Immobilieninvestment
Recht und Strategie

3A OPINION: LAW AND DIGITISATION

“This is progress, hopefully I can follow along ” -Sportfreunde Stiller

or:

The future is already here – rental contracts with qualified electronic signature meet the legal requirements!

Since 01.08.2001 (!!) the following law is in effect Germany (with minor editorial changes):

- 126 Written form

…

(3) The written form may be replaced by electronic form unless provided by law otherwise.

- 126a Electronic form

(1) If the legally prescribed written form is to be replaced by electronic form, the issuer must add his name to the declaration and provide the electronic document with a qualified electronic signature.

(2) In the case of a contract, the parties must each electronically sign an identical document in the manner described in paragraph 1.

The sad reality is that almost nothing of this has been put into practice. Rental agreements, some with extensive, often large-format enclosures, are still printed several times for the purpose of signing and the pages connected by eyelets and/or cords; finally the documents are signed with a pen. If you have forgotten to make a loose-leaf copy, the eyelets/cords are often loosened after signing so that copies can be made. And in the vast majority of cases, the finished document is scanned (large-format plans also cause a lot of trouble here), so that the contract can be filed in the document management systems…

It comes as no surprise that mistakes within this procedure are numerous. Especially for long-term rental agreements, this has serious consequences: at least the leases are not void but they are not binding and can be terminated prematurely (§ 550 BGB). The economic consequences for the parties are significant and the subsequent lawsuits occupy an entire senate at the Federal Court of Justice with cases concerning questions of written form in commercial tenancy law. In turn, confusion in the universe of (partly absurd) individual cases cannot be avoided and lawyers drafting leases are confronted with almost insoluble

problems. Against this background, the repeated demand of the legal community to finally fundamentally reform § 550 BGB or to abolish it altogether is more than understandable.

However, it would be so easy to formally conclude the contracts correctly at least once: it would only take the lawyers to use the technical possibilities that they already possess. Today, every lawyer finally has a signature card and a card reader for the beA (the “special electronic mailbox for lawyers”). Or you can use online providers such as SignMe, a service from Bundesdruckerei (https://cloud.sign-me.de/signature/start). There you can have files signed easily and with little effort if you are afraid of the technical effort to upgrade your own systems. Best suited are PDF files and the use of the container function (PDF file with internal attachments, which hardly differs from a physical master folder, only that the cords cannot be torn. Still you can make perfect copies of the attachments at any time without damaging the original). At the end of the process there is a single signed file and the uniformity of the document is guaranteed in the most exemplary way.

This simplification was also the declared will of the legislator. He wanted to offer an alternative to paper documents. The then Federal Government explained this in detail in the explanatory memorandum to the draft law (cf. p. 15 et seq. of Bundestag document 14/4987, available at http://dip21.bundestag.de/dip21/btd/14/049/1404987.pdf).

But there is still great resistance to put this into practice. Even some experts in the legal business are of the opinion that the Federal Court of Justice may not apply the law if there is only one file instead of a paper document and refuses formal recognition of the contracts concluded in this way, as can be read in a recent guest article in the FAZ (14.09.2018, p. 13).
Although the Federal Court of Justice is always good for a surprising ruling, it would be more than surprising if it did not apply a law against the spirit of the reasoning behind the law if it could also save it a lot of work.

In the FAZ, this provocative thesis is merely instrumentalised in order to demand the abolition of § 550 BGB once again. That, in turn, is almost negligent. Not only does it provoke a shrug of the legislators’, who can simply refer to the law in effect, but it also does a disservice to the progress-friendly colleagues undermining their efforts to apply a law that is now 17 years old. Finally, the lawyers have the chance to demonstrate that the (often only claimed) aversion to progress does not apply to everyone. They now have the opportunity to put clients in a position to make fewer mistakes when applying the not so new digital possibilities

instead of sticking to the old (and known) error-prone behaviour patterns. And I am convinced that the Federal Court of Justice is more likely to jump aside the progressive user than the paper tiger.

3A opinion

From Stefan Meusel
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