PRIVATE LAW

The Use of the Shell of a Limited Liability Company

By Ruediger Veil

I. Introduction

There are four stages leading up to the creation of a limited liability company (*GmbH*). The founders agree upon the memorandum and articles (1), appoint a manager (2) and pay in the capital contribution (3). They must then notify the relevant District Court (*Registergericht*) in order to register the company in the Commercial Register (*Handelsregister*) (4). This notification must include a confirmation from the manager that the requisite minimum proportion of the proprietor's capital contributions has been paid in and is freely available for his or her use.

Usually, the District Court needs several weeks to process the notification. In the meantime, the founders of the limited liability company are personally responsible for the company's obligations.[1] In order to avoid these risks, shelf companies, limited liability companies which are created in advance (*Vorratsgesellschaften*), are, after registration in the Commercial Register, sold to entrepreneurs. The object of such a company is to administer its own property. It does not operate an enterprise, but merely exists as the core of a company. The selling of such companies „off the shelf" has proved to be a prosperous business. This may be changed after the *Bundesgerichtshof's* (Federal High Court of Justice) decision of Dec. 9 th., 2002.[2] The *Bundesgerichtshof* found that the use of the shell of a limited liability company has to be interpreted as a new economic incorporation (*wirtschaftliche Neugründung*).

In making this decision, the *Bundesgerichtshof's* aim was to protect the creditors of the company. Part II of this comment provides the background information on the decision of Dec. 9 th., 2002, and Part III will consider its consequences.

[1] See BGHZ 134, p. 333; BGH NJW 1998 p. 1645.

[2] BGH decision of Dec. 9 th., 2002, published in: BB 2003, p. 324; see also *Altmeppen*, NZG 2003, p. 145 et seq.; *Goette*, DStR 2003, p. 300 et seq.; *Peetz*, GmbHR 2003, p. 229 et seq.; *Thaeter/Meyer*, DB 2003, p. 324 et seq.

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II. The *Bundesgerichtshof's* Decision of 9 December 2002

In 1992 the *Bundesgerichtshof* had held that incorporating a limited liability company which would not operate an enterprise was permitted by statute. However, the founders did have to clarify in the articles the company's purpose, namely that of administering its own property.[3] Admittedly, the *Bundesgerichtshof* did not include in its judgement whether the creditors of the company should be protected when the company is sold to an entrepreneur who subsequently activates the company. This question has therefore been the subject of much controversy.

Some authors proposed that the rules for the formation of a limited liability company should apply, whereby the manager must register the necessary amendments to the articles (e.g. the new purpose of the company, its new name and its registered office) in the commercial register (Section 7, 8, 9 GmbHG). Thus, the manager has to ensure that the capital is still paid up and is at his or her free disposal. If not, the new shareholders have to make a payment on the initial contribution.[4] Some Courts even hold that the manager should be liable for the company's debts on the grounds that Sec. 11 Sub. 2 GmbHG could be applied analogously.[5]

Other authors argued that there was no need to establish a specific concept that protects the company's creditors. The problems could be solved by the application of the general provisions of the civil law, especially Sec. 826 of the Civil Code (*Bürgerliches Gesetzbuch*). Furthermore, the shareholders could be personally liable according to the general principles of „piercing the corporate veil".[6] Such liability arises if reference to the company is deemed to contravene the principle of good faith, e.g. if the company is notably undercapitalized.[7] Some *Oberlandesgerichte* (Higher Regional Courts) followed this assumption.[8]

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[3] BGHZ 117, 323, p. 331 et seq.

[4] *Ulmer*, BB 1983, 1123, p. 1125 et seq.; *Priester*, DB 1983, p. 2291, 2295 et seq.; Baumbach/*Hueck/Fastrich*, GmbHG, 17th. ed. 2000, § 3 Rdn. 15; *Altmeppen*, NZG 2003, p. 145, 146.

[5] LG Hamburg, GmbHR 1997, p. 895; LG Hamburg GmbHR 1983, p. 219; OLG Hamburg GmbHR 1985, p. 335.

[6] See *Bommert*, GmbHR 1983, p. 209, 212; *Raiser*, Recht der Kapitalgesellschaften, 3th. ed. 2001, § 26 Rdn. 33; *Bärwaldt/Schabacker*, GmbHR 1998, p. 1005, 1010 et seq.; *Heerma*, GmbHR 1999, p. 640, 642 et seq.; *Banerjea*, GmbHR 1998, p. 814, 815 et seq.

[7] See *Heermann*, Materielle Unterkapitalisierung und sog. Haftungsdurchgriff, in: Theobald (Hrsg.), Entwicklungen zur Durchgriffs- und Konzernhaftung, 2002, p. 11, 44 et seq.

[8] BayObLG GmbHR 1999, p. 607, 608 et seq.; OLG Frankfurt/Main, GmbHR 1992, p. 456.

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In the decision of Dec. 9 th., 2002 the *Bundesgerichtshof* declined the latter proposal on the thesis that it gave the creditors inadequate protection. However, the „problems of an effective protection of creditors" are only hinted at in the decision: It may be possible, that the company, if it has prematurely commenced business under its new purpose, has already suffered losses or that the originally paid capital has been taken out again.[9]

It is doubtful that the same limited liability company can be incorporated twice. Founding a limited liability company and buying the shell of a company are two different transactions. In the latter case the company has already gone through the entire incorporation process. Its founders have paid the capital contribution and the District Court has checked whether or not the company has been duly constituted. It may be possible that contributions were repaid to the shareholders after the registration of the company. However, this is generally allowed in any other company that is registered in the commercial register. The slogan like operating argument seems to be unconvincing solely with the concept of the „new economic incorporation" *(wirtschaftliche Neugründung)*.[10]

Furthermore, it is not beneficial to interpret the process of founding a shelf company and later selling and operating this company as consistent.[11] While it is clear that this process is completed upon registration of the amendments to the articles, it is nevertheless incompatible with the legal concept of a limited liability company to say that a typical GmbH is created for the sole purpose of its „use for entrepreneurial purposes"[12].

Therefore, it is not relevant that the company has not operated an enterprise yet. After all, the main argument of the *Bundesgerichtshof*, that the use of the company's shell is a „new economic incorporation", is not convincing. The transaction does not endanger the creditors interests significantly.

III. Consequences

Though the *Bundesgerichtshof's* decision fails to convince us, it is nevertheless binding. However, the decision leaves some issues remaining. On the one hand, the *Bundesgerichtshof* holds that the capital has to be available in the full amount, when the manager registers the necessary amendments to the articles in the Commercial Register. The manager has to ensure that the capital is still paid up and is at his or

[9] BGH BB 2003, p. 324, 325.

[10] See also BayObLG GmbHR 1999, p. 607, 608; *Heerma*, GmbHR 1999, p. 640, 643; *Bärwaldt/Schabacker*, GmbHR 1998, p. 1005, 1009.

[11] That is the main argument of *Goette*, DStR 2003, p. 300.

[12] *Goette*, DStR 2003, p. 300.

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her free disposal. If necessary, the new shareholders have to make a payment on the initial contribution. On the other hand, the *Bundesgerichtshof* did not comment on whether Sec. 11 Sub. 2 GmbHG should be applied analogously and whether the shareholders are personally liable that the minimum amount of the nominal capital (25.000 Euro) is still available („*Unterbilanzhaftung*")[13].

According to the *Bundesgerichtshof's* decision the foundation of the company is only finalized after the registration of the amendments to the articles. The situation does not generally differ from the usual process of incorporating a GmbH. Therefore, as a consequence of the interpretation of the process as a „*wirtschaftliche Neugründung*", the new shareholders are personally, jointly and severally liable pursuant to the so-called „*Unterbilanzhaftung*".[14] The deadline for this liability is the point in time when the manager assures according to Sec. 8 Sub. 2 GmbHG that the requisite minimum proportion of the proprietor's capital contributions has been paid in and continues to lie at his or her disposal.

It is more difficult to judge whether the manager can be hold liable for the company's debts under Sec. 11 Sub. GmbHG. According to this provision any person who acts in the name of the company prior to registration shall be personally liable. It protects creditors by naming a debtor, because the rules of the GmbHG securing the capital are not yet applicable.[15] This is the only purpose of the provision! However, the shareholders and the manager are bound by these rules, when a shelf company has been founded! In this case, contributions to the share capital may not be repaid to shareholders either (Sec. 30 Sub. 1 GmbHG). Shareholders have to return to the company any benefits received from it contrary to this provision (Sec. 31 Sub. 1 GmbHG). Therefore, applying Sec. 11 Sub. 2 GmbH analogously would contravene the very aim of the law.[16]

IV. Conclusion

It is doubtful whether entrepreneurs can still avoid their personal liability by founding a company whose only object is to administer its own property. „Using" such a company by operating a business is interpreted by the *Bundesgerichtshof* as a

[13] See BGHZ 80, p. 129, 140.

[14] *Ulmer*, BB 1983, p. 1123, 1126; *Lutter/Hommelhoff*, GmbHG, 15th. ed. 2000, § 3 Rdn. 8; *Ahrens*, DB 1998, p. 1069, 1071; *Thaeter/Meyer*, DB 2003, p. 539, 540.

[15] BGHZ 80, p. 182, 184; *Raiser*, Recht der Kapitalgesellschaften, 3th. ed. 2001, § 26 Rdn. 114.

[16] OLG Brandenburg, GmbHR 1998, p. 1031, 1032; Hachenburg/*Ulmer*, GmbHG, 8th. ed. 1992, § 3 Rdn. 40; *Priester*, DB 1983, p. 2291, 2296; *Heerma*, GmbHR 1999, p. 640, 645; Scholz/*K. Schmidt*, GmbHG, 9th. ed. 2001, § 11 Rdn. 99.

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new economic incorporation. Though the slogan like operating argument is unconvincing the courts and lawyers will nevertheless have to obey the decision.
The main consequence is that the share-capital has to be available in the full amount when the manager registers the necessary amendments to the articles (e.g. the new purpose of the company, its new name and its registered office) in the commercial register. The manager has to ensure that the capital is still paid up and is at his or her free disposal. Therefore it is possible that the new shareholders may have to make a payment on the initial contribution.
In most cases these requirements should not be a problem. However, two issues were not resolved by the *Bundesgerichtshof*, so a legal uncertainty still remains: firstly, whether the manager of the company can be hold personally liable for the debts of the company under Sec. 11 Sub. 2 GmbHG, and secondly, whether the new shareholders are personally liable for the fact that the minimum amount of the nominal capital (25.000 Euro) is still available. In my opinion the first question has to be answered in the affirmative, the second one not. Therefore, founding a limited liability company in advance - a shelf company - can still be advantageous.

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