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Can the sole shareholder of a German limited liability company (GmbH) dismiss the managing director if the articles of association provide that the (optional) supervisory board is responsible for appointing and dismissing the managing director?

In the dispute over the dismissal of the investor Martin Kind as managing director of the Bundesliga football club Hanover 96, the Regional Court of Hanover and the Higher Regional Court of Celle have ruled in summary proceedings on the question of whether a managing director of a limited liability company can be dismissed by its shareholders' meeting if the articles of association provide, contrary to the statutory provision, that not the shareholders' meeting but the (optional) supervisory board is responsible for appointing and dismissing the managing director. In the specific case, both the Regional Court and the Higher Regional Court concluded that a resolution of the shareholders' meeting to dismiss the managing director was null and void. Irrespective of the individual questions and the fact that the decision is not legally binding or merely a reference decision in proceedings for interim relief, the decisions provide an opportunity to review one's own provisions in the articles of association and, if necessary, to improve them (Hanover Regional Court (LG), judgement of 16.8.2022 - 32 O 116/22 (not legally binding); Celle Higher Regional Court (OLG), reference decision of 8.9.2022 - 9 U 72/22).

At first glance, the legal issue and the facts of the case seem straightforward: The articles of association of a limited liability company (GmbH) stipulated that the power to dismiss a managing director did not lie with the general meeting of shareholders, but with an optional supervisory board of the company. The shareholders' meeting - in this case in the form of a single shareholder - ignored this and passed a resolution to dismiss the managing director, notwithstanding its lack of competence under the articles of association. The managing director defended himself in court, and the courts involved in the proceedings for in-

terim relief (the Hanover Regional Court in the first instance and the Celle Higher Regional Court on appeal) came to the seemingly obvious conclusion that the dismissal resolution was null and void.

On closer inspection, however, the legal situation is not so clear: At the very outset the law on defective resolutions in a limited liability company (GmbH) follows the model of rescission under stock corporation law (AktG). That defective resolutions are in principle not null and void, but only subject to rescission. In addition, the case raises a number of difficult and controversial issues. The decisions provide an opportunity to review and, where necessary, amend the provisions of articles of association.

This concerns three aspects in particular: First, the question of the permissibility of a transfer of power to a supervisory board as such (see I. below); second, the legal institution of resolutions that breach the articles of association (see II. below); and third, the particularities and interactions between articles of association and voting agreements (see III. below).

I. Transfer of power by statute

In a German private limited company (GmbH), the power to appoint and dismiss a managing director is vested in the general meeting of shareholders, which, according to sec. 46 no. 5 of the Act on Limited Liability Companies (GmbHG), can decide on the appointment and dismissal of a managing director. However, this statutory allocation of power is not rigidly prescribed; rather, it is a dispositive rule that applies only in the absence of special provisions in the articles of association (sec. 45 (2) GmbHG). In practice, such a shift in powers is often found if the articles of association provide for an (optional) supervisory or advisory board.

In principle, a transfer of powers to these optional bodies is not problematic. However, if it is provided for in the articles of association, it may be questionable whether the transfer of powers is to be understood as conclusive or whether the general meeting retains powers, at least in special cases, such as dismissal for cause. According to a controversial but prevailing view in literature, a final transfer of powers and the associated deprivation of the general meeting of its powers is possible. On the one hand, reference is made to the law of the parity co-determined limited liability company (paritätisch mitbestimmte GmbH), where a transfer of powers to the supervisory board is the legal rule. On the other hand, reference is made to the autonomy of the general meeting in drawing up the articles of association and in amending them to reverse the transfer of powers at any time. The latter was also the reasoning of the Hanover Regional Court in the underlying case:

"It is important to note that if the shareholders transfer the power to dismiss to another body in the articles of association, they may at the same time reserve the power to dismiss for cause. This was not done in the present case. A shareholders' meeting is free to amend the articles of association retrospectively. This speaks against a general power of the shareholders´ meeting to dismiss a managing director in deviation from the provisions of the articles of association if there is an important reason". (Hanover Regional Court, judgement of 16.8.2022 - 32 O 116/22 (not legally binding) = NZG 2023, 68, 71 (Rn 45, beck-online).

In practice, the company's own provisions in the articles of association should be reviewed against this background and, if necessary, clarified. If, contrary to the basic legal rule, the competence is transferred to a supervisory or advisory board, it may be advisable to clarify whether this is to be the case comprehensively and conclusively or whether the shareholders' meeting should not retain the decision-making power for special cases, such as dismissal for cause. If the latter is desired, it should be expressly reserved in the articles. In this case, it seems advisable to provide for further rules. For example, provisions should be included to prevent the immediate reappointment of the managing director, who has just been dismissed for cause by the general meeting, by the supervisory board, which remains in power to (re)appoint the managing director.

II. The legal concept of resolution transgressing the articles of association

The legal concept of resolution transgressing the articles of association (satzungsdurchbrechender Beschluss) is referred to when the shareholders of a corporation (Kapitalgesellschaft), with a majority that amends the articles of association, only wish to deviate from a provision of the articles of association for a specific individual case without permanently amending the articles of association for this purpose. In the present case, this became virulent because the sole shareholder, who was not authorised to do so under the articles of association, nevertheless passed a resolution to dismiss the managing director. The

sole shareholder did not want to change the articles of association permanently with his resolution, but wanted to breach them selectively for this individual resolution.

The legal concept of resolution transgressing the articles of association is intended to ensure this flexibility: It would be an unnecessary obstacle for the sole shareholder who only wants to deviate from the articles of association in a single case to have to comply with the special requirements of an amendment to the articles of association, in this case also the entry in the commercial register (sec. 54 GmbHG).

To this day, the legal concept of resolution transgressing the articles remains controversial in principle and in detail. Essentially, case law distinguishes between, on the one hand, selective breaches of the statutes and, on the other hand, breaches of the statutes that establish a status. The latter are invalid because if the effect of a resolution is not limited to the measure in question but has a more far-reaching effect that establishes a permanent state, the resolution cannot be favoured and is invalid to the extent that the requirements for an amendment of the statutes have not been met.

In practice, it is important to note that in the vast majority of cases, case law considers that the breach of the articles of association has the effect of establishing a status and therefore tends to invalidate the relevant resolutions. The legal uncertainties that already exist in this respect are exacerbated by this line of case law. This is also confirmed by the decision of the Hanover Regional Court, which, in a specific case, justified the establishment of a status by the resolution with regard to a purely factual deadlock on the supervisory board.

Irrespective of the jurisprudential discussion on this legal institution, practice has to deal with the existing legal uncertainties. If flexibility is to be provided for in order to avoid a formal amendment of the articles, appropriate opening clauses can be used in the articles. At the specific point of the provision to be made more flexible, it should then be provided that, in deviation from the basic rule, an appropriately formulated exception can be considered under more specific conditions.

III. Relationship between articles of association and voting agreements

In this context, special attention must also be paid to any agreements under the law of obligations. In the underlying case, the Celle Higher Regional Court had interpreted the so-called "Hanover 96 Agreement" as a voting agreement. Since the sole shareholder of the limited liability company (GmbH) undertook in this purely contractual agreement to make changes to the articles of association only with the consent of the other party to the agreement, the court considered this to be a voting agreement which, in the specific case, would apply not only to a formal change to the articles of association but also to resolutions transgressing the articles of association.

If a shareholder violates a purely contractual voting obligation, this does not affect the voting and thus the validity of the resolution. However, this may not be the case if all shareholders or a single shareholder have entered into a specific voting commitment. Separate enforcement of the obligation arising from the voting agreement would then be "mere fiddling". For reasons of procedural economy, therefore, the ineffectiveness of the vote under company law, and thus of the resolution, must exceptionally be assumed.

In addition, the Celle Higher Regional Court considered the voting behaviour to be particularly disloyal because the sole shareholder was obviously aware of the commitment entered into and had attempted to undermine it by passing a resolution transgressing the articles of association.

From the point of view of corporate practice, it should be emphasised against this background that, in exceptional cases, agreements under the law of obligations may also have to be taken into account in exceptional cases when assessing the effectiveness of resolutions. When interpreting such agreements, all the circumstances of the individual case must be taken into account, which may also include the specific corporate and group relationships. This should also be taken into account when drafting the relevant agreements.

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