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The new law on defective resolutions for partnerships under the Act for the Modernisation of Partnership Law (“MoPeG”): systematic changes, practical consequences and current case law

With the entry into force of the Act for the Modernisation of Partnership Law (“MoPeG”) on 1 January 2024, the legislators fundamentally reformed the rules regarding defective resolutions for commercial partnerships (OHG, KG, GmbH & Co. KG). Sections 109–115 of the German Commercial Code (HGB) contain for the first time detailed provisions on resolution procedures and the judicial enforcement of resolution defects.

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The reform is based on the cassation model under stock corporation law and deliberately breaks with the previously applicable declaratory model. For non-commercial partnerships (GbR, PartG), the old system remains in place, with provision for an opt-in option. The new regulation raises numerous questions for the practice and case law, which are presented below.

1. Systematic change: From the declaratory model to the cassation model

Until the end of 2023, the declaratory model applied to partnerships: defective partner resolutions were generally void but could be enforced between the partners by means of a declaratory action (Section 256 of the German Code of Civil Procedure (ZPO)) without any time bar. Such judgments were only effective inter partes. In contrast, a cassation model was applied to limited liability companies (GmbH) and public limited companies (AG): defective resolutions were initially valid, and the company has to be challenged within a specified period by means of an action for annulment.

With the MoPeG, this system has now been adopted for commercial partnerships (Sections 110 et seq. of the German Commercial Code (HGB)). Defective resolutions are generally effective and only void in exceptional cases. The challenge is brought through a legal action against the partnership and no longer against the partners, as was the case before MoPeG. The judgment applies to all members and organs of the partnership, regardless of their participation in the proceedings.

2. The new system for defects in resolutions

The new law distinguishes between three categories of resolution defects:

a) Nullity (Section 110 (2) HGB)

A resolution is null and void from the outset if its content violates mandatory legal provisions which the shareholders cannot renounce (e.g. violation of public policy, creditor protection rules, absolute inalienable membership rights such as the right to participate in the members' meeting). Nullity can be enforced through an annulment action (Section 114 HGB) or thorugh other procedures(e.g. by way of objection). Nullity occurs by operation of law, so that, in contrast to stock corporation law, there is no provision for remedy.

b) Means of avoidance (Section 110 (1) HGB)

Resolutions that violate other legal provisions or the statutes/partnership agreements can be contested. The legal challenge must be brought against the partnership itself (Section 113 (2) HGB) and must be filed within three months of the notification of the resolution (Section 112 HGB), otherwise the resolution becomes final. This period may be reduced to at least one month by the statutes/partnership agreement. The right to contest a resolution is vested in each member/partner who was a member at the time the resolution was passed or whose legal predecessor was a member at that time (Section 111 HGB).

c) *Invalidity*

Although not expressly regulated, the provisional invalidity of resolutions that interfere with irrevocable rights of a shareholder without the latter's consent (e.g. management rights, special rights, profit sharing) is

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recognised. The invalidity can be asserted by bringing an action for a declaratory judgment against the partnership. It is not subject to any time limit but is subject to the doctrine of forfeiture for delay.

3. Procedural enforcement and procedural issues

a) Types of legal action and jurisdiction

The new system provides for legal actions to contest a resolution (Section 113 HGB), legal actions to declare a resolution null and void (Section 114 HGB) and legal actions for a positive declaration of the validity of a resolution (Section 115 HGB). The general action for a declaratory judgment remains in place for certain cases (e.g., disputes about the conclusion or content of a resolution). The local court at the company's registered office has exclusive jurisdiction (Section 113(1) HGB).

b) Scope of legal effect and duty to inform

A favourable judgment applies to and for all parties (Section 113 (6) HGB). The partnership is obliged to inform all members/partners about the legal action and the status of the proceedings (Section 113 (3) HGB). Failure to comply with this obligation may result in claims for damages.

c) Litigation value and costs

The litigation value is determined by the significance of the matter for the parties (Section 113 (5) HGB). The costs of the proceedings are to be borne by the partnership, with the plaintiff member/partner being charged proportionally. Whether a claim for reimbursement can be made against an unsuccessful partner is still unclear and will have to be determined by case law.

4. Dispositive legal constructions: opt-in and opt-out

The new law on defects in resolutions is dispositive (Section 108 HGB). Commercial partnerships may retain the old declaratory model in their partnership agreement (opt-out) or adopt modified provisions. Conversely, general civil law associations (GbR) and registered partnerships (PartG) may adopt the new system (opt-in).

However, freedom of choice is limited by mandatory provisions (e.g. grounds for nullity, minimum period for bringing an action).

5. Effects and outlook for GmbH law

The MoPeG reform has also affected the law on defective resolutions in GmbHs (limited liability companies). In the explanatory memorandum to MoPeG the assumption is made that the new dispute model will have an impact on GmbH law. There is discussion in the literature as to whether Sections 110 HGB et seq. will apply analogously to GmbHs in future, in particular with regard to the extended period for challenge (three months instead of one month) and the more flexible notification requirement.

6. Current case law and open questions

In future, the courts will have to deal with numerous detailed questions, such as the interpretation of

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statutes/partnership agreements with regard to opt-in/opt-out clauses, the scope of legal validity and the allocation of costs.

The new law on defective resolutions for partnerships brings about a paradigmatic shift and increases legal certainty but compels partnerships and advisors to carefully adapt their statutes.

Practitioners are called upon to take advantage of the new scope for structuring and to closely follow developments in case law and literature. The coming years will show how the new system proves itself in judicial and extrajudicial practice and what further adjustments will be necessary.

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Schlagwörter

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