

## Commercial Property - Germany

### Federal Court of Justice rules on signatory requirements for rental contracts

Contributed by **SIBETH Partnerschaft**

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On November 4 2009 the Federal Court of Justice made its requirements regarding the written form of a rental contract even more stringent. A rental contract with a stock corporation failed to meet these requirements because it was signed by only one of the four members of the board of directors who shared the right of collective representation.<sup>(1)</sup>

Since 2005<sup>(2)</sup> the Federal Court of Justice has held that the required written form of rental contracts involving multiple persons (eg, partnerships under civil law or communities of heirs) must be signed by all members; failing this, the signing member must explicitly state in the contract that he or she is acting not for himself or herself, but also on behalf of the other members. This clarification must take place in two steps.

First, it must be evident that the signatory does not wish to act for himself or herself, but rather for the company which is concluding the contract. In this respect, the court remains true to its previous policy. Thus, if the manager of a German limited liability company signs for the company, even without a separate statement regarding his or her representation, it is deemed to be clear that he or she is acting for the company.<sup>(3)</sup> According to the court's November ruling, adding the name of the company which concludes the contract beneath the line of the signature is sufficient to clarify that the signing manager of a stock corporation is acting on behalf of the company. This certainly applies to companies registered in the register of companies. No Supreme Court ruling has yet been made on whether it also applies to partnerships under civil law or to communities of heirs.

Second, it must be clarified that a signatory who belongs to a managing board with collective powers of representation wishes to act on behalf of those management colleagues who share such powers. Adding the name of the company under the signature line is insufficient in this case; rather, an explicit note regarding this representation is necessary.

Unfortunately, the ruling makes no reference to the legal provisions under company law and registry law. Therefore, the effect of the respective representation responsibilities within the company are unclear. For example, it is unclear how the courts would view cases in which a manager with collective power of representation is assigned individual responsibility and the relevant signatory powers for a specific area of business.

The court stated that the function of the representative (eg, sole power of representation and authorized signatory status) need not be stated in order to comply with the written form requirement. On the other hand, the court emphasized that compliance with this requirement is not dependent on whether the signatory was authorized to sign the contract under the company law or registry law provisions. The court stated that the requirement is complied with even if the contract is signed by someone other than the individual listed in the preamble to the contract. Such a person is deemed to be acting for all persons involved or for the company as a whole.

This ruling will have major consequences for rental contracts to which a stock corporation is a party. Existing rental contracts should be checked to ascertain whether a sufficient note on representation has been added to the signature if (i) several persons with collective powers of representation are listed in the preamble, or (ii) collective powers of representation exist. If necessary, supplements should be added to ensure that the written form requirement is met; failure to do so may render rental contracts liable to termination. To avoid difficulties, care should be taken in new rental contracts that only one authorized representative is named in the preamble to the contract as far as possible – with an individual power of attorney if appropriate – and that this person then signs the contract for the company.

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- (1) Federal Court of Justice Decision XII ZR 86/07, November 4 2009.
- (2) The first such Federal Court of Justice ruling was NJW 2005, 2225.
- (3) NJW 2007, 3346.

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