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Content:

The new German tax rule concerning "shifting of functions"

With effect from January 1, 2008 the German legislature introduced a new rule into the German tax legislation concerning the shifting of business functions from a domestic entity to a related foreign entity (Art. 1, section 3 German Foreign Tax Code). The OECD uses the term "business restructurings" (see www.oecd.org: "Discussion draft on the Transfer Pricing Aspects of Business Restructurings"). Although the decision of the management to shift a function over the border is an internal decision by a group of companies, the German tax authority assumes the realization of taxable profit. The realization of profit is always assumed if the transaction includes not only the transfer of tangible and intangible assets but also a "potential profit". The aim of the new rule is to tax the hidden reserves behind the transfer of a "package of assets". This "package of assets" may comprise tangible and intangible assets, relation to customers, claims, goodwill, well trained employees etc.. The tax authority assumes that a third party is willing to pay a purchase price for this potential of profit.

In all cases of taxable transaction which will be treated as a taxable shifting of functions there must be a contract of obligations. That means in a case of closing a business in Germany and creating a new business in a foreign country, as well as in the case of shifting of functions to a foreign permanent establishment there is no contract of obligations, because there is no contract between related parties. But this is a basic assumption behind the theory of the new tax law.

How is the value of the "package of assets" calculated? The valuation has to be done on the basis of future earnings expected by the two parties. That means, that both parties involved in that transactions have to present forecasts to the tax authority to determine the changes in their future profits. Both forecasts determine the virtual "range of agreement" between the related parties. It is not acceptable for the tax authority that the valuation is done on the basis of the individual goods transferred to the foreign entity. A single function may not be valuable, only the allocation between function and other assets create a valuable package.

It is not necessary that the calculated and taxable hidden reserve is to be taxed immediately. It is possible to create a licence agreement. That means that the German company transfers only the right to use the "package of goods". If there is a material

difference between the future realized profits and the profits budgeted in the forecasts during the next 10 years, the tax assessment may be changed by the tax authority. The reason behind that rule is that the German tax authority assumes that independent third parties would have agreed such an adjustment clause. To prevent this extremely high tax risk for the future it may be recommendable to agree an adjustment clause in advance in the agreement between the related parties.

In the meantime the German government issued the "Directive of shifting of functions", dated August 12, 2008. Surprisingly the government treats the multiplication of functions as a case of shifting of functions, although this case has not been mentioned expressly in the law. If a function is multiplied, e. g. the function is also introduced in a foreign related entity and this entity uses managerial and/or technical experience of the German entity, this transaction may also give rise to a taxable profit under the rule of "dealing at an arms' length basis" which is internationally accepted.

There is currently a discussion in the tax advisers' profession whether the new law is still in line with the EC regulations. There is considerable doubt that the German law is in agreement to EC rules, because it rules only with the cross-border shifting of functions and not with the shifting of functions between domestic related parties.

It is also doubtful whether the internationally accepted rule of "dealing at an arms' length basis" requires the full disclosure of group internal information.

Conclusion:

In all cases where internationally operating business entities are planning to shift functions over the German border to a foreign related entity, such projects should be carefully reviewed to prevent material tax risks. A new letter from the German Ministry of Finance is expected to be issued during this year. The letter is expected to explain the opinion of the German Tax Administration in detail. But anyway, it must be expected, that these new rules will result in numerous cases of double taxation and expensive mutual agreement procedures between the different tax authorities. A much preferable solution may be to install an internationally agreed regulation (at least within the EU) to avoid the immediate taxation of fictitious profits.

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Directors´Liability

Since the mid-1980s many hundreds, perhaps even thousands, of directors have been held liable in the Netherlands. Often this involves liability for the claims of creditors who find that they have insufficient redress against the legal entity with which they have done business. Directors (and former directors) are also regularly confronted with claims from the legal entity itself. As investors may also institute liability proceedings and shareholders and certain other stakeholders have the right of inquiry (i.e. the right to request the Enterprise Chamber of the Amsterdam Court of Appeal to investigate a company's policies and activity), it is clear that every director would be well-advised to seek advice on what he may and may not do and what criteria governing liability he should take account of.

The problem is that a plethora of theories about the standards to be applied have been advanced, both in the literature and in the decisions of lower courts. This means that it is hard to get a clear overview of what actually applies in law. And without such an overview it is not possible to obtain an understanding of the law on this subject. In this article I shall therefore confine myself to what can be inferred from the case law of the Supreme Court of the Netherlands in recent years regarding the criteria for determining liability as laid down.

Under the Civil Code, a legal entity may hold a director liable for loss or damage caused by the improper performance by the director of his or her duties. Where the duties in question are the responsibility of more than one director, the directors concerned may be held jointly and severally liable.

Directors who are not involved are, in principle, not liable, unless their knowledge of the matter meant that they should have taken action. Directors have no strict liability for the faults of fellow directors either. However, the management board collectively has certain responsibilities that come within the scope of the duties of each director and that cannot be shifted by means of an internal division of responsibilities. Examples are statutory obligations of the management board as well as matters that entail collective responsibility because they have a major bearing on the continuity of the legal entity.

Legal entities may have any number of good reasons for not suing a director who has caused them loss or damage, and although the receiver in the liquidation of an insolvent legal entity is also entitled to institute such a lawsuit, for a long time this power was exercised only sporadically.

It was therefore not until 1997 that the Supreme Court had an opportunity to provide clarity about the criteria to be applied. The Supreme Court had formulated the same criterion in 1983 for the liability of an employee to his employer

In 1999 the Supreme Court was asked which criterion should be applied in determining the internal liability of a director employed under a contract of employment. The director had been held liable on account of a cash shortfall. The director could conceivably have invoked the criterion that would afford him the greatest protection, so that liability would occur only if there had been intent or deliberate recklessness. This would have meant that there was a difference in the degree of legal protection afforded to directors depending on whether or not they had a contract of employment.

An alternative which would provide greater clarity for directors was that the ‘serious blame’ criterion could be taken as a yardstick for internal liability. It is clear from the history of the legislation that an exception was included above all for directors of legal entities, thereby recognising that their position in relation to the employer differs significantly from that of ordinary employees. This provision creates a statutory basis for applying a different criterion to directors than to other employees.

In its judgment the Supreme Court saw no reason to recognise ‘serious blame’ as the criterion for directors’ liability to their employer. Directors are therefore entitled to the same protection as employees.

The director of a legal entity will therefore have to assume that the criterion for internal liability is ‘serious blame’, regardless of whether he has a contract of employment.

There is a tendency on the part of the lower courts to define this open standard by reference to criteria derived from other variants of directors’ liability.

However, the Supreme Court does not wish the criterion to be construed by the lower courts in the light of new and unduly strict definitions such as ‘intentional or deliberately reckless action’, ‘so unmistakably and clearly in dereliction of his duties that no reasonably minded entrepreneur could think otherwise’, or ‘acting in a way in which no reasonably minded director would have acted in such circumstances’. The court may, however, apply such conclusions as findings of fact in explaining why the ‘serious blame’ criterion has been fulfilled.

Where a public or private company goes into insolvent liquidation, the receiver can hold the directors jointly and severally liable for the shortfall in the assets if the management board has manifestly performed its duties improperly and it is likely that this was a major cause of the insolvency. The manifestly improper management must have occurred in the period of three years prior to the liquidation, but need not have extended over the entire period of three years.

There is, in my view, no basis for Wezeman's assertion that this joint and several liability covers, in principle, everyone who was a director at any time in this three-year period (except if he is able to exculpate himself), even if the manifestly improper management did not occur in his or her term of office. Directors are liable only if the manifestly improper management occurred in the period in which they were part of the management board and were therefore jointly responsible for that management.

If it is established that there was manifestly improper management by the management board in a given period, a director who was a member of the board in the period concerned may invoke, as a defence to liability, the exculpation provisions of the Civil Code. He will then have to allege and prove that the improper performance is not attributable to him and that he has not been negligent in taking measures to mitigate the consequences. A director, who ceased to hold office two years before the insolvency, when there was still no problem, and subsequently had no influence whatever over the manifestly improper management cannot be held liable.

For the purposes of the tortious liability of directors to creditors of the legal entity, a distinction is made first of all between (i) actions prejudicing joint creditors in their means of redress against the legal entity and (ii) actions of a different kind prejudicing an individual creditor. As regards the former category, the receiver in the liquidation of an insolvent legal entity not only has the right to bring an action for fraudulent preference, but can also bring an action in tort on behalf of the joint creditors against those whose acts have prejudiced the interests of the creditors. In an insolvent liquidation, an individual creditor loses the possibility of having a juristic act set aside on the grounds of fraudulent preference, but retains the right to institute proceedings in tort for his share in any loss jointly suffered. The Bankruptcy and Insolvency Act provide the framework of standards for the period before the insolvent liquidation, which must be taken into account by the entity that becomes insolvent and by its creditors. However, the judgment does raise the question of whether a person other than the counterparty of the subsequently insolvent entity can still be held liable for the loss suffered by the joint creditors if the transaction prejudicing them cannot itself be rescinded.

Although directors are not, in principle, liable for the loss which an individual creditor suffers as a result of a breach of performance by (and the possible insolvency of) the legal entity, there are major exceptions to this. In its *Beklamel* judgment. the Supreme Court held that a director may be liable in tort if he arranges for the legal entity to conclude a contract with a third party although he knows – or reasonably ought to know – that the legal entity will not be able to perform the contract (or to do so in a timely manner) and will provide no redress for the loss or damage suffered by the third party as a consequence of the breach of performance. This criterion was clarified in the *New Holland Belgium* judgement. If the above-mentioned criteria have been fulfilled, the director must be assumed to have acted in such a blameworthy way that he is liable, except if he is able to demonstrate that there were circumstances that justify or excuse his actions.[1] In this connection, a director is deemed to have such knowledge of the legal entity's financial position that he is able to assess whether the legal entity would be able to fulfil new commitments. If a director does not have such knowledge, he should not enter into contracts carrying significant financial consequences. The director's liability according to this criterion was extended to cover current liabilities. If a director knows or reasonably ought to know that the legal entity is no longer able to meet its commitments, he also has a duty either (i) to warn parties to whom the legal entity has obligations in exchange for the provision of goods or services to the legal entity under outstanding contracts that the legal entity is no longer able to perform its obligations or (ii) to apply for a court protection from creditors (moratorium).

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HEUREUX COMME UN TRANSPORTEUR IMPAYE EN FRANCE …

En effet, en ces temps lointains où la France avait un gouvernement de gauche et même un ministre communiste des Transports, Monsieur Jean-Luc GAYSSOT fut l'instigateur d'une loi, semble t-il, exceptionnelle en Europe.

La Loi GAYSSOT du 6 février 1998 a complété l'article L.132-8 du Code de Commerce:

La lettre de voiture forme un contrat entre l'expéditeur, le voiturier et le destinataire ou entre l'expéditeur, le destinataire, le commissionnaire et le voiturier. Le voiturier a ainsi une action directe en paiement de ses prestations à l'encontre de l'expéditeur et du destinataire, lesquels sont garants du paiement du prix du transport. Toute clause contraire est réputée non écrite.

Le transporteur peut donc s'adresser à l'expéditeur et au destinataire si son donneur d'ordre n'a pas respecté ses engagements et ce, sans qu'aucune clause contractuelle puisse supprimer ou atténuer cette possibilité.

C'est l'action directe.

Interprétée depuis plus de dix ans par la jurisprudence, qu'en est il aujourd'hui ?

1° / Qui peut utiliser la Loi GAYSSOT ?

Le transporteur exclusivement.

Même la partie subrogée dans ses droits par le paiement du prix du transport n'est pas admise à le faire.

C'est le cas du commissionnaire de transport qui a réglé les frais de son substitué (Cour de Cassation, Chambre Commerciale, 22 janvier 2008 – BTL – Bulletin des Transports et de la Logistique - 2008, page 67).

L'objectif de la Loi était de protéger le transporteur du non paiement de son donneur d'ordre, le plus souvent commissionnaire de transport.

C'est toujours dans cette optique qu'elle est appliquée.

2° / La Loi GAYSSOT est elle susceptible de s'appliquer dans le cadre d'un transport international ?

La Convention Internationale CMR étant muette sur ce point, la réponse est oui par référence à la Convention de Rome.

D'abord, si les parties la choisissent (article 3 de la Convention).

Ensuite, pour le transporteur dont l'établissement principal est établi en France, si c'est aussi le lieu de chargement ou de déchargement ou de l'établissement principal de l'expéditeur, puisque c'est alors avec la France que le contrat est présumé avoir les liens les plus étroits (article 4, paragraphe 4, de la Convention) (Cour de Cassation 24 mars 2004 – BTL 2004, page 246).

Enfin, à défaut, si c'est avec la France que le contrat présente les liens les plus étroits (article 4, paragraphe 5 de la Convention).

Ainsi, un transporteur turc a-t-il obtenu le paiement de ses prestations d'un destinataire français pour un transport de Turquie vers la France, puisque le commissionnaire de transport et le destinataire étaient français et que de plus, une convention de partenariat ''selon la loi française'' avait été signée par le commissionnaire de transport et le transporteur (Cour d'Appel d'AIX EN PROVENCE 14 novembre 2006 – BTL 2007, page 237).

Au contraire, et selon le même raisonnement, pour un transport de France en Grèce réalisé par un transporteur bulgare, selon les instructions d'un commissionnaire de transport grec, la loi française a été écartée (Tribunal de Grande Instance de PERONNE 30 juin 2008 – BTL 2008, page 470).

Un autre argument utilisé est que la Loi GAYSSOT, texte d'ordre public ayant une portée impérative sur l'ensemble du territoire national au regard des intérêts sociaux,

politiques et économiques qu'il protège, relève ainsi des ''lois de police'' et doit s'appliquer selon l'article 7 de la Convention de ROME (Tribunal de Grande Instance de PERONNE 8 avril 2004 – BTL 2004, page 635 et Tribunal de Commerce de PARIS 19 avril 2005 – BTL 2005, page 325).

Jurisprudence cependant contredite (Tribunal de Grande Instance de PERONNE 8 août 2008 – BTL 2008, page 573).

La Cour de Cassation, à ma connaissance, n'a pas tranché cette question.

3° / Qui est garant du prix du transport ?

Celui qui est mentionné comme expéditeur ou destinataire sur la lettre de voiture.

Ainsi, ont été condamnés des plates-formes logistiques, des entrepositaires …

Pour éviter cette garantie, il convient de préciser le nom de son mandant *''agissant pour le compte de …''* (Cour de Cassation, Chambre Commerciale, quatre arrêts du 22 janvier 2008 – BTL 2008, page 78 et Cour de Cassation, Chambre Commerciale 7 avril 2009 – BTL 2009, PAGE 272).

4° / Quelles conditions sont requises ?

Une facture impayée par le donneur d'ordre *''défaillant''* .

Ce qui ne veut pas dire que le débiteur est en faillite mais que la facture, après un certain nombre de relances et le dépassement d'un délai raisonnable, est toujours en suspens (Cour d'Appel de LYON 1ier mars 2007 – BTL 2007, page 203).

La notion de délai raisonnable peut être appréciée par référence au délai convenu de paiement imposé par la loi française sous peine de sanctions pénales, soit trente jours suivant la date d'émission de la facture (article L.441-6 du Code de Commerce).

Et peu importe que le garant ait déjà réglé les frais de transport au donneur d'ordre du transporteur, il risque un double paiement (Cassation 26 novembre 2002 – BTL 2002, page 800 et Cassation 4 février 2003 – BTL 2003, page 123).

Quant à la déclaration de créance du transporteur au passif de son donneur d'ordre en faillite, elle n'est pas une condition de recevabilité de l'action directe (Cour de Cassation 17 décembre 2003 – BTL 2004, page 11).

6° / Dans quel délai agir ?

Sous peine de prescription, selon la loi française, un an suivant le jour de la remise ou de l'offre de la marchandise au destinataire (article L. 133-6 du Code de Commerce).

Selon, la CMR, un an à partir de l'expiration d'un délai de trois mois à dater de la conclusion du contrat de transport (article 32, 1, c de la CMR).

En effet, dans le cadre d'un transport international, c'est la prescription de la Convention Internationale qui s'applique à l'action directe car on revient sur ce point, à ses dispositions impératives (Cour de Cassation 24 mars 2004 – BTL 2004, page 246).

Etant précisé qu'une action tardive du transporteur qui par négligence, aura continué à collaborer avec un donneur d'ordre défaillant, risque d'être sanctionnée par des dommages - intérêts alloués au garant se compensant en totalité ou en partie avec le prix du transport (Cour d'Appel de COLMAR 11 décembre 2003 – BTL 2004, page 32).

Et si la déclaration de créance au passif du donneur d'ordre n'est pas obligatoire, elle permet d'éviter le jeu de la prescription puisqu'elle interrompt son cours à l'encontre du garant solidaire (Cour d'Appel de PARIS 26 septembre 2007 – BTL 2007, page 672).

7° / La parade des garants

Les transporteurs savent user avec efficacité

de la Loi GAYSSOT qui leur est maintenant tout à fait familière.

Un référé suffit parfois à obtenir la condamnation du garant (Tribunal de Commerce de NANTERRE 29 janvier 2009 – BTL 2009, page 163).

Expéditeurs et destinataires tentent d'y échapper.

Ainsi, incluent ils dans leurs ordres de transport, une interdiction de sous traiter mais cette précaution ne leur permettra d'éviter la garantie de paiement que si le transporteur sous traitant connaissait ou aurait dû connaître cette interdiction (Cassation 13 juin 2006 – BTL 2006, page 415).

Plus délicat pour le transporteur est de devoir démontrer le prix convenu avec l'expéditeur (Cassation 10 janvier 2006 – BTL 2006, page 43).

Ce problème est résolu si le prix du transport est mentionné sur la lettre de voiture et a de grandes chances de l'être si le transporteur a traité directement avec l'expéditeur.

Mais quand un commissionnaire de transport est intervenu, le transporteur devra obtenir des justificatifs qui sont entre les mains de son donneur d'ordre.

Enfin, une décision récente de la Cour de Cassation a permis à l'expéditeur, pourtant mentionné comme tel sur les lettres de voiture CMR, d'échapper à l'action directe car notamment, en tant que vendeur dans le cadre d'une vente au ''départ usine'', il n'était pas l'expéditeur puisque c'était à l'acheteur d'assurer le transport (Cour de Cassation 28 octobre 2008 – BTL 2008, page 700).

Cet arrêt cité en conclusion, montre combien la jurisprudence est en constante évolution.

Pour l'instant, j'espère seulement que cet article un peu sec, plutôt pratique, pas doctrinal du tout, et peut être assez court pour que vous l'ayez lu jusqu'au bout, pourra vous être utile.

Summary

HAPPY AS AN UNPAID CARRIER IN FRANCE ...

Yes he is, thanks to a communist Minister of Transport, Mister Jean Luc GAYSSOT, who initiated a law giving to the carrier the possibility to obtain directly from the shipper and the consignee the payment of the cost of the transport when his principal did not pay it.

This law ''d'ordre public'' (any agreement clause contrary to the Law is prohibited) had been applied since 1998 with a jurisprudence globally favourable to the carrier.

Thus, the shipper or the consignee runs the risk to be condemned to settle the cost of the transport when he has paid it already.

Even, if they are not the actual shipper or consignee.

Only for a delay of payment of the principal of the carrier.

And the Law may be used under certain conditions by the foreign carrier also, by reference to the Convention of ROMA.

It is proper to point out that this jurisprudence is in constant move.

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Finnland:

Ausgleichsanspruch des Vertragshändlers nach deutschem Vorbild

Der Ausgleichsanspruch für Vertragshändler nach deutschem Vorbild hält Einzug in die finnische Rechtsprechung.

Ein jüngstes Urteil in erster Instanz des Bezirksgerichts in Espoo vom 19.3.2009 (Az. 06/2106) bestätigt erstmals ausdrücklich die Bedeutung der deutschen Rechtspraxis für die Auslegung des finnischen Handelsvertretergesetzes (Laki kauppaedustajista ja myyntimiehistä 417 vom 8.5.1992).

Die dem finnischen Handelsvertretergesetz zu Grunde liegende Richtlinie 86/653 EWG beruhe weitgehend auf deutscher Gesetzgebung, weshalb, so das Gericht, *"man sich bei der Auslegung des finnischen Handelsvertretergesetzes auf die deutsche Rechtspraxis stützen kann".*

Zugleich ist das Urteil ein erneutes Beispiel dafür, worauf bei grenzüberschreitenden Geschäftsbeziehungen und insbesondere deren Beendigung zu achten ist.

I. Urteil und Hintergrund

Ein Zufall ist die zitierte Feststellung des Gerichts im Grunde genommen nicht, denn die bereits 1953 in das deutsche Handelsgesetzbuch (HGB) aufgenommenen und seither in ständiger Rechtsprechung fortgebildeten Vorschriften stellen eine ausgewogene Gesamtheit dar, die Art. 17 der Richtlinie 86/653/EWG Vorbild gestanden haben, der im Wortlaut dem des § 89 b HGB nachempfunden ist.

Der Bericht der Kommission vom 23.7.1996 über die Anwendung von Artikel 17 der Richtlinie 86/653/EWG (KOM (96) 364 endg) erwähnt ebenfalls ausdrücklich, dass der Regelung deutsches Recht als Vorbild gedient habe und Anwendung und Auslegung von Artikel 17 der Richtlinie sich an deutschem Recht orientieren solle.

Es erscheint daher durchaus plausibel, eine analoge Anwendung von § 28 des finnischen Handelsvertretergesetzes auf Vertragshändler nun auch an die in Deutschland zu § 89 b HGB entwickelten Grundsätze und Voraussetzungen zu knüpfen, wenn man sich bei der Umsetzung der Richtlinie für den Ausgleichsanspruch (Gesetzesvorlage 1991 vp – HE 201) und nicht für die Alternative eines Schadensersatzanspruches entschieden hatte. Das entspricht nicht nur der Richtlinie, sondern auch der historischen Entwicklung des finnischen Rechts.

Die Entwicklung eines eigenen finnischen Rechts begann nach der Angliederung Finnlands an Russland im Jahre 1809, als der Zar im Jahre 1862 die Reichstage einberief, deren Gesetzgebung dem damals in Europa vorherrschendem Trend folgte und in weiten Teilen deutsches Recht zum Vorbild hatte. Im Zivilrecht mag auf Robert Montgomerys (1834 – 1898) Werk „Handbok i Finlands allmännä privaträtt", das „Handbuch des finnischen allgemeinen Zivilrechts" hingewiesen werden, das in weiten Bereichen die Lehren von Bernhard Winscheid (1817 – 1892) und dessen Lehren des Pandekten-rechts übernimmt.

Die zivilrechtliche Ähnlichkeit hat sich bis heute erhalten und wird allgemein anerkannt.

Das Urteil steht auch durchaus im Einklang mit dem bisher einzigen höchstrichterlichen Urteil zur Frage der analogen Anwendbarkeit von Handelsvertreterrecht auf Vertragshändlerbeziehungen. In seinem Urteil Nr. 42 hatte das Höchste Gericht (Korkein oikeus, KKO) bereits 1987 die Möglichkeit einer Analogie bejaht und festgestellt, dass es die Schutzbedürftigkeit eines Vertragshändlers erlaube, die für den Handelsvertreter geltenden Kündigungsfristen auch auf einen Händlervertrag (Alleinvertrieb) anzuwenden und diese angemessen seien.

Auch in der neueren Literatur wird die Ansicht vertreten, dass auf deutsches Recht zurückzugreifen sei, worauf auch das Urteil Bezug nimmt (Saarnilehto-Viljanen, Defensor Legis, 3/2006, S. 382 ff; Teleranta, Kauppaedustaja, myyntimies ja yksinmyyjä, Helsinki 1993, S. 158).

Der Zufall mag bei dem nun ergangenen Urteil dennoch eine Rolle gespielt haben, denn den Prozessbevollmächtigten beider Parteien war nicht nur die deutsche Sprache, sondern auch die deutsche Rechtsprechung tatsächlich geläufig, was bei Verfahren im Ausland sicherlich keine alltägliche Konstellation ist.

Die in Deutschland in ständiger höchstrichterlicher Rechtsprechung anerkannten Grundsätze zu Voraussetzungen und Berechnung des Aus-gleichs sind daher tatsächlich - und nicht nur irgendwie - in das Verfahren eingeflossen.

II. Konsequenzen für die Praxis

Beauftragen Sie für Fragen des Ausgleichsanspruches in Finnland einen Anwalt, der sich mit deutschem Recht auskennt.

Die Bedeutung des Urteils liegt nämlich darin, dass vermutlich erstmals (andere, auch erstinstanzliche Urteile sind jedenfalls nicht bekannt geworden) dazu ausgeführt wurde, ob und unter welchen Voraussetzungen nach finnischem Recht ein Vertragshändler einen Ausgleich analog den für den Ausgleichsanspruch eines Handelsvertreters geltenden Gesetzesvorschriften geltend machen kann.

Über diese grundsätzliche Bedeutung hinaus sollte das Urteil jedoch nicht verallgemeinert werden. Es ist die Entscheidung in einem spezifischen Einzelfall, und ob das Urteil in der Sache und in der Begründung zutreffend oder weniger zutreffend ist, soll und kann hier nicht beurteilt oder abgehandelt werden.

In dem vom Bezirksgericht Espoo zu entscheidenden Fall ging es um die Beendigung einer gut fünfzehn Jahre bestehenden Geschäftsbeziehung, bei der ein Händler Produkte des Herstellers in ganz Finnland verkaufte, die eine laufende produkttechnische Unterstützung des Herstellers erforderlich machten. Das führte zu einer engen Zusammenarbeit, diversen Absprachen und unter anderem dazu, dass dem Hersteller die Kunden des Händlers bekannt wurden. Ein ausdrücklicher Vertrag bestand zwischen den Parteien indes nicht.

Das Gericht nahm eine Integration des Händlers in die Vertriebsorganisation des Herstellers und ein handelsvertreterähnliches Verhältnis an und kam zu einem Ausgleichsanspruch und einer sich an deutschem Vorbild orientierenden Berechnung desselben.

Für die deutsch-finnische Geschäftsbeziehungen bedeutet das Urteil Rechtssicherheit und bestätigt unsere in früheren Veröffentlichungen geäu erte Vermutung, dass sich finnische Rechtsprechung an deutschem Vorbild orientieren wird.

Das Gericht nahm ausdrücklich Bezug auf die Rechtsprechung des Bundesgerichtshofs (BGH) nach der, so das Gericht, die Anwendung von Handelsvertreterecht auf Allein- oder Vertragshändler von zwei entscheidenden Voraussetzungen abhängig sei, dass der Alleinverkäufer ein Teil der Verkaufsorganisation des Herstellers und verpflichtet sei, am Ende der Vertragsbeziehung seinen Kundenstamm dem Hersteller zu überlassen.

Es bietet sich damit an, finnische Vertragsbeziehungen und deren Beendigung anhand der aus Deutschland bekannten Kriterien auf Risiken zu prüfen. Dabei darf allerdings nicht vergessen werden, dass es sich lediglich um eine Argumentationshilfe handeln kann. Ein finnisches Gericht wird finnisches Recht stets selbst entscheiden, den BGH braucht es dazu nicht.

Summary

Finland:

Indemnification of the reseller according to German law

The Finnish District Court in Espoo (decision of 19.3.2009, re:. 06/2106) has for the first time in Finland ruled, that the German principles of the indemnification of an agent and the analogy as regards resellers shall be applied also under Finnish law. As Finnland belongs to the countries which had chosen the indemnification instead of compensation for the losses an agent might suffer when the principal

discontinues the relation, Finland ought to pay attention to the comments of the Commission when introducing the rules under Richtlinie 86/653 EC.

The court came to the conlclusion that: *"when interpreting the content of the Finnish Law on Agents one may tale the German court praxis into consideration".*

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