

KNOETZL

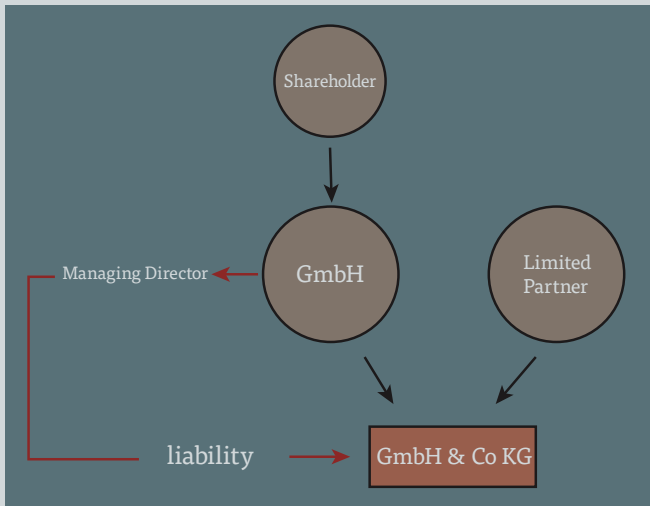
GMBH & CO KG

DIRECT LIABILITY OF THE MANAGING DIRECTOR
OF THE GMBH

The Austrian Supreme Court maintains its controversial protection of limited partnerships (and in particular their creditors) via the analogous application of the capital maintenance rules and the direct liability of the general partner's directors to the GmbH & Co KG.

If you are a director of the GmbH in a GmbH & Co KG, be aware that capital maintenance rules may apply. This means that the only benefits the GmbH & Co KG may distribute to its limited or general partners or to the general partner's shareholder(s) is distributable profit. Any other non-arms-length transactions or payments, including in particular loans, are null and void. You may be directly liable to the GmbH & Co KG (and its creditors) for the repayment of any such benefits.

KNOWHOW



The construct of a GmbH & Co KG, i.e. a limited partnership where the general partner is a company with limited liability (i.e. a GmbH), is often used to minimise liability to creditors while maintaining the (tax) benefits of a limited partnership.

However, in cases where the sole general partner is a corporate entity and not a natural person, the Austrian Supreme Court tends to apply the rules governing corporate entities analogously, where it feels the creditors require protection.

DIRECT LIABILITY OF THE GMBH'S DIRECTOR TO THE GMBH & CO KG

In a recent case (6 Ob 171/15p), the managing director of the general partner (GmbH) had caused the limited partnership to grant unsecured, non-arms-length loans of EUR 25 million to the sole shareholder of the GmbH.

In this context the Austrian Supreme Court confirmed and clarified its controversial ruling on the liability of the general partner's managing director: the managing director of a GmbH that is acting as the general partner of a GmbH & Co KG may become directly liable to the limited partnership under the rules governing the liability of managing directors of a company with limited liability (GmbH), if

- the limited partner, the GmbH's shareholders and the managing director are identical or if
- the GmbH's only function is to act as managing director of the limited partnership (GmbH & Co KG).

In such cases the GmbH's director may become liable to the partnership (in this case as enforced by the receiver in the partnership's insolvency proceedings) in analogy to Sec 25 of the

Act on Companies with Limited Liability (GmbHG).

The point is that the GmbH is being used as an **artificial intermediary** and that the director of the GmbH is effectively acting for the limited partnership, so that his actions affect the partnership directly. Consequently, the courts reason there is no reason to release him from his responsibility and liability to the GmbH & Co KG.

While it is true that the partnership can base any claims for damages caused by bad management against the GmbH and can then attach the GmbH's claims against its director, this may not be sufficient to protect the partnership (its creditors). This is especially true if the GmbH becomes insolvent. In the case at hand, the GmbH was, while not insolvent, in any event devoid of assets; it would have become insolvent once the partnership filed its claim.

CAPITAL MAINTENANCE RULES

If none of the general partners of a limited partnership are "real" (i.e. natural) persons, the Austrian Supreme Court applies the **capital maintenance** rules of Sec 82 et seq of the Act on Limited Liabilities (GmbHG) applied **analogously** to benefits granted to the shareholders of the general partner (the GmbH) as well as to benefits granted to the limited partners.

This means that a limited partnership where the sole general partner is a GmbH is prohibited from granting any benefits to its partners or to the shareholders of its general partner, save for the distribution of dividends.

In the case at hand the managing director of the general partner (GmbH) had caused the limited partnership to **grant loans to the sole shareholder of the GmbH**. This was deemed a violation of capital maintenance rules.

The Austrian Supreme Court held the question of whether the managing director of the GmbH **knew** that these loans would not be repaid to the limited partnership to be irrelevant. Since at the time the loans were granted (2007) the Austrian Supreme had already ruled that the capital maintenance rules were to be applied analogously to such limited partnerships (2 Ob 225/07p), the managing director – as "expert" within the meaning of Sec 1299 of the Austrian Civil Code – must have been aware that these loans were unlawful.

The court also rejected the argument that a director of a GmbH is not liable when all its **shareholders have approved** the damaging act: shareholder resolutions that are null and void by law do not exculpate the director. This includes in particular resolutions that violate rules that serve to protect the corporation's creditors and to maintain the corporation's capital.



STATUTE OF LIMITATIONS

The limited partnership's claim against the GmbH's director is subject to the **five-year statute of limitations** under Sec 25 para 6 of the Act on Companies with Limited Liability, rather than the general 3-year statute of limitations.

