

Time Limit for Security after Termination of a Domination and Profit and Loss Transfer Agreement

With regard to claims which were created before the publication of the termination of the domination and profit and loss transfer with the commercial register and which become due only thereafter, the claims of creditors for security by the dominant company for receivables against the dependent company are limited to those which become due within five years after publication of the termination of the corporate agreement.

I. Facts of the Case

In December 2007 the dependent company rented commercial premises from the plaintiff for a period of 15 years. In April 2006 the defendant as the dominant company and the dependent company had concluded a domination and profit and loss transfer agreement for the period of ten years, but had annulled it in December 2010. The defendant had granted a guarantee (Bürgschaftversprechen) to the plaintiff (§ 302 Subsection 3 AktG applied by analogy) which was limited to January 2016. With the legal action the plaintiff demanded security payment by January 2017 for its claims from the rental agreement pursuant to § 232 Subsection 1 German Civil Code (Bürgerliches Gesetzbuch – BGB).

II. Decisions by Previous Instances

The legal action was dismissed in the first instance (Regional Court (Landgericht – LG) in Brunswick, ruling dated December 21, 2012 – Case No. 9 O 2422/11 (352)) and by the appeal court (Higher Regional Court (Oberlandesgericht – OLG), ruling dated October 2, 2013 – Case No. 3 U 34/13); the courts were of the opinion that the additional liability in § 303 AktG which was unlimited in time and asserted by the plaintiff in return for granting the security payment was restricted to a period of five years with § 26 and § 160 HGB being applied accordingly.

III. Decision by the German Federal Court of Justice

The German Federal Court of Justice (Bundesgerichtshof – BGH) confirmed the opinion of the appeal court and stated that the plaintiff could not claim a security payment pursuant to § 232 Subsection 1 BGB beyond January 2016 until January 2017. The claim for security was also applicable accordingly in limited liability corporate group law pursuant to § 303 Subsection 1 AktG and restricted in analogous application of § 26 and § 160 HGB as well as § 327 Subsection 4 AktG to receivables which are due within five years as of publication of the termination of the domination and profit and loss transfer agreement had been registered with the commercial register.

In its reasons the BGH stated that § 303 AktG included an accidental omission in the regulation which does not foresee a time limit. The BGH believed that this could lead to an indefinite liability for the dominant company which the legislation had overlooked. The risk of indefinite liability resulted for agreements for continuing obligations from the fact that claims could already be generated before publication that the termination of the corporate agreement had been registered with the commercial register while the individual receivables only became due later – long after the end of the corporate agreement. The liability of the dominant company could also insofar still apply although the creditors of a group company did not have a claim to continue both the domination and/or profit and loss transfer agreement and the obligation to compensate losses pursuant to § 302 AktG. This was incompatible with the intention of the claim in § 303 AktG to counteract the risk that the previously dependent company could not exist on its own due to the previous emphasis on group interests nor pay its liabilities as a result of the loss of the obligation by the dominant company to compensate losses (§ 302 AktG) in the course of terminating the corporate agreement. Yet it is precisely this risk which becomes less after the termination of the domination and profit and loss transfer agreement.

The omission in the regulation could be remedied by applying the regulations accordingly when a shareholder leaves a partnership (§ 26 and § 160 HGB) and when the corporate integration is terminated (§327 Subsection 4 AktG). The interests of the creditors when a

domination and profit and loss transfer agreement is terminated are comparable here.

This position also reflects the intention of the legislation whereby the new version of § 327 Subsection 4 AktG will transfer the additional liability for leaving a partnership to corporate groups pursuant to § 160 HGB. Insofar the claim pursuant to § 303 AktG could not go beyond the additional liability for the previous dominant company at the time of corporate integration; the risks for the creditors after the end of corporate integration were even greater than after the end of a domination and profit and loss transfer agreement.

Other than as hitherto represented in some of the legal literature and previously decided by the BGH in connection with an agreement for continuing obligations for a merger (BGH, ruling dated March 18, 1996 Case No. II ZR 299/94) it is not the specific security interest of the creditor which is relevant and which must also be determined in each case, whereby the maximum total amount which will become due in the future is decisive. Such an opinion is too vague and is therefore unsuitable to eliminate the risk of indefinite liability.

IV. Conclusion

The additional liability for claims of dominant companies for receivables from the dependent company which only become due after the end of a domination and profit and loss transfer agreement is limited to five years after publication of the termination of the corporate agreement.

The BGH has distanced itself from its previous decisions whereby the period depends on the security requirements of the creditor and the maximum total amount which will become due in the future is decisive. The decision offers legal certainty: the amount of the security payment can be determined more easily with the relevant period – this is to be welcomed.

However, there are problems with agreements for continuing obligations such as rent: the claims for rent are already generated when the agreement is concluded but only become due at a later time (cf. Mense/Klie in *Gesellschafts- und Wirtschaftsrecht* (GWR- Corporate and Business Law magazine) 2014, 525 (525)). The dominant company must subsequently continue to provide security for rent liabilities of the dependent company even after termination of the domination and profit and loss transfer agreement. This is also significant for corporate acquisitions (demands on the vendor for security for receivables of the target company) or the employment of workers (pension obligations of the former dependent company and security in the employees' favor) (cf. Mense/Klie in GWR 2014, 525 (525)).

Conversely, for legal transactions with companies which concluded a domination and profit and loss transfer agreement with another company and from the perspective of the creditors it will depend on having corresponding security in advance when the agreement is concluded.

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