

Blowing in the Wind

By Dr. Reinhard Nacke

As has been widely reported, Germany recently launched a project that is unique in the world: the complete change of its energy policy. After the Fukushima catastrophe had once again demonstrated that the use of nuclear power poses unpredictable risks, Chancellor Merkel and the German government accepted the obvious consequences. The operating licenses for 8 of the 22 German nuclear power stations were revoked with immediate effect. The remaining plants will be closed down by 2022. In the meantime, nuclear power will be replaced by alternative energy sources. Renewable energy is of particular importance in this respect. According to the government's plans, these renewable energy sources should provide 18% of the required energy by 2020. Wind power stations and photovoltaic plants are set to play a key role in this endeavour.

Large sections of the German population and industry welcome the government's decision. Industry, however, is particularly interested in the economic benefits. Photovoltaic modules and wind turbines have to be built and installed, and biogas and hydropower plants have to be manufactured etc. At the same time, many companies will need years

in order to dismantle the nuclear power stations. In addition, Germany will generate a level of expertise in the field of renewable energies that will open up major export opportunities for German companies, especially in the engineering sector, for many years to come.

German lawyers in general and the lawyers of the Geneva Group in particular will also profit from this economic recovery plan.

In this context, Hansen Sonderby & Co. (Per Hansen) and FPS (Reinhard Nacke) provide legal counsel in a particularly interesting case. The Danish client is the owner of a wind farm situated in Germany. This wind park has hitherto been financed by a German bank. It is planned, however, to replace this financing program more profitably by a Danish bank. This bank though is only willing to finance the wind farm if the ownership is transferred to it by way of security. The client is expected to show proof of this by presenting the expert opinion of a German law firm. For this purpose, Per Hansen of Hansen Sonderby & Co. turned to FPS Düsseldorf with whom his firm has a long history of collaboration.

Their expert opinion would have answered the question of security ownership within a short time in the affirmative if the wind turbines had been standing on owned land. The fact that the previ-



Wind Farms – qualified as movable or immovable construction?

ous bank had had no reservations whatsoever when they received the security ownership of the wind turbines for their loan would also have backed this opinion.

But matters were not that simple. The wind turbines were installed on leased land and one judge at the Federal Court of Justice (BGH), among others, declared in two essays that wind turbines cannot be transferred like movable property without the land they stand on (see in general Nacke in GGI Handbook Real Estate, C 65). Several Higher Regional Courts (OLG) have come to different decisions in this matter and the Federal Court of Justice has decided about this question so far.

Said judge at the Federal Court of Justice and other authors are of the opinion that the turbines are affixed to the

land and thereby become immovable property. This does not only apply to the foundation and the concrete tower, but also to the rotatable nacelle and the rotor. Although according to German law objects which are affixed to the land due to a tenancy agreement for a temporary purpose do not automatically become the property of the landowner, the exception by this opinion would not be granted in this case. Only as an exception according to them do wind turbines fulfil a temporary purpose, i.e. only if the usual period of operation exceeds the term of the lease significantly. In this case only, the wind turbine is affixed to the land for a temporary purpose.

The opposing view argues that re-powering, i.e. replacing weak wind turbines with stronger ones, has meanwhile
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become customary. Therefore, wind turbines are always installed temporarily.

For reasons of precaution, the expert opinion had to presume that the opposing view could not prevail and that the Federal Court of Justice would deny the possibility of transferring the ownership of a wind turbine without the ownership of the land.

Thus, § 95 paragraph 2 of the German Civil Code (BGB) had to be considered. According to this provision, objects remain movable property if they are installed due to a right in rem, e.g. a servitude. This then leads to further actual and legal problems which, however, shall not be discussed in detail here. At any rate, the question of the bank's possible acquisition of ownership in this particular case in the end could be answered in the affirmative. But it could not be at-

tested that the acquisition would be totally unencumbered. According to German law, the landowner has a so-called landlord's lien with regard to objects installed on the land. This lien entitles the landlord to prevent the removal of the wind turbine until any outstanding rental claims have been satisfied.

If the wind turbines had been situated in Denmark, the legal situation would have been completely different (see Hansen in GGI Handbook Real Estate, C 51).

From the foregoing, we learn:

1. The property law differs greatly from one country to another (as is shown in the Handbook Real Estate published by the GGI Practice Group Real Estate).
2. It is risky to infer from the legal situation in one country to the legal situation in another without careful examination.
3. GGI makes it possible to quickly gather reliable information about foreign law.



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