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Asset appropriation by shareholder/managing director leading to a destruction of company existence: Questions of liability.

In its ruling of 24 September 2024, the Brandenburg Higher Regional Court clarified that a managing director is in breach of his duty if he withdraws assets from the company for his own benefit and to the detriment of the company. The withdrawal of company assets without compensation by the managing director, who was also a shareholder, also constituted an existence-threatening intervention and led to liability under Section 826 of the German Civil Code (BGB).

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1. Background

The plaintiff was the insolvency administrator of a limited liability company (GmbH), which in turn was a shareholder in an insolvent limited liability company ("**the insolvent debtor"**). The insolvency administrator claimed damages from the managing director of the insolvent debtor for amounts withdrawn from the company's assets. This managing director was at least a de facto shareholder of the insolvency debtor, as the transfer of shares in the insolvency debtor was also under dispute.

The amounts withdrawn by the managing director constituted the entire assets of the insolvency debtor, amounting to over EUR 800,000.00. The payments were made in a total of four transfers to the managing director himself or to companies of which he was the chairman of the board. To this end, the managing director concluded investor agreements with the aforementioned companies, in order to legitimise the payments.

The Potsdam Regional Court ordered the managing director of the insolvent debtor to repay the transferred amounts to the insolvency estate. The managing director appealed against this ruling.

2. Reasons for the decision

The Brandenburg Higher Regional Court upheld the ruling of the Potsdam Regional Court, meaning that the appeal, although in itself admissible, was unsuccessful on the merits.

The plaintiff was entitled to claim repayment of approximately EUR 800,000.00 from the defendant under Section 43(1) of the German Limited Liability Companies Act (GmbH Act) to the insolvency estate, as he had breached his duty as managing director by paying out the insolvency debtor's entire bank balance.

According to Section 43 (1) GmbH Act, one of the essential duties of a managing director of a limited liability company is not to exploit his position as managing director to his own advantage and to the detriment of the company. By concluding the investor agreements and subsequently paying out the entire balance, he had seriously violated his duties as managing director. This was particularly so because the company did not have any significant operating business that could have compensated for the payments.

Approval by the shareholders' meeting pursuant to Section 48 GmbH Act was not required

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for the claim against the managing director, because, as insolvency proceedings had been initiated, the interests of the company's creditors outweighed the need to protect the company in liquidation.

In addition, the plaintiff also had a claim against the defendant under Section 826 of the German Civil Code ("*Anyone who intentionally causes harm to another person in a manner contrary to public morality is obliged to compensate the other person for the damage*.") for an intervention that destroyed the company's existence. In this context, the Higher Regional Court of Brandenburg referred to the ruling of the Federal Court of Justice (FCJ) in the 'Trihotel' case (FCJ, ruling of 16 July 2007 – II ZR 3/04). It stated that liability for destruction of existence must be affirmed if, in relation to the company's assets earmarked for the priority satisfaction of the company's creditors, there are interventions without compensation, which lead to insolvency or exacerbate it. The debtor of this claim is not only each of the shareholders, but also persons who have a decisive influence on the company. According to this principle, liability for a de facto shareholder - as was the case with the defendant – also comes into consideration.

The central factual requirement of Section 826 of the German Civil Code is the withdrawal of the company's assets without compensation through abusive interference. An intervention will in any event be considered abusive where the company's assets, which under GmbH law are primarily intended to satisfy the company's creditors, are systematically withdrawn for the direct benefit of the shareholder or a third party.

In the opinion of the Higher Regional Court of Brandenburg, this was the situation in the case before it. The defendant made the transfers without further consultation and without knowledge of the exact financial position of the insolvent debtor, leaving the insolvent debtor without financial resources. As a consequence, the defendant accepted the potential insolvency of the company.

The defendant was therefore obliged to compensate for the assets whose withdrawal had led to the destruction of the company's existence.

3. Practical note

The statements of the Higher Regional Court of Brandenburg clearly illustrate the legal consequences of ill-considered and unauthorised payments out of company funds. The risks for the managing directors increase, particularly where substantial payments are made out of the company account. In the case decided by the Higher Regional Court of Brandenburg, liability was only imposed on the sole shareholder-managing director. If there had been another managing director, the question would have arisen as to whether this person would also have been obliged to make payment to the insolvency

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administrator. Based on the principle of overall responsibility of managing directors, which follows from Section 43 of the GmbH Act, this would generally be the case. It is therefore essential for managing directors of a limited liability company to be able to provide evidence of exoneration in the event of a claim by a third party, such as an insolvency administrator, that all monitoring and control obligations have been fulfilled. This applies in particular, as in the case before the Higher Regional Court of Brandenburg, to payments made by a shareholder-managing director to companies closely associated with him.

Source: Brandenburg Higher Regional Court - 7 U 146/24

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insolvency, management duty of care, secondary liability, shareholder liability