


URL: <http://www.deloitte-tax-news.de/german-tax-legal-news/subscribers-rescission-in-case-of-a-failed-share-capital-increase.html>

 26.07.2016

German Tax and Legal News

Subscriber's rescission in case of a failed share capital increase - Company's obligation to facilitate a speedy execution of the increase

The subscriber of a share capital increase has a right of rescission in case the capital measure is not executed within a reasonable period.

If a company expressly undertakes to execute an increase of its share capital, it is obliged to facilitate a speedy implementation of this capital measure. In case the capital increase fails, the subscriber is entitled to withdraw from the transfer agreement and can request for the repayment of his capital contribution.

Case

The Federal Supreme Court (Bundesgerichtshof – BGH) had to judge on the question, whether a subscriber in connection with a capital increase has a right of rescission and/or is entitled to claim damages in case of a failure of the capital measure.

The plaintiff had been a silent partner in the defendant limited liability company (Gesellschaft mit beschränkter Haftung – GmbH). In the course of an increase of the share capital of the defendant GmbH, he made a contribution in kind to the company in form of his share silent partnership interest. The underlying agreement stipulated the GmbH's obligation to facilitate the execution of the share capital increase. Subsequently, as some disagreements arose between the company's shareholders, the execution of the share capital increase was not pursued further. Finally, the competent commercial register (Handelsregister) declined the registration of the capital increase.

The Court's ruling

In deviation from its former case law, the BGH pointed out that in the given case there was a contractual obligation of the company to facilitate a speedy execution of the share capital increase, i.e. by facilitating its registration with the commercial register, which, if violated, can result in damage claims.

In similar cases, the BGH had denied a subscriber's claim for the execution of shareholder resolution on the increase of the company's share capital as well as a damage claim for non-performance. Besides, the BGH had left open in its former rulings, whether the company is obliged to indemnify a subscriber of a failed capital increase for any reliance damages. In this context, the present ruling has brought some light in this complex: The court holds that there is no general claim for performance of the subscriber in respect of the actual execution of an increase of the share capital and no damage claim for non-performance that with respect to a corresponding damage claim would result in the company's compulsion to comply. Its shareholders are and shall remain in principle free to suspend a former resolution regarding an increase of the share capital.

However, in case the company explicitly undertakes the obligation towards the subscriber to facilitate the execution of the share capital increase, in particular by pursuing the mandatorily required registration with the commercial register, this obligation can in case of a failure of the capital measure lead to a subscriber's contractual claim for reliance damages besides a right of rescission (and a form of repayment claim).

Comment

The present ruling of the BGH is to be welcomed from a practical point of view.

The BGH still does not hold a company generally obliged to facilitate the speedy execution of a resolved increase of the share capital. However, the ruling points out a way for the contractual handling of the risk of a failed share capital increase. Through the inclusion of an explicit obligation of the company to facilitate the execution of a capital increase by pursuing its registration with the commercial register in the transfer agreement, the respective subscriber can be entitled to contractual compensation claim for his potential reliance damages besides his right of rescission. Since these contractual claims cannot be countered with a plea of impoverishment (Einrede der Entreicherung) in contrast to

statutory claims for unjust enrichment, this approach is beneficial for the subscriber of a respective failed share capital increase.

www.deloitte-tax-news.de

Diese Mandanteninformation enthält ausschließlich allgemeine Informationen, die nicht geeignet sind, den besonderen Umständen eines Einzelfalles gerecht zu werden. Sie hat nicht den Sinn, Grundlage für wirtschaftliche oder sonstige Entscheidungen jedweder Art zu sein. Sie stellt keine Beratung, Auskunft oder ein rechtsverbindliches Angebot dar und ist auch nicht geeignet, eine persönliche Beratung zu ersetzen. Sollte jemand Entscheidungen jedweder Art auf Inhalte dieser Mandanteninformation oder Teile davon stützen, handelt dieser ausschließlich auf eigenes Risiko. Deloitte GmbH übernimmt keinerlei Garantie oder Gewährleistung noch haftet sie in irgendeiner anderen Weise für den Inhalt dieser Mandanteninformation. Aus diesem Grunde empfehlen wir stets, eine persönliche Beratung einzuholen.

This client information exclusively contains general information not suitable for addressing the particular circumstances of any individual case. Its purpose is not to be used as a basis for commercial decisions or decisions of any other kind. This client information does neither constitute any advice nor any legally binding information or offer and shall not be deemed suitable for substituting personal advice under any circumstances. Should you base decisions of any kind on the contents of this client information or extracts therefrom, you act solely at your own risk. Deloitte GmbH will not assume any guarantee nor warranty and will not be liable in any other form for the content of this client information. Therefore, we always recommend to obtain personal advice.