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German Tax and Legal News

The membership information rights of the limited partner

German Federal Court of Justice (BGH) clarifies the scope of the extraordinary information claim of the limited partner pursuant to section 166 para. 3 German Commercial Code.

The extraordinary information right of the limited partner is to be differentiated from the right to review the annual financial statement and can also serve to verify the business activities of the general partner.

If the limited partner is entitled to an extraordinary claim to information against the partnership pursuant to section 166 para. 3 German Commercial Code (HGB), this extraordinary information claim may extend beyond the ordinary information right of the limited partner under section 166 para. 1 HGB which shall ensure the verifiability of the correctness of the annual financial statements and may provide an information claim concerning the general management of the general partner.

The information rights of the limited partner at a glance
Control without information is unthinkable. If the limited partner in a limited partnership wants to control the management, he needs information about the partnership. For this purpose, he is entitled to the ordinary information right under section 166 (1) HGB. The ordinary information right enables the limited partner to request a copy of the annual financial statements and to examine them on the basis of access to the books and business documents of the partnership, and thus is related to - and restricted to - the annual financial statements. Whether this ordinary information right can or cannot be restricted is highly controversial. However, there is a consensus that the core of the limited partners' information and control rights must remain unaffected. The judicial enforcement is carried out by means of a performance suit before the ordinary courts.

If an important reason exists (e.g. in case of imminent damage to the partnership or the limited partners, or in case of a reasoned suspicion of incorrect management), the limited partner can rely on the extraordinary information right under section 166 (3) HGB. The enforcement of this right is subject to the procedural law in family matters and in matters of voluntary jurisdiction (FamFG), which offers a number of procedural advantages with the conceptual focus on the procedural acceleration, the principle of official investigation and the possibility of non-disclosure of the procedure. The scope and extent of the extraordinary information right and in particular which information may be concerned remained unclear in the past. Only a limited number of court decisions on this topic have been passed.

German Federal Court of Justice: Autonomy of the extraordinary information right
In its decision of June 14, 2016 on file number II ZB 10/15, the German Federal Court of Justice (BGH) expressly stated that the extraordinary information claim of the limited partner under section 166 para. 3 HGB is independent and added to the ordinary information right under section 166 para. 1 HGB and is not restricted to the annual financial statements in terms of time or content. The extraordinary information right may also include, but is beyond, the claim for submission of a copy of the annual financial statement and access to appropriate books and business documents, if there is an important reason/good cause. The claim is only limited by the fact that the coveted information is appropriate and reasonable for the enforcement of partnership-compatible rights. Ultimately, a corrective weighing of the mutual interests is to take place.

Practical advise
The extent of the extraordinary information right of § 166 (3) HGB, which at first glance is blurred, is to be welcomed, because it provides a wide scope for flexible implementation of an individual information requirement by the limited partner in order to control the management in practice. The procedural provisions of the FamFG ensure a speedy and adequately flexible procedure. The non-publicity of the proceedings allows the partnership to protect its confidentiality and secrecy interests.

Even in cases in which the information rights of the limited partner of a partnership are

reduced under the partnership agreement (which is legally possible), a judicial procedure may be considered due to the recent decision of the German Federal Court of Justice.

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