FEDERAL COURT OF JUSTICE

Judgement of 16 March 2012

V ZR 279/10

BGB § 985; REAO BE § 50 para 2, § 51

The Restitution Decree for the Land of Berlin does not exclude a claim for restitution according to § 985 BGB, if the confiscated asset went missing after the war and the owner became aware of its whereabouts only after the expiry of the deadline for the registration of a restitution claim.

BGH [*Federal Court of Justice*], judgement of 16 March 2012, V ZR 279/10 - KG Berlin

LG Berlin

The Fifth Civil Senate of the Federal Court of Justice, following the hearing of 10 February 2012, by the presiding judge Prof. Dr. Krüger, the judge Dr. Stresemann, the judge Dr. Czub, and the judges Dr. Brückner and Weinland ruled:

> Following the plaintiff's revision and in dismissing the defendant's cross revision, the judgement of the Eighth Civil Senate of the Kammergericht Berlin [*Court of Appeal*] shall be set aside regarding costs and insofar as the action for restitution of the poster "Great Dane" has been dismissed and the counterclaim has been upheld.
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> To the extent of the setting aside, the defendant's appeal against the judgement of the Nineteenth Civil Chamber of the Landgericht Berlin [*District Court*] of 10 February 2009 shall be dismissed. The further appeal shall remain dismissed.
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> The defendant shall bear the costs of the appeal.
>
> De Jure

The facts of the case:

1 The plaintiff is the son and the legal successor of Dr. Hans Sachs. Since 1896, Dr. Hans Sachs had carried together an extensive and valuable poster collection, which was confiscated in the year 1938 by order of the Ministry of Propaganda. Dr. Sachs left Germany in late 1938 due to national-socialist persecution of the Jews and emigrated to the U.S.

2 The poster collection went missing after the war. In the year 1961, Dr. Sachs, by way of compromise, received a compensation payment according to the Federal Restitution Act in the amount of 225.000 DM for the loss of the collection. Only later did he learn that parts of the collection had been found in the GDR and were located in the Museum for German History in East-Berlin. Dr. Sachs died in the year 1974 and was succeeded by his wife. She died in the year 1998 without having asserting any claims regarding the collection after the Reunification. The plaintiff is her heir.

3 Today, the poster collection, from which 4.259 posters have been identified so far, is in the possession of the defendant, a foundation under public law. With its claim, the plaintiff initially demanded the restitution of two posters ("Great Dane" and "The blond Venus"). By way of counterclaim, the defendant sought to determine that the plaintiff was not the proprietor of the poster collection, and in the alternative, that the plaintiff was not entitled to claim restitution of the posters.

4 The District Court of Berlin ordered the defendant to restitute one of the posters ("Great Dane") and dismissed the further claim as well as the counterclaim. On appeal of both parties, the Court of Appeal – in dismissing all other proposals – decided according to the defendant's auxiliary counterclaim. With the revision approved by the Senate, the plaintiff, which no longer requests the restitution of the second poster ("The blond Venus"), seeks the conviction of the defendant to the extent granted by the District Court as well as the complete dismissal of the counterclaim. The defendant, who seeks the dismissal of the revision, has filed a cross revision against the dismissal of the counterclaim in the principle request. The plaintiff seeks the dismissal of the cross revision.

The legal considerations:

I.

5 The Court of Appeal, whose decision is published in ZOV 2010, 87, assumes that the father of the plaintiff has lost his property of the poster collection neither before nor in the course of the actual confiscation in the year 1938. Nor has he lost his property in the course of the compensation proceedings. The posters have also not been transferred to the public property of the GDR. But the plaintiff's claim for restitution according to § 985 BGB is excluded by the provisions of the Restitution Law of the Allies and of the Federal Restitution Act. It corresponds with the jurisdiction of the Federal Court of Justice that claims arising from national-socialist injustice can only be pursued according to the restitution and compensation acts. In addition, a possible claim for restitution of the plaintiff has forfeited.

6 This does not stand up to legal scrutiny on all points.

II.

7 The revision of the plaintiff.

8 The revision of the plaintiff is justified. The Court of Appeal wrongfully dismissed the plaintiff's claim for restitution of the poster "Great Dane" according to § 985 BGB and, upon the counterclaim of the defendant, declared that the plaintiff has no right to claim from the defendant the restitution of the poster collection previously owned by his father.

9 1. According to the view of the Court of Appeal, the plaintiff as the legal successor of his father (heir of heir) is the proprietor of the poster collection. This is favourable for the revision (for the cross appeal see below under III.).

10 2. A claim for restitution according to § 985 BGB is not excluded by the specific rules concerning the reparation of national-socialist injustice.

11 a) The Court of Appeal correctly assumes that a claim for restitution is not excluded by the Property Act. The Property Act, according to § 1 para 6 VermG [*abbreviation for Property Act*], applies to proprietary claims of citizens, which – as the father of the plaintiff – have been persecuted on racial grounds during the time period from 30 January 1933 to 8 May 1945 and have lost their assets as the result of forced sales, expropriation or otherwise. The question does not arise, whether a claim based on proprietary provisions precedes a civil claim also resulting from state injustice covered by the Property Act – so far only affirmed by the Senate (judgement of 7 July 1995 - V ZR 243/94,

BGHZ 130, 231, 235) for the claim for restitution according to § 1 para 1 (c) and para 3 VermG –, because the father's loss of assets does not trigger a claim for restitution according to § 1 para 6 VermG. Such a claim requires that the asset, at the time of the damage, was located in the acceding territory (cf. BVerwGE [*abbreviation for Federal Administrative Court*] 135, 272, 277 note 31 with further details). This requirement is not met, because the poster collection was, according to the findings of the Court of Appeal, seized in Berlin-Schöneberg and therefore in the later western part of the city.

12 b) Contrary to the view of the Court of Appeal, the claim for restitution [*according to § 985 BGB*] is not excluded by the provisions of the Restitution Law of Allies – here the order applicable to Berlin BK/O (49) 180 of the Allies Headquarters of Berlin regarding the restitution of identifiable assets to the victims of national-socialist repressive measures (of 26 July 1949, VOBI. for Greater Berlin I page 221 – hereinafter referred to Restitution Decree or REAO).

13 aa) Indeed, the Federal Court of Justice consistently upheld that claims arising from the injustice of a national-socialist expropriation measure could basically only be pursued according to the restitution and compensation acts issued for such reparation and the procedures laid down therein (cf. judgements of 11 February 1953 - II ZR 51/52, BGHZ 9, 34, 45; of 8 October 1953 - IV ZR 30/53, BGHZ 10, 340, 343; of 5 May 1956 - VI ZR 138/54, RzW 1956, 237 as well as the decree of 27 May 1954 - IV ZB 15/54, NJW 1954, 1368; similarly the prevailing opinion in the older literature, cf. Blessin/Wilden, Bundesrückerstattungsgesetz, 1958, introduction note 26; Goetze, Die Rückerstattung in Westdeutschland und Berlin, 1950, comment on article 57 REG [AmZ]; Harmening/Hartenstein/Osthoff, Rückerstattungsgesetz, 2nd edn, 1952, introduction Bl. No 53 Rs.; Kubuschok/Weißstein, Rückerstattungsrecht, 1950, article 49 REG [BrZ] / article 57 REG [AmZ] note 2; Muller, Rückerstattung in Deutschland, 1948, preliminary note page 10; Korth, SJZ 1948, 377, 383; dissent opinion van Dam, Rückerstattungs-Gesetz für die Britische Zone, 1949, introduction page 15; von Godin, Rückerstattung feststellbarer Vermögensgegenstände, 1950, article 57 REG [AmZ] Anm. 1; Dubro, NJW 1953, 706).

14 The precedence of the restitution proceedings was one the one hand justified by the particular difficulties resulting from the fact that the applicable law did not provide a sufficient basis to reverse the movements of assets induced by the national-socialist injustice (in detail, Anton, Rechtshandbuch Kulturgüterschutz und Kunstrestitutionsrecht, Bd. 1, 2010, page 689 et seqq.), and this was to be met by a special law finally settling the claims of the victims. On the other hand, the – in comparison with the general limitation periods – clearly shorter deadlines for the victims to make a claim for restitution (according to article 50 para 2 sentence 1 REAO such had to be made until 30 June 1950) aimed to protect the interest of the public in a speedy recovery of the economy as well as the interests of persons obliged to restitution in no longer having to expect further claims of the victims after the

expiry of such deadline (cf. BGH, judgement of 8 October 1953 - IV ZR 30/53, BGHZ 10, 340, 343 et seqq.).

15 bb) In contrast to this, the newer literature – partly following a decision of the Grand Civil Panel (decision of 28 February 1955 - GSZ 4/54, BGHZ 16, 350) – is of the opinion that the restitution law first and foremost served the interests of the victim. Therefore, the victim cannot be denied of claims, which are already based on the general civil law rules resulting from the injustice (cf. Hartung, Kunstraub in Krieg und Verfolgung, 2005, page 169; Rudolph, Restitution von Kunstwerken aus jüdischem Besitz, 2007, page 94 et seqq.; Schulze, Kunstrechtsspiegel 2010, 8, 9; IPrax 2010, 290, 297; Weller, Kunstrechtsspiegel 2009, 32, 35 and 42, 43; similarly already Mosheim, BB 1949, 27: "Meistbegünstigungs-Prinzip").

16 cc) Whether the latter opinion provides reason for calling into question the existing jurisdiction, may remain undecided. In any case, the restitution provisions of Restitution Law of the Allies have no priority over a claim for restitution according to § 985 BGB, if the confiscated asset – as in the present case and unlike in the previous cases decided by the Federal Court of Justice – went missing after the war and the beneficiary became aware of its whereabouts only after the expiry of the deadline for the registration of a restitution claim.

17 Contrary to the view of the Court of Appeal, article 51 sentence 1 REAO does not preclude a claim for restitution in such a case. Although accordingly, unless otherwise specified, claims that are covered by the Restitution Decree can be brought only in accordance with the proceedings and deadlines set therein. The barrier effect, which according to the jurisdiction of the Federal Court of Justice (cf. judgement of 8 October 1953 - IV ZR 30/53, BGHZ 10, 340, 344 for comparable provisions in the American and the British Zone) follows from this provision, is however limited by the overriding principle of in rem restitution.

18 (1) The Restitution Decree primarily governs the restitution of “identifiable” assets (cf. § 1 para 1 REAO). The term “identifiable” initially intended – in drafts – to limit the scope of the Law of the Allies to the loss of rights, which could be repaired by the restitution of the confiscated asset in rem (cf. ORG Nürnberg, RzW 1959, 371, 372 r. Sp. as well as Schwarz, Rückerstattung nach den Gesetzen der Alliierten Mächte, 1974, page 118 et seq.). It [*Restitution Decree*] only applies to assets, which could actually be reclaimed because the beneficiary was aware of the current possessor (cf. article 1 para 2 REAO; Goetze, ibid, article 1 REG [AmZ] note 2; with the same result Harmening/Hartenstein/Osthoff, ibid, article 1 REG [BrZ] note III. 2). This requirement was not met, if – as in the case of the poster collection of the plaintiff’s father – the existence and whereabouts of an asset remained uncertain during the period of time in which proceedings could be initiated in accordance with the Restitution Decree.

19 (2) The Restitution Decree, however, also provides for compensation claims of the beneficiary in the event that the person liable for restitution has lost the asset or restitution became impossible for other reasons (article 26 para 3 and article 27 para 2 REAO). According to the view of the Allies, the monetary compensation was a subordinate form of redress; first and foremost, such was to happen by way of restitution of the confiscated asset to the beneficiary (cf. preliminary note as well as article 1 REAO; also article 1 para 1 REG [AmZ]; article 1 para 1 REG [BrZ]; article 5 of the Decree No 120 [FrZ]; BGH, judgement of 5 May 1956 - VI ZR 138/54, RzW 1956, 237, 238; Blessin/Wilden, ibid, introduction note 15; Schwarz, ibid, page 122 and page 175). That claims for monetary compensation under the Restitution Decree are nevertheless to be regarded as a final redress, if the asset initially went missing after the war and only re-emerged after the expiration of the registration deadline for restitution claims does – regardless of an existing obligation to reimburse a monetary compensation already received – not follow from the Restitution Decree (cf. BVerwG, ZIP 1997, 1392, 1393 regarding the claim for restitution according to § 1 para 6 VermG).

20 (3) Moreover, the primary objective of the restitution in rem is contrary to the assumption that a claim for restitution according to the civil law is also precluded by the Restitution Decree of the Allies if the beneficiary was unable to achieve the restitution of the confiscated asset under this procedure because the asset – as in the present case – went missing until the expiration of the registration deadline of article 50 para 2 REAO and was therefore not "identifiable". If in such a case, even after the re-emergence of the asset, the barrier effect so far adopted by the Federal Court of Justice for article 51 sentence 1 REAO was applied, the beneficiary and his legal successors would be permanently excluded from the primary pursued compensation by ways of restitution, although such restitution, even at a later time, would be actually and – according to the basis of the general laws – also legally possible. As a result, the restitution provisions of Law of the Allies would deny the beneficiary any possibility of claiming the restoration of the legal status and, by this means, would perpetuate the national-socialist injustice. Such a result is incompatible with the nature and purpose of these provisions to protect the interests of the victims (cf. BGH, decision of 28 February 1955 - GSZ 4/54, BGHZ 16, 350, 357).

21 c) The Federal Restitution Act does also not preclude the plaintiff's claim for restitution. Because it merely created a legal basis for the calculation and fulfilment of restitution claims, already emerging form other legal provisions, for an amount of money or compensation against the German Reich (cf. § 2 in connection with § 11 No 1 BRüG [*abbreviation for Federal Restitution Act*]; Biella, Das Bundesrückerstattungsgesetz, 1981, page 83 et seq.; Kemper/Burkhardt, Bundesrückerstattungsgesetz, 2nd edn, 1957, introduction page 16) and insofar renewed the deadline (cf. § 29 BRüG). It contains no provisions indicating that the rights granted to the beneficiary by virtue of his property of the (allegedly) lost asset are transferred to the public authorities with the fulfilment of the claim for restitution. Nor does it – apart from the provisions of §§ 12, 13 BRüG,

which are not applicable in the present case – give rise to new claims in favour of those affected by a national-socialist persecution measure, which might raise the question of the relationship to the claims according to the general civil law.

22 3. The Court of Appeal did not find – which could have precluded a claim for restitution – that the father of the plaintiff, in connection with the compensation granted to him in the year 1961, issued a statement waiving all existing rights to the poster collection. Because there is no presumption of a waiver of rights, an unambiguous behaviour would be required, which the recipient could consider as a waiver of rights (cf. BGH, judgement of 16 November 1993 - XI ZR 70/93, WM 1994, 13). This requirement is not met by the letter of the plaintiff's father of the year 1966, in which he explains to an employee of the Museum for German History in East-Berlin that he was merely ideally and not materially interested in a collaboration and that he, apart from that, had received a considerable sum in compensation covering all of his claims. The emphasis on a purely non-material interest in the collection by the plaintiff's father primarily served to eliminate the obvious fear of the museum's employee that the he would claim his rights to the collection and to avoid the loss of contact with the museum. Thereby, it should be noted that a claim for restitution against a public museum in the GDR during the times of the Cold War must have seemed as a hopeless endeavour to the father; this also indicates that the father, by referring to the compensation sum received, did not express a definitive waiver of his rights to the collection, but rather wanted to dispel the museum's distrust regarding his reason for establishing contacts.

23 4. The claim for restitution, in respect to which the defendant has expressly made no objection on grounds of statutes of limitation, has not forfeited.

24 a) A right is forfeited, if the obligor due to the inactivity of his obligee over a certain period of time, upon objective assessment, had reason to expect and in fact did expect that the obligee would no longer assert his right, and therefore, a later assertion of such right would violate the principle of good faith. In addition to the passing of time, special circumstances based on the behaviour of the obligee must be present to justify the confidence of the obligor that the obligee would no longer assert his right (constant jurisdiction of the court, cf. Senate, judgement of 12 December 2008 - V ZR, 49/08, NJW 2009, 847, 849 note 39 [in this respect in BGHZ 179, 146 not printed] and of 30 October 2009 - V ZR 42/09, NJW 2010, 1074, 1076 note 19 with further details). Forfeiture can also occur in case of the proprietor's claim for restitution according to § 985 BGB (cf. Senate, judgement of 30 April 1993 – V ZR 234/91, BGHZ 122, 308, 314 to § 894 BGB). It should be noted however, that the claim for restitution is a core element of the property and that its denial results in an economic expropriation of the proprietor, and therefore, forfeiture can only be accepted in exceptional cases (cf. Senate, judgement of 16 March 2007 - V ZR 190/06, NJW 2007, 2183, 2184 with further details).

25 b) There is no forfeiture in the present case.

26 aa) Contrary to the view of the Court of Appeal, the time period before 3 October 1990 cannot be taken into account in order to determine whether the assertion of the claim for restitution by the plaintiff constitutes an unlawful exercise of a right. Because until this day, a claim for restitution asserted by the father or (after his death in the year 1974) by the mother of the plaintiff – which is also assumed by the Court of Appeal – must have seemed as a hopeless endeavour, because the poster collection was located in the territory of the GDR and therefore, it would have been impossible in all probability to assert a claim for restitution under private law (cf. BGH, judgement of 14 January 1964 - VI ZR 44/63, VersR 1964, 404, 405 to the „opposite" case where the obligee of the claim was located in the DDR; Schoen, NJW 2001, 537, 543). As far as the Court of Appeal takes into account the time period before the reunification, nevertheless with reference to the provision – concerning the suspension of the statute of limitations due to force majeure – of § 206 BGB, it ignores the fact that the provision contains no principles beyond the statute of limitation (cf. BGH, judgement of 24 October 1960 - III ZR 132/59, BGHZ 33, 360, 363; Erman/Schmidt-Räntsch, BGB, 13th edn, § 206 note 2 with further details).

27 bb) The relevant period of time of 16 years, during which the plaintiff's mother as well as (after her death in the year 1998) the plaintiff himself have refrained from asserting a claim for restitution, does not suffice to justify a forfeiture of the claim (cf. Senate, judgement of 30 October 2009 - V ZR 42/09, NJW 2010, 1074, 1075, note 19). Additional circumstances causing the defendant to conclude that a claim for restitution would no longer be asserted have not been identified. Neither the content of the letter of the plaintiff's father of the year 1966 (see above under 3.) nor the father's statements in an article published in the year 1970/17 according to which he was certain that "Western and Eastern Germany (…) knew how to guard their treasures" suffice to create the necessary basis of trust for the assumption of forfeiture. It follows from the above that the already truly aged father would himself no longer assert any claims – which at that time would not have been enforceable anyway –, but it does not follow from the above that also his heirs would agree to a permanent stay of the collection in a museum. The Court of Appeal did not find statements suggesting something else.

28 cc) Finally, the Court of Appeal wrongly concludes that the defendant, by the end of the time period – specified in § 30a para 1 sentence 1 VermG – to assert a claim for restitution, according to the Property Act on 30 June 1993, had a legitimate expectation that it would no longer be exposed to a claim for restitution of the proprietor of the poster collection. The Property Act – what was elsewhere assumed by the Court of Appeal itself – does not apply in the present case, in which the assets confiscated by the national-socialist regime were brought to the acceding territory only after their confiscation (cf. BVerwGE 135, 272, 277 note 31 as well as above under 2. a)). That the application of the Property Act was differently assessed in the literature until the judgement of the Federal Administrative Court in the year 2009, does not give rise to legitimate expectations on the part of the unjustified possessor.

29 dd) Whether the defendant – as the plaintiff claims –, as a foundation under public law with regard to the "declaration by the Federal Government, the Laender and the national associations of local authorities on the tracing and return of nazi-confiscated art, especially from Jewish property" of 14 December 1999 following the Washington Statement of 3 December 1998 (both printed in Anton, ibid, page 736 et seq., 739 et seq.) according to which the persons making the declaration "will bring their influence to bear in the responsible bodies of the relevant statutory institutions that works of art that have been identified as nazi-confiscated property and can be attributed to specific victims are returned, upon individual examination, to the legitimate former proprietors or their heirs, respectively" cannot invoke the plea that the claim for restitution is forfeited, does not need to be resolved in the present case.

III.

30 The cross revision of the defendant.

31 The cross revision of the defendant, which was supposed to determine that the plaintiff had no property of the poster collection, is unfounded. The father of the plaintiff remained the proprietor of the collection during his lifetime. After his death, the property, by ways of succession, was first transferred to his wife and thereafter to the plaintiff.

32 1. The fact that the poster collection was seized from the plaintiff's father in the year 1938 on behalf of the Ministry of Propaganda had no impact on the existing property rights. According to the – not contested – findings of the Court of Appeal, the seizure is to be considered as a confiscation without any formal act of expropriation. A legal basis for the acquisition of the possession of the poster collection by the German Reich can also not be seen in the Eleventh Decree to the Reich Citizenship Law ordering the forfeiture of Jewish property. This Decree, due to its unlawful content conflicting with the key requirements of every rule of law, is to be considered null and void and therefore, it is unable to any legal effects (cf. BGH, decision of 28 February 1955 – GSZ 4/54, BGHZ 16, 350, 353 f.; BVerfGE 23, 98, 106; BVerwGE 98, 261, 263).

33 2. Without success, the defendant claims that the father of the plaintiff, at the time of the seizure, was no longer the proprietor of the poster collection, because he had previously sold it to the banker Dr. Lenz. Since the collection was in his hands until the very end, only a transfer of property according to § 930 BGB comes into question; this required that the plaintiff's father abandoned his proprietary possession to the collection and, due to an agreed possession arrangement (§ 868 BGB), conveyed the possession to the purchaser. The Court of Appeal correctly concluded that these requirements were not met.

34 a) Contrary to the view of the defendant, the Court of Appeal has not failed to recognise the requirements for a constructive possession. The agreement of a constructive possession replaces the actual transfer of the item provided for in § 929 sentence 1 BGB. Such a change of property is precluded, if the seller's intention to henceforth possess the item in his (immediate) proprietary possession for another person is in no form visible, even if only visible to the purchaser (cf. BGH, judgement of 18 November 1963 - VIII ZR 198/62, NJW 1964, 398 et seq.). A transfer of property concealed to such extent is not in conformity with the – even though restricted in § 930 BGB in order to facilitate legal transactions with chattels (cf. PWW/Prütting, BGB, 6th edn, § 930 note 1) – principle of publicity under property law.

35 b) The Court of Appeal was not able to determine a change in possession prior to the seizure of the poster collection by ways of an explicit agreement of constructive possession or at least by ways of a conclusive conduct (cf. BGH, judgement of 29 October 2011 - II ZR 314/99, NJW-RR 2002, 854, 855; Palandt/Bassenge, BGB, 71st edn, § 930 note 8 with further details). The statement of the plaintiff's father of the year 1953, cited by the defendant, according to which the collection at the time of its seizure had already been "formally transferred", does not allow the conclusion that there was an effective transfer of property. The same applies to the statement of Dr. Lenz of the year 1946, according to which the collection was transferred to him "by way of a pledge" to be saved in this manner from the threat of confiscation. Both statements are limited to a – with regard to the statement of Dr. Lenz not unambiguous – notification of a legal opinion. In the absence of factual evidence for the underlying events, it is impossible to assess whether such is true.

36 3. The plaintiff likewise unsuccessfully submits, that the property of the poster collection was transferred to the then possessor by law due to the fact that the plaintiff's father had not registered it for restitution. The purpose of the Restitution Decree was to ensure the expedited restitution of identifiable assets (cf. BGH, decision of 28 February 1955 - GSZ 4/54 BGHZ 16, 350, 360). If the claims based on the Restitution Decree could not longer be enforced due to the expiry of the registration deadline, the person who was at that time in possession of the asset had no longer to expect exposure to a claim for restitution. But such did not lead to the acquisition of property by the person liable for restitution, which had only acquired the possession but not the property of the confiscated asset.

37 4. The defendant raises no objections to the view of the Court of Appeal according to which the plaintiff's father had not lost his property of the poster collection at a later time. In this respect, no errors in law are evident.

IV.

38 Therefore, the judgement of the Court of Appeal is to be set aside to the extent contested by the revision (§ 562 para 1 Code of Civil Procedure). The Senate shall decide on the matter as such, because the judgement is set aside only for a violation of the law, in the application of the law to the situation of fact as established, and in light of said situation the matter is ready for a final decision to be taken (§ 563 para 3 Code of Civil Procedure).

V.

39 The decision on costs is based on § 91 para 1, § 92 para 2, § 97 para 1 ZPO.

Krüger, Stresemann, Czub, Brückner, Weinland

Courts of lower instance:

LG Berlin, Judgement of 10 February 2009 - 19 O 116/08 -

KG Berlin, Judgement of 28 January 2010 - 8 U 56/09 -