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CMS Hasche Sigle obtains protection against dismissal for GmbH managing directors in Federal Court of Justice

Munich – The German Federal Court of Justice (FCJ) has for the first time stated in a key decision (case ref. II ZR 70/09) that the Dismissal Protection Act can also apply to managing directors of a GmbH (private limited company). In future, managing directors who have moved up through the ranks or who feel the need for a higher level of reassurance will be able to rely on the courts recognising the agreed protection against dismissal. Nonetheless, really watertight protection requires careful drafting of the contract.

This landmark decision for GmbH managing directors was obtained by CMS Hasche Sigle jointly with Prof. Achim Krämer, a lawyer admitted to practice before the FCJ. Dr Eckhard Schmid, a partner at CMS Hasche Sigle, had represented a managing director affected by this issue before the FCJ in a case against Austria Leasing GmbH.

According to the Dismissal Protection Act, managing directors are not employees and consequently do not enjoy the protection against dismissal afforded to employees. It had been a matter of debate up to now whether managing directors could obtain protection against dismissal by means of a corresponding provision in their service contract. The Higher Regional Court (HRC) of Frankfurt/Main had rejected this option, based on the principles of GmbH law, and the academic literature on the subject

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supports that view. Hamm HRC also recently denied a managing director the agreed protection against dismissal.

The FCJ has now overturned the Frankfurt HRC's judgment and stated that the Dismissal Protection Act is applicable. The Karlsruhe judges emphasised that the Dismissal Protection Act, which normally does not apply to managing directors, can be agreed between the parties in the context of freedom of contract. The court held that the shareholders' meeting could place such a restriction on a GmbH.

Accordingly, the shareholders' meeting can choose to grant a managing director more favourable status in their service contract. The FCJ cited examples such as a pension commitment, a very long notice period, benefits and protection akin to those enjoyed by civil servants, restricting termination to extraordinary notice, or by providing the same protection against dismissal as for an employee.

Given that a GmbH has a large measure of freedom by virtue of law and a managing director is not normally protected against dismissal, but the shareholders' meeting has wide-ranging powers to bind the GmbH, the presiding judge included a quotation from Goethe's "Faust" in his ruling: *"The first is free to us ; we are slaves as regards the second."*

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Lawyer at the Federal Court of Justice:

Prof. Achim Krämer

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