

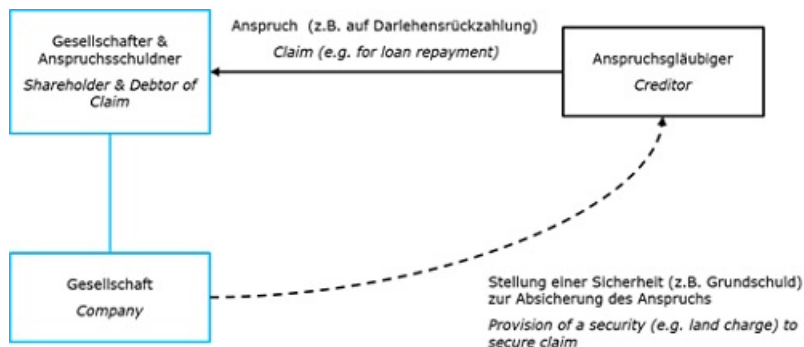
BGH ruling on up- and cross-stream collaterals in groups - Time of provision relevant for § 30 GmbHG

BGH determines the relevant evaluation date for granting real collaterals within the scope of § 30 GmbHG on the provision date and not on the date of realization

In the context of the capital maintenance rules according to sec. 30 para. 1 of the German Limited Liability Companies Act (Gesetz betreffend die Gesellschaften mit beschränkter Haftung, "GmbHG") and within the granting of collateral by a company for liabilities of its parent company it was disputed for a long time, whether the relevant point in time to assess a prohibited capital repayment is already the time of the provision of the collateral or only at the date of its realization.

The German Federal Court of Justice ("BGH") now reaffirms by decision dated March 21, 2017 (Az.: II ZR 93/16) its already indicated legal opinion and determined the date of provision of the collaterals as the relevant point in time.

Assets of the company required to maintain the stated share capital may not be distributed to the shareholders, sec. 30 para. 1 sentence 1 GmbHG. This includes not only direct payments from the company to its shareholders: The granting of a collateral or security by the company for third-party claims against the shareholders (see chart below) is also a relevant transaction within the scope of sec. 30 para. 1 sentence 1 GmbHG.



It was, however, long-disputed whether a prohibited payment can already be seen in the provision of the collateral or at the time of its actual realization.

Decision of the BGH

According to the BGH, the provision of the collateral is the decisive point in time. The BGH compares in his judgement the granting of a loan to a shareholder with the provision of a collateral for a shareholder's loan liability and applies an "economic view". From such economic viewpoint, the asset serving as security is economically already excluded from the remaining assets of the company with the provision of the security.

However, no forbidden repayment is made if the company has a reimbursement claim against the shareholder (sec. 30 para. 1 sentence 2 GmbHG) which is of full value and fully recoverable. Such recourse/reimbursement claim vis-à-vis its shareholder comes into existence immediately after the secured liability becomes due for payment by the company.

In the view of the BGH, a claim is fully recoverable if – from an ex ante perspective – the shareholder is likely to be able to repay the collateralized loan ("forecast decision"). In such case it is unlikely that the collateral will be exercised or that the reimbursement claim is lost. If the forecast decision is positive, a simple accounting exchange on the assets side occurs when the collateral is provided, which is and remains irrelevant under sec. 30 GmbHG, even if the company's assets deteriorate at a later date: Such subsequent negative development of the claim's value does not affect the correctness of the ex-ante value determination made by the managing director.

The managing director must, however, monitor the shareholder's financial situation and

react to an impending deterioration in creditworthiness by requesting securities or by enforcing the reimbursement claim. A lack of assertion of the reimbursement claim, however, does not lead to a liability for damages by the managing director pursuant to sec. 43 para. 2 GmbHG and does not itself constitute a payment within the meaning of sec. 30 GmbHG.

Conclusion

The decision provides clarity for group financing, companies and their managing directors within the framework of up- and cross-stream collateral and is therefore to be welcomed. The BGH, on the other hand, does not provide a detailed description of the standard of due care which is to be applied to the forecast decision made by the managing director, and therefore could lead to a liability of the managing director if he should be unable to prove that he exerted due care when making his evaluation from an ex-ante point of view. It is not clear whether the BGH, whose decision was about a real collateral (a land charge), intended to cover personal securities (guarantees, etc.) as well, but it does not appear unlikely that the BGH's rather abstract criteria were meant to apply to personal securities as well.

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