

Commercial Property - Germany

Registration of a consortium in the Land Register

Contributed by **SIBETH Partnerschaft**

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Under German law, a consortium consisting of several construction companies can be classified as a partnership under civil law or a commercial partnership. In contrast to commercial partnerships, which unarguably have legal personality, the question as to whether partnerships under civil law have legal individuality (ie, the capacity to be the subject of legal rights and duties) has been at the heart of heated discussions among academics and in the courts.

Once this controversy had been decided and it was generally acknowledged that a partnership under civil law is indeed capable of holding rights or incurring obligations, the issue of whether such partnerships under civil law were eligible for inclusion in the Land Register became the key question for debate. The outcome of this debate was important to construction company consortiums because it enables them to secure outstanding claims for payment for work rendered by claim-securing mortgages.

In a ruling of June 8 2010 the Berlin Appeal Court ruled that a consortium is eligible for registration in the Land Register, and therefore can apply for the registration of a claim-securing mortgage. The ruling contradicted the view taken by the court of first instance.

According to the appeal court, a consortium is eligible for inclusion in the Land Register irrespective of whether it is classified as a partnership under civil law or a commercial partnership under German law, since the eligibility of a partnership under civil law can be derived from the consistent case law pronouncements of the Federal Court of Justice and the eligibility of a commercial partnership results directly from Section 124(1) of the Commercial Code.

The court of first instance previously rejected the application for the registration of a claim-securing mortgage and the eligibility of the consortium for registration in the Land Register on the grounds that the writ of execution, which designated the consortium as a consortium only, did not sufficiently show whether it was legally constituted as a partnership under civil law or a commercial partnership. In contrast, the appeal court accepted the designation as a consortium, stating that a consortium normally meets the criteria for a partnership under civil law (ie, a partnership of individuals in pursuit of a joint purpose on a contractual basis, with a specific contribution to be rendered by each party). This means that a consortium should fundamentally be registered as a partnership under civil law in the Land Register. The only exception to this principle applies when there are specific indications that the consortium is a commercial partnership. However, this applies only to permanent consortia which are designed from the outset to carry more than just a single construction project, (ie, consortia which are formed for an indefinite period to carry out several construction projects). Most consortiums are formed in relation to single construction projects.

However, when a consortium is registered in the Land Register, the following points must be taken into account:

- Temporarily, the possibility existed of entering a partnership under civil law in the Land Register without stating the partners involved. This repeatedly led to controversy because it meant that the Land Register did not show the names of the individuals who formed partnerships. The legislative body solved this problem by amending Section 47 of the Land Registration Act, which now explicitly requires all members of a partnership under civil law to be registered in the Land Register.
- In the case of a consortium which, as a special case, is considered to be a partnership under civil law, Section 47 stipulates that not only the consortium itself, but also all of its partners, must be registered. They should therefore also be listed in the underlying writ of execution. In order to ensure this, an exact denomination of all partners should be listed in the caption of the first application of the legal proceedings.
- In the exceptional cases in which a consortium is declared to be permanent and therefore a commercial partnership, no further details of the partners need to be declared.

The law does not require the correction of previous entries that have been made in the name of the partnership under civil law alone by adding the details of the partners.

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