomy of dispute resolution clauses does not prevent this, because the autonomy of the arbitration agreement as such does not prevent the application of the CISG. This is because autonomy does not mean that the dispute resolution clause must necessarily be governed by a different law than the main contract. The application of the CISG to the question of arbitration agreements being validly concluded under substantive law is also not precluded by the decision of the Eighth Civil Panel (Federal Court of Justice, March 25, 2015 – VIII ZR 125/14), according to which agreements on the place of jurisdiction were not subject to the CISG but, in accordance with Art. 4 sentence 2 CISG, to the relevant law of the forum state for such agreements, especially since no autonomous law was at issue in arbitration agreements, which served the goal of creating an internationally uniform law. As a result, the N.V.S. terms and conditions were not effectively incorporated into the purchase agreement with the arbitration agreement.

National conflicts of law rules, regardless of whether German or Dutch law is applicable, do not result in a different conclusion. In determining which conflicts of laws rule is to be used to determine the law applicable to the arbitration agreement pursuant to Art. 11 para. 2 case 1 Introductory Act to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch* – EGBGB), the court first of all states that both recourse to the provisions of Art. 27 to 37 Introductory Act to the German Civil Code, old version, which has been made in established case law so far, was no longer possible and the analogous application of Regulation (EC) No. 593/2008 (Rome I Regulation) could not be considered. Rather, Art. V para. 1 lit. a UNC was to be applied by analogy. According to this provision, the recognition or enforcement of an arbitral award may be refused if the arbitration agreement is invalid under the law to which the parties have submitted it or, if the parties have not determined this, under the law of the country in which the award was made. An analogous application was required according to a teleological interpretation, taking into account the "principle of internal concordance of decisions", and ensured the concurrence of plea and arbitration proceedings. In the present case, the parties had not made an explicit choice of law with regard to the arbitration clause in dispute, so that with regard to the place of arbitration mentioned in the arbitration clause Amsterdam, Dutch law including the CISG was applicable. Against this background, there was no effective agreement of the parties because the N.V.S. terms and conditions with the arbitration agreement were not sent or otherwise made available to the claimant's policyholder and thus were not validly incorporated under the CISG.

(Federal Court of Justice, November 26, 2020 – I ZR 245/19)

Practical Tip

- The Federal Court of Justice has followed the position taken by courts in other contracting states of the CISG on the applicability of the CISG to arbitration agreements. German parties should take care to communicate or otherwise make available their GTC and the arbitration clauses contained therein to the other party when negotiating contracts in international trade.

Declaration of enforceability of an emergency arbitral order

State courts are generally required to declare enforceable the emergency order imposed by an arbitral tribunal.

Background

The parties, shareholders in a German limited liability company (GmbH), are in a dispute about the validity of certain shareholder resolutions requiring the signature of the chief financial officer for the transfer of funds, the conclusion of employment contracts and the authorisation of travel activities. The shareholders, who believed the resolutions to be valid, sued in arbitration administered by the German Arbitration Institute (*Deutsche Institution für Schiedsgerichtsbarkeit e.V.* – DIS) for compliance with these resolutions by the managing directors.

The arbitral tribunal found that the resolutions passed by the shareholders' meeting in relation to the restriction of management powers had not been passed with the majority required under the shareholders' agreement and had therefore not been validly passed. The threat of the arbitration claimant to hold the managing directors accountable for breach of duty in case of non-compliance with the resolutions would hinder them in the performance of their duties in such a way that the entrepreneurial objective of the GmbH and its assets would be seriously

jeopardised. The arbitral tribunal considered it necessary to take protective measures in the interim relief proceedings and issued a corresponding "order", according to which the arbitration claimants had to refrain from preventing the managing directors from carrying out the aforementioned activities.

Before the Bavarian Highest Regional Court (BayObLG), the arbitration respondent as applicant sought to have the interim order of the arbitral tribunal declared enforceable pursuant to section 1041 (2) German Code of Civil Procedure.

Decision

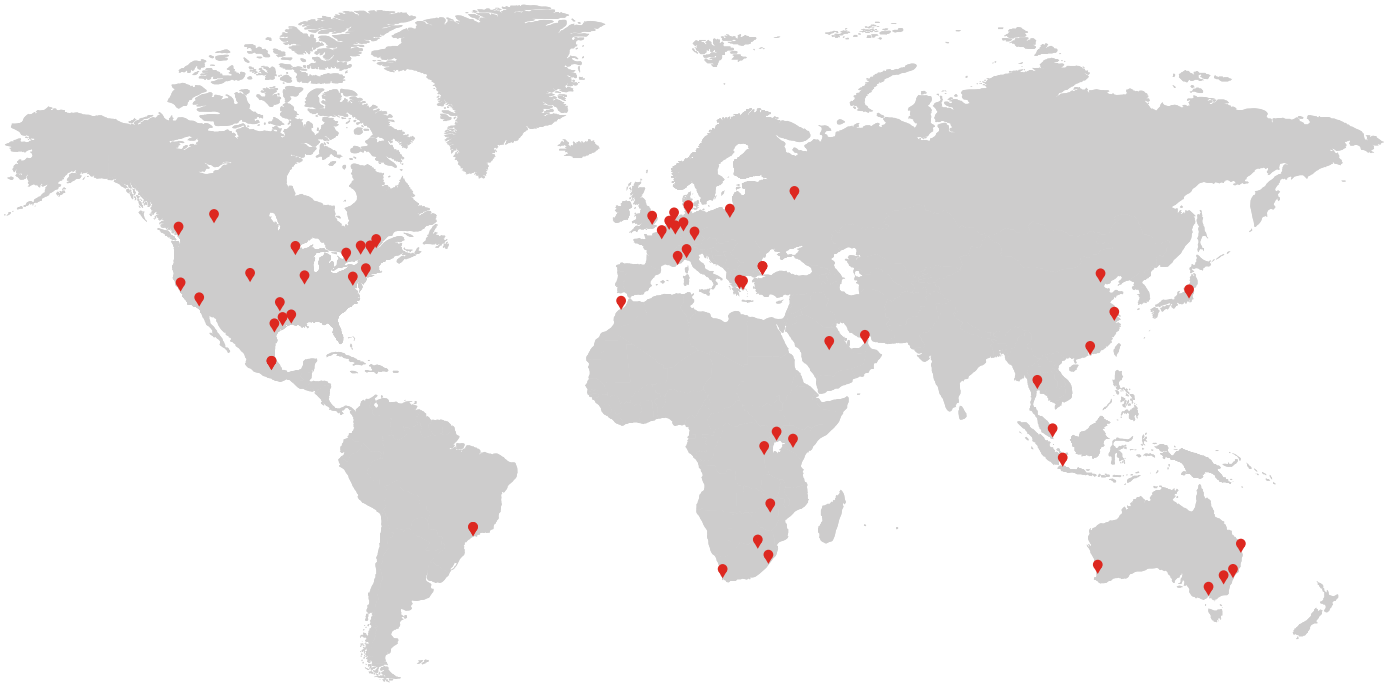
The Bavarian Highest Regional Court granted the application and declared the emergency arbitral order enforceable and issued the enforcement title. In doing so, the court had not carried out a full review of the content of the arbitral tribunal's decision. In doing so, it continued the previous case law on such constellations, according to which a closer review by the state court was not appropriate. Accordingly, the scope of review in such cases comprises: (1) the plausibility of the emergency order, in particular with regard to comprehensible explanations of the grounds for and entitlement to the injunction; (2) the affirmation of the suitability and necessity of the legal protection objective without obvious discretionary errors; as well as (3) the preservation of the relationship between the ends and the means. In all other respects, (4) no anticipation of the main proceedings may take place.

(Bavarian Highest Regional Court, August 18, 2020 – 1 Sch 93/20)

Practical Tip

- The decision strengthens arbitration by confirming the prevailing understanding that the state court must declare the arbitral tribunal's emergency order to be enforceable in principle. Respondents may not rely on being able to seek another review/appeal.

Global resources



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- Singapore
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- Cape Town
- Casablanca
- Durban
- Harare[3]
- Johannesburg
- Kampala[3]
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NRF Compliance Talk

In our video series "NRF Compliance Talk", partners and associates from our Compliance Team explain a number of current topics and new developments in the areas of compliance, white-collar crime and internal investigations. In short videos, we focus, in particular, on practical relevance and provide useful hints for legal practice.

Link: https://www.nortonrosefulbright.com/de-de/wissen/video/0c330509/nrf-compliance-talk

International Arbitration Report – News from the World of Arbitration

Our *International Arbitration Report* is published twice a year in English. It provides insights into current developments in the field of arbitration. From their global perspective, partners from our firm highlight key topics such as arbitration and M&A and analyses the latest developments in individual sectors.

Click here for the June 2021 edition: https://www.nortonrosefulbright.com/en/knowledge/publications/c7f1f7f6/international-arbitration-report-issue-16

NRF Institute – Events und Training

Webinars, on-demand training and exclusive premium knowledge is provided via our *NRF Institute* website. The wide range of global knowledge offers relevant information such as cross-border guidelines for your industry on topics like sustainability, energy transition or disruptive technologies.

In order to obtain free access to the topics and events, all you need to do is register.

You can find an overview of upcoming webinars at https://knowledgeproducts.nortonrosefulbright.com/nrf/events

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Inside Disputes

Our English-language blog, "Inside Disputes", provides insights into the latest developments and trends in international banking and commercial disputes.

Link: https://www.nortonrosefulbright.com/en/inside-disputes

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Should you require further information on any of the topics in this Newsletters or should you have any other queries, please do not hesitate to contact us.

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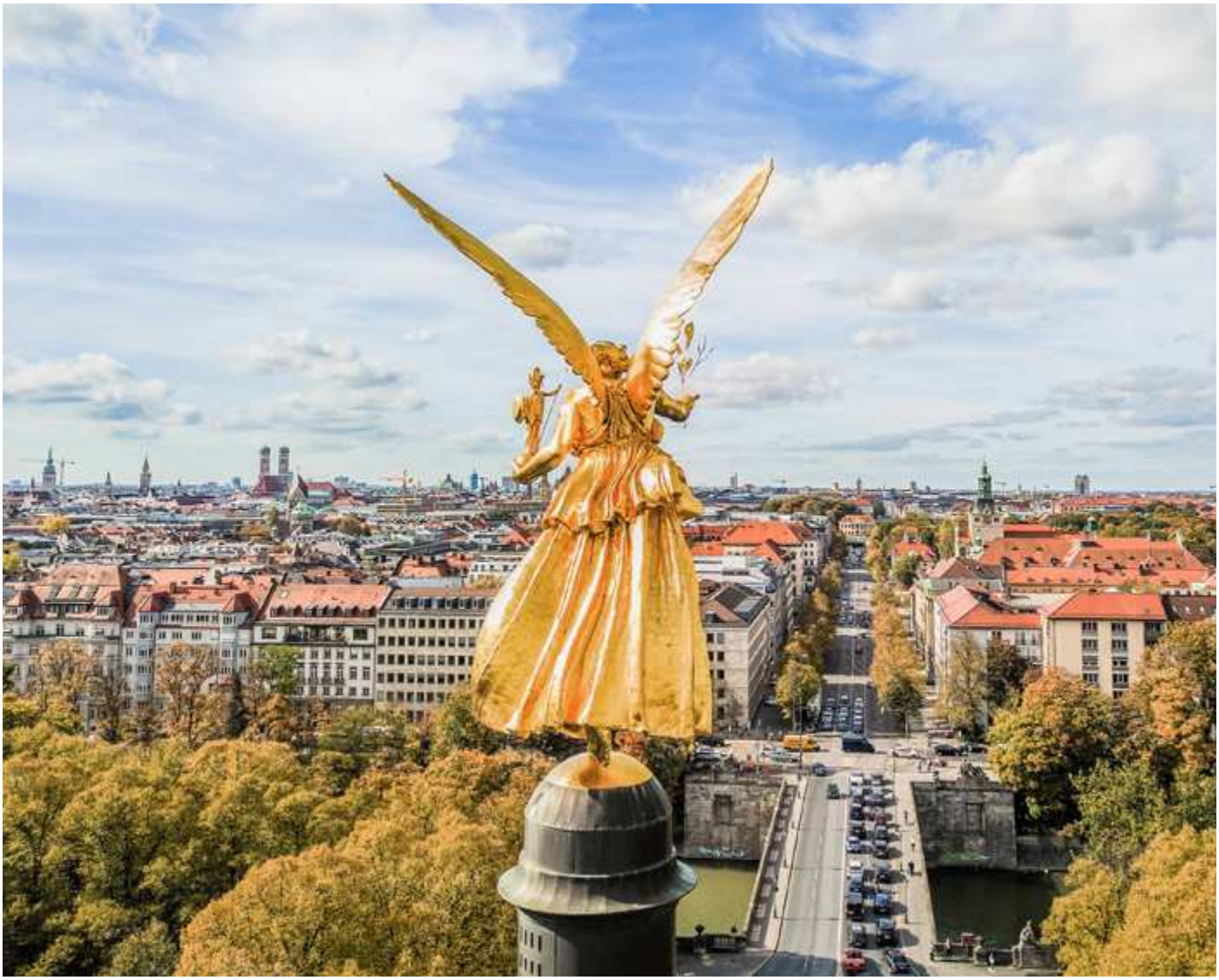

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