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Seminar für Handels-, Schifffahrts-
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Seminar

The two-tier system in Germany and Italy

Prof. Dr. Heribert Hirte, LL.M. (Berkeley)

The responsibility of the supervisory board and the manager

b) The responsibility of the manager

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von

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Table of Content

List of Abbreviations

AktG	Stock Company's Act
BGB	Civil Code
GmbHG	Law on the Private Limited Company
InsO	Insolvency Act
PLC	Private Limited Company
StGB	Penal Code

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A. Introduction

This paper discusses the responsibilities of a manager of a German Private Limited Company (PLC). The work comprehends the responsibility of managers in respect to the administrated company, the shareholders and the counterparty of the company according to the civil law. The responsibility in regards to public bodies, employees of the company and other third parties is not discussed in this paper.

The responsibility and the duties of the manager are explained in four chapters as follows:

Chapter I: Principle article on the responsibility of managers of the German Corporate Law (§ 43 I, II GmbHG – Act on the PLC);
Chapter II: Special duties that are established primarily to protect the company including its shareholders;
Chapter III: Special duties that focus on the protection of both the company and its counterparties; and
Chapter IV: Special duties that protect primarily the counterparties

B. The manager of a German Private Limited Company

I. The designation of a manager

The German law states that the shareholders of a PLC must designate at least one manager (§ 46 no. 5 GmbHG) for their company; a PLC without a manager cannot be registered in the Commercial Register.[1] According to § 6 II 1 GmbHG manager can be any natural person that is not restricted in his capability to conclude contracts. The shareholders are free to elect a

[1] Raiser § 32 Rz. 5.

shareholder or any third person for this position. The designation can be established either in the articles of incorporation or in a separate shareholders' agreement. Pursue to § 39 GmbHG the manager has to be registered in the Commercial Register.

II. Exclusion from the possibility to become manager

The German corporate law highlights various reasons that exclude a person from being appointed as a manager. According to § 6 II 3 GmbHG a person is excluded from the managerial position if he is sentenced for an insolvency crime in the terms of §§ 283 to 283d StGB (Penal Code). Once the sentence becomes final this person must not accept the position of a manager for next five years. In addition, a decision of juridical body or a pubic authority which prohibits the execution of certain professions may exclude this person from becoming a manager in the respective area of the prohibition (§ 6 II 2 GmbHG).

III. Tasks and duties

According to § 35 II 2 GmbHG the manager represents the company both in juridical proceedings and any other matters. Following this there are the two main assignments: The manager has to administrate the business of the company (intern accountability) and has to represent the company towards the counterparties (extern accountability).

Among others the manager is accountable for:

- the management of the daily business of the company;
- the bookkeeping and the preparation of the annual financial statements (§ 41 GmbHG, §§ 264, 242 HGB);
- the convocation of shareholders' meetings (§ 49 GmbHG);
- providing information to the shareholders (§ 51a GmbHG);

- the filing of the actual list of shareholders to the Commercial Register (§ 40 GmbHG);
- the registrations of any other issues regarding the Commercial Register (§ 78 GmbHG);
- the filing of the opening of insolvency procedures in the case of inability to pay or in case of over-indebtedness (§ 64 GmbHG, § 15 InsO – Insolvency Act); and
- the representation of the company in any juridical procedures (§ 35 I GmbHG)[2]

IV. Termination

The designation of a manager according to § 38 I GmbHG can be rescinded at any time and without any specific reason by the shareholders. Nevertheless it is possible to restrict the revocability of a manager in the articles of incorporation to that extend that the rescission can only be based upon an important reason (§ 38 II GmbHG).

On the contrary, the right of the manager to resign from his charge cannot be limited by the shareholders. A contract with the manager may include certain time limits or formal requirements for the execution of his right of resignation. However the right to resign as such cannot be excluded.[3] If the manager resigns in a situation without adhering to the established requirements, the resignation will still be valid but the company or the shareholders may have the right to claim damages from the manager.[4]

C. Responsibility of the manager

The responsibility and liability of the manager are explained in four chapters according to the subject that the individual duty primarily protects.

[2] Schmidt § 36 II 1a; Raiser § 32 Rz. 1, 7.
[3] Goette DStR 1998, 938, 942.
[4] BGHZ 78, 82 93; BGHZ 121, 257, 262; Khatib-Shahidi/Bögner BB 1997, 1161 ff.; Kießling/Eichele GmbHR 1999, 1165 f.

I. Principal article on the responsibility – § 43 I, II GmbHG

The principle article on the responsibility of the manager of a German PLC is § 43 I, II GmbHG. § 43 I, II GmbHG explains the general rule on responsibility for the duty of care for the manager: "Managers of a PLC shall employ the diligence of a prudent businessman in the matters of the company. Managers who violate their obligation are jointly and severally liable against the company for the resulting damage." This principle article applies in any case in which a certain duty is not regulated by a specific article.[5] The ancient definition of the Reichsgericht is still applicable: "The manager must handle with the diligence of a person in an executive position who fulfils duties on financial matters of others on a trust basis."[6]

The primary duties of the manager resulting from § 43 I, II GmbHG can be outlined in the following four groups:

1. The manager must adhere to the rules and restrictions that are established in the *law, articles of incorporation and bylaws*.[7]

2. He must work together with his colleagues on a *co-operative basis*. He has to inform whenever necessary the colleagues on important changes of strategy, decisions and developments.[8] He is also responsible for the execution of decisions of the shareholders' meeting.

3. He is incumbent by the *obligation of confidentially*.[9] He is bound to secrecy on any confidential information and strategy planning, business secrets and in any other confidential matters.

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[5] OLG Jena NZG 2001, 86, 87; Michalski/Haas § 43 Rz. 40.
[6] RGZ 64, 254, 257.
[7] BGHZ 133, 370, 375 = NJW 1997, 130 = ZIP 1996, 2017; BGH GmbHR 1994, 390, 392; KG NZG 1999, 400, 401; Scholz/Schneider § 43 Rz. 50 ff.; Rowedder/Schmidt-Leithoff/Koppensteiner § 43 Rz. 10.
[8] Dahnz S. 27; Rowedder/Schmidt-Leithoff/Koppensteiner § 43 Rz. 15: Hommelhoff ZIP 1983, 383, 389 ff.
[9] Dahnz S. 27.

4. The most important duty is the obligation of *professional and diligent management of the business* of the company. Included in this obligation are as follows:

- the organisation and surveillance of the companies' structure;
- the regular surveillance of the financial status and liquidity;
- the diligent preparation of all important decisions; and
- the guidance and surveillance of the subordinate personnel.

The manager must ensure that the decisions and actions serve the interest of the company.[10] These have to comply with the objective of the company set out in the articles of incorporation.[11]

He must take into consideration the underlying principles of economy and has to avoid taking significant risks for the company.[12] But it is important to note that the managerial decisions bear inherent risks. That is why the manager is provided with a wide discretionary in running the business.[13] The principles of the ARAG/Garmenbeck decision[14] do apply for the manager of a PLC[15]:

The manager has a wide range of discretion when running the business of the company that embraces both the conscious acceptance of risks and the danger of errors of judgement and false estimation. The liability of the manager starts not until the clear transgressions of those limits that are established by the principle that the manager has to prepare diligently the basis and the facts for future decisions and that the decision must be taken with good care and executed exclusively in the interest of the company.[16]

Following this ruling the diligent research and preparation of decisions or any other managerial action is crucial for the liability of the manager. He is obliged to evaluate the effects and impacts of the different possibilities.

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[10] Scholz/Schneider § 43 Rz. 56 ff.; Dahnz S. 27; Rowedder/Schmidt-Leithoff/Koppensteiner § 43 Rz. 11.

[11] Plück/Lattwein S. 70 f.

[12] Dahnz S. 27; Plück/Lattwein S. 71; Braun S. 49; Scholz/Schneider § 43 Rz. 70; v. Werder DB 1995, 2177; v. Werder/Maly/Pohle/Wolf DB 1998, 1193.

[13] Dahnz S. 27.

[14] BGH 135, 244; Kindler ZHR 1998, 101.

[15] BGH NJW 2003, 358, 359; OLG Stuttgart GmbHR 2003, 835, 836; LG Berlin ZIP 2004, 73, 74; Lutter/Hommelhoff § 43 Rz. 14; Michalski/Haas § 43 Rz. 64 ff.

The manager should seek for assistance internally and externally if he lacks knowledge or experience in certain areas that are very complex or exceptional.[17] He may take risks for the company; but the bigger the risk is the more careful he has to be in the research and preparation of the managerial operation. Overall, he must carefully evaluate the costs and benefits of the risk.[18]

As a conclusion from the above the manager's discretion in respect to the execution of managerial actions is wide but limited. The judgement on whether an action transgresses those limits depends very much on the individual case. An action must not be in breach with underlying acknowledged economic principles.[19] The limit of a managerial action in any case is the law, the articles of incorporation, the bylaws as well as the objective of the company.

In order to claim damages from the manager, the manager's failure has to rest upon his personal negligence or intention.[20] § 43 I GmbHG contains an objective standard for negligence. Personal deficits like age, lack of experience or capability of the manager do not exclude his negligence.[21] If the manager accepts a managerial position without having the necessary knowledge or capability, then yet the acceptance of the position has to be considered to be negligent.[22]

II. Special duties that primarily protect the company including its shareholders

This chapter contains those special duties that are established primarily to protect the company against defaults by the manager.

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[16] BGH 135, 253 f.
[17] Heisse S. 32.
[18] Dahnz S. 27.
[19] BGH ZIP 2002, 213, 214.
[20] Lutter/Hommelhoff § 43 Rz. 20; Rowedder/Schmidt-Leithoff/Koppensteiner § 43 Rz. 9.
[21] BGH NJW 1983, 1856, 1857; OLG Celle NZG 2000, 1178, 1179; OLG Koblenz GmbHR 1991, 416, 471; Dahnz S. 37; Rowedder/Schmidt-Leithoff/Koppensteiner § 43 Rz. 8; Scholz/Schneider § 43 Rz. 165.
[22] BFH GmbHR 2000, 1211, 1212 f.; Roth/Altmeppen § 43 Rz. 4.

1. Infringement of shareholders' directives

According to § 37 I GmbHG the manager is obliged to follow and to execute the directions of the shareholders. But the individual shareholder himself is not in the position to issue any instructions to the manager. The only approved event for doing so is the shareholders' meeting, i.e. the only directive that legally binds the manager is a decision made in the shareholders' meeting. Thus, any instruction made by the majority shareholder or the minority shareholder outside the shareholders' meeting does not obligate the manager.[23]

When decisions are made in the shareholders' meeting, the manager cannot reject the execution of this decision with the argument that the decision is contrary to the companies' objective.[24] Nevertheless he must give notice to the shareholders if he believes that the decision is contrary to the interest of the company.[25] The manager is not obligated to follow the shareholders' directions in the case that it is contrary to the law, to the articles of incorporation or *contra bonus mores.*[26]

If the manager infringes upon a legally valid directive of the shareholders' meeting, he will be liable for the damages caused pursuant to § 43 II GmbHG.[27]

2. Non-competition

The GmbHG does not include a special non-competition clause for the manager. But the duty of non-competition originates from the duty to loyalty and applies even in the case that it is not mentioned expressively in

[23] Ebert GmbHR 2003, 444; Meyke Rz. 50; Rohwedder/Schmidt-Leithoff/Koppensteiner § 43 Rz. 44; Hachenburg/Mertens § 43 Rz. 69; Scholz/Schneider § 37 Rz. 31; Lutter/Hommelhoff § 43 Rz. 22.
[24] OLG Frankfurt DB 1997, 922.
[25] Rohwedder/Schmidt-Leithoff/Koppensteiner § 43 Rz. 28; Lutter/Hommelhoff § 43 Rz. 22; Konzen NJW 1989, 2977, 2985.
[26] Meyke Rz. 47.
[27] Plück/Lattwein S. 86; Roth/Altmeppen § 37 Rz. 29, § 43 Rz. 7; Lutter/Hommelhoff § 37 Rz. 40.

the articles of incorporation, the bylaws or the employment contract.[28] The duty of non-competition prohibits commercial operations of the manager for personal account and third party accounts.[29] He must utilise the business opportunities in favour of the company and not for his personal benefit.[30] It is irrelevant whether the company would have obtained notice of the business opportunity or whether the company would be able to take advantage of the opportunity without the manager.[31]

The substantial range of the duty to non-competition is determined by the objective of the company set out in the articles of incorporation, no matter whether the company effectively executes business in the stated area.[32] Furthermore, the manager is banned from carrying out activities within the area where the company effectively executes business, regardless whether this area is covered by the objective of the company or not.[33]

The shareholders' meeting is free to exempt the manager from the non-competition obligation. But there are many conflicting opinions on the required majorities and the appropriate procedures.[34]

If the manager undertakes any actions that infringe upon his non-competition duty, firstly the company has the right to claim that the manager ceases those actions.[35] Secondly, if the manager causes damages to the company the latter may claim liability according to § 43 II GmbHG, § 823

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[28] BGHZ 49, 30; BGH WM 1964, 1320; = GmbHR 1965, 194, BGH GmbHR 1977, 43; BGH WM 1979, 1328, 1330; BSG NZA 1991, 159; Hachenburg/Mertens § 43 Rz. 39; Rowedder/Schmidt-Leithoff/Koppensteiner § 43 Rz. 19; v. d. Osten GmbHR 1989, 450; Scholz/Schneider § 43 Rz. 126; Eckard/v. Zwoll S. 123; Plück/Lattwein S. 89.

[29] Scholz/Schneider § 43 Rz. 126; Eckard/v. Zwoll S. 123, Plück/Lattwein S. 89; Roth/Altmeppen § 43 Rz. 21.

[30] BGH WM 1983, 498, 499, 1985, 1443; OLG Frankfurt GmbHR 1998, 376, 378; Roth/Altmeppen § 43 Rz. 21; Rowedder/Schmidt-Leithoff/Koppensteiner § 43 Rz. 19; Weissner S. 136 ff., 142 ff.; Polley S. 126 ff.; Merkt ZHR 1995, 423, 428 ff.; Plück/Lattwein S. 89 f.

[31] BGH WM 1976, 77; OLG Frankfurt/M. GmbHR 1998, 377; Roth/Altmeppen § 43 Rz. 21; Scholz/Schneider § 43 Rz. 126.

[32] BGHZ 89, 170; BGH DStR 1993, 1266; Plück/Lattwein S. 89.

[33] Scholz/Schneider § 43 Rz. 127; Lutter/Hommelhoff Anh § 6 Rz. 22.

[34] Armbrüster ZIP 1997, 1269, 1277; Röhricht WPg 1992, 766, 781 f.; Rowedder/Schmidt-Leithoff/Koppensteiner § 43 Rz. 19; Lutter/Hommelhoff Anh § 6 Rz. 23; Baumbach/Hueck/Zöllner/Noack § 35 Rz. 43; Roth/Altmeppen § 43 Rz. 22; Scholz/Schneider § 43 Rz. 139b.

[35] Plück/Lattwein S. 90; Lutter/Hommelhoff Anh § 6 Rz. 24.

II BGB, § 266 StGB or § 826 BGB (Civil Code).[36] The manager has to cede to the company the rights obtained and any other benefits received from the business.[37] Beyond § 43 II GmbHG the claim can be based upon §§ 675, 667 BGB or §§ 687 II, 667 BGB.[38]

3. Contracts between the manager and the company

According to § 181 BGB basically the manager is prohibited to enter into any contracts between himself and the administrated company. But the German civil law contains three exceptions to this rule.

Firstly, the manager is allowed to fulfil a legally and correctly established obligation of the company (§ 181 BGB) e.g. receiving the salary or payment for outlays.[39]

Moreover the manager is allowed to sign contracts between himself and the company if the company is entirely legally benefiting from the contract.[40]

Finally, the most important exception is the companies' permission (§ 181 BGB). The prevailing opinion holds that in case of a *general* permission the permission has to be included in the articles of incorporation, which pursuant § 10 I 2 GmbHG has to be filed to the Commercial Register.[41] In the event of giving permission to an *individual* contract, a straightforward shareholders' agreement is sufficient.[42] The permission is given basically by

[36] Lutter/Hommelhoff Anh § 6 Rz. 23; Scholz/Schneider § 43 Rz. 131.
[37] Hachenburg/Mertens § 43 Rz. 39; Lutter/Hommelhoff Anh § 6 Rz. 23; Scholz/Schneider § 43 Rz. 131a; doubtfully Meyer-Landruth/Miller/Niehus § 43 Rz. 23; Rowedder/Schmidt-Leithoff/Koppensteiner § 43 Rz. 19.
[38] BGHZ 38, 171; BGHZ 39, 2 f.; Scholz/Schneider § 43 Rz. 131b; Hachenburg/Mertens § 43 Rz. 41.
[39] Hachenburg/Mertens § 35 Rz. 58; Roth/Altmeppen § 35 Rz. 64; Scholz/Schneider § 35 Rz. 96; Lutter/Hommelhoff § 35 Rz. 19; Baumbach/Hueck/Zöllner/Noack § 35 Rz. 130.
[40] BGHZ 59, 236, 240 f. = NJW 1972, 2262; BGHZ 94, 232, 234 ff. = NJW 1985, 2407; BGH NJW 1989, 2542, 2543; Roth/Altmeppen § 35 Rz. 64; Scholz/Schneider § 35 Rz. 97; Lutter/Hommelhoff § 35 Rz. 19.
[41] BGH GmbHR 1983, 269; BGH GmbHR 1991, 261, 262 = NJW 1991, 1731; OLG Hamm DNotZ 1996, 816, 817 ff.; OLG Frankfurt GmbHR 1997, 349; Claussen, S. 146 ff.; Scholz/Schneider § 35 Rz. 98, 124; dissenting: Roth/Altmeppen § 35 Rz. 66.
[42] Scholz/Schneider § 35 Rz. 99; Rowedder/Schmidt-Leithoff/Koppensteiner § 35 Rz. 35.

the shareholders' meeting. If a supervisory board is required by § 52 I GmbHG, then according to § 112 AktG (Stock Companies Act) the supervisory board is in the position to give permission or to approve contracts between the manager and the company.[43]

If the manager enters into a contract without permission of the shareholders or the supervisory board, the contract may be approved subsequently by the shareholders' meeting.[44] Otherwise the manager incurs the liability according to § 179 BGB.[45]

III. Special duties that focus on the protection of both the company and its counterparties

This chapter explains those duties that are established in order to protect both the company and the counterparties of the company. The protection is put into effect often by the means of protecting the registered share capital of the company. With this the legislator intends to prevent the insolvency of the company as this secures both the share value for the shareholders and the companies' liquidity to pay the demands of the counterparties.

1. Convocation of the shareholders' meeting

According to § 49 GmbHG the manager must convene the shareholders' meeting in three cases:

[43] Scholz/Schneider § 35 Rz. 99; Baumbach/Hueck/Zöllner/Noack § 35 Rz. 129; Rowedder/Schmidt-Leithoff/Koppensteiner § 35 Rz. 35; Roth/Altmeppen § 35 Rz. 67.

[44] BGHZ 75, 358, 362; BGH WM 1971, 1082, 1084; Scholz/Schneider § 35 Rz. 99; Lutter/Hommelhoff § 35 Rz. 19.

[45] BFH GmbHR 1997, 34, 35; BFH GmbHR 1991, 332; BFH GmbHR 1996, 60, 61; OLG Frankfurt GmbHR 1997, 349; Münch. Komm. BGB/Schramm § 181 Rz. 37; Rowedder/Schmidt-Leithoff/Koppensteiner § 35 Rz. 35; Baumbach/Hueck/Zöllner/Noack § 35 Rz. 131; Lutter/Hommelhoff § 35 Rz. 19; Scholz/Schneider § 35 Rz. 109.

1. To start with, the manager has to call for the shareholders' meeting if this is expressively required by the *law or by the articles of incorporation*.[46] For instance § 50 I GmbHG provides that shareholders that hold together at least 10% of share capital of the company can demand from the manager to call for the meeting.

2. In addition, the manager must call for the shareholders' meeting in the *interest of the company* as and when it is necessary.[47]
In the interest of the company, it is necessary to convene the shareholders' meeting for special matters as required by the law. This is the case *inter alia* in the following situations:

- when making changes to the articles of incorporation (§ 53 I GmbHG);
- increase or decrease of the registered capital (§§ 55 I and 58 GmbHG);
- subsequent contributions of shareholders (§ 26 GmbHG);
- transfer of those shares with restricted transferability in terms of § 15 V GmbHG;
- designation and dismissal of liquidators (§ 66 GmbHG); and
- liquidation of the company (§ 66 GmbHG) as well as all cases stated in § 46 GmbHG.

According to the prevailing opinion the manager has to convene the shareholders' meeting in the interest of the company in fundamental and extraordinary matters[48] or with respect to businesses that bear an extraordinary risk.[49] Examples of such matters are the changes of a long

[46] Roth/Altmeppen § 45 Rz. 10; Scholz/Schneider § 49 Rz. 18.
[47] In detail Zitzmann S. 63 ff, 107 ff.
[48] BGH NJW 1973, 1039; BGH NJW 1984, 1461, 1462; OLG Karlsruhe NZG 2000, 264, 267; Hachenburg/Mertens § 37 Rz. 4, 10; Daumke/Keßler S. 163; Lutter/Hommelhoff § 49 Rz. 11; Scholz/Schmidt § 37 Rz. 12 f., § 49 Rz. 20.
[49] Roth/Altmeppen § 49 Rz. 9.

standing business policy[50], the establishment of affiliated companies[51] and the transfer of divisions of the business to third parties[52].

3. Finally, § 49 III GmbHG regulates the special duty to convene the shareholders' meeting if half of the registered capital of the company is lost. In this case, the manager must call for the shareholders' meeting as soon as the annual or any other financial statement reveals this loss. Half of the registered capital is lost when the net assets of the company are lower than half of the registered capital.

If the manager fails to convene the shareholders' meeting in the scenario above, an established supervisory board[53] may call for the meeting according to § 52 I GmbHG, § 111 III AktG or the shareholders may claim the convocation.[54] Further the company can claim damages pursuant to § 43 II GmbHG.[55] On the contrary, the counterparty of the company cannot claim damages if the manager does not fulfil its duty to convocation.[56] This applies even in the case of § 49 III GmbH.[57] The latter article does indirectly protect the counterparties of the company too, but the prevailing opinion holds that only the company has the right to the claim.

2. Exceeding the power

According to § 37 II GmbHG basically the manager has unlimited power to act on behalf of the company.[58] The (external) power to enter into contracts

[50] BGH NJW 1991, 1681, 1682 = GmbHR 1991, 197 = BB 1991, 714; Kort ZIP 1991, 1274, 1275 ff.; Rowedder/Schmidt-Leithoff/Koppensteiner § 37 Rz. 11; Scholz/Schneider § 49 Rz. 20.
[51] BGHZ 83, 122, 131 f. = NJW 1982, 1703; Scholz/Schneider § 49 Rz. 20.
[52] OLG Hamburg GmbHR 1992, 43, 45; Lutter/Leinekugel ZIP 1998, 225, 231 f.; Rowedder/Schmidt-Leithoff/Koppensteiner § 37 Rz. 11; Scholz/Schneider § 49 Rz. 20.
[53] Scholz/Schmidt § 49 Rz. 29.
[54] Scholz/Schmidt § 49 Rz. 30, § 50 Rz. 8.
[55] Thümmel Rz. 153; Roth/Altmeppen § 49 Rz. 9.
[56] Meyer-Landrut § 49 Rz. 15; Hachenburg/Hüffner § 49 Rz. 29; Ulmer GmbHR 1984, 256; 260; Scholz/Schmidt § 49 Rz. 31.
[57] Meyer-Landrut § 49 Rz. 15; Hachenburg/Hüffner § 49 Rz. 29; Ulmer GmbHR 1984, 256; 260; Scholz/Schmidt § 49 Rz. 31.
[58] BFH DB 1993, 460; Lutter/Hommelhoff § 35 Rz. 3; Rowedder/Schmidt-Leithoff/Koppensteiner § 37 Rz. 46; Scholz/Schneider § 35 Rz. 22 ff.

cannot be restricted neither by the articles of incorporation nor by a decision of the shareholders' meeting.[59] This means that internal restrictions do not affect the external power of the manager.

Following this rule, the manager is able to enter into an agreement that is beyond the objective of the company[60] as well as into contracts that are disadvantageous for the company and favourable for the manager himself[61]. This rule is established in order to protect the counterparties of the company.

The *doctrine of the abuse of power* provides an exception to this rule. Under the terms of this doctrine a contract is not binding for the company in the case that the manager exceeds internal restrictions and maliciously works together with the counterparty of the company (so-called collusion).[62] The same applies if the manager consciously exceeds internal restrictions and the counterparty either knows about it (i.e. without working together with the manager)[63] or at least that the transgression of the restriction was notorious for the counterparty (so-called evidence).[64] Pursuant to the still prevailing opinion, it is not sufficient for the application for this doctrine that the counterparty only could have had knowledge about the transgression.[65]

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[59] Roth/Altmeppen § 37 Rz. 37; Scholz/Schneider § 35 Rz. 22.

[60] OLG München GmbHR 1992, 533, 534; Scholz/Schneider § 35 Rz. 22; Lutter/Hommelhoff § 35 Rz. 3; Roth/Altmeppen § 35 Rz. 13; Rowedder/Schmidt-Leithoff/Koppensteiner § 37 Rz. 46.

[61] Roth/Altmeppen § 37 Rz. 37.

[62] RGZ 134, 43, 56; RGZ 136, 359, 360; RGZ 145, 315; BGH NJW 1966, 1911; BGH WM 1976, 658, 659 = DB 1976, 1278; BGH WM 1985, 997, 998; BGH NZG 2004, 139, 140; OLG Hamm GmbHR 1997, 999, 1000; Roth/Altmeppen § 37 Rz. 39; Rowedder/Schmidt-Leithoff/Koppensteiner § 37 Rz. 54; Scholz/Schneider § 35 Rz. 133.

[63] BGHZ 50, 112, 114 = NJW 1968, 1379; Roth/Altmeppen § 37 Rz. 39; Rowedder/Schmidt-Leithoff/Koppensteiner § 37 Rz. 54.

[64] BGH WM 1976, 658, 659 = DB 1976, 1278; BGH WM 1980, 953, 954; BGH NJW 1984, 1461, 1462; BGH NJW 1985, 2409, 2410; BGH WM 1988, 704, 706; BGH NJW 1994, 2082, 2083 = DB 1994, 2074 = ZIP 1994, 859; BGH ZIP 1996, 68, 69; KG WM 1982, 405, 407; OLG Stuttgart NZG 1999, 1009, 1010; OLG Zweibrücken NZG 2001, 763; John in FS für Mühl, S. 349, 359; Münch. Komm. BGB/Schramm § 164 Rz. 117; Baumbach/Hueck/Zöllner/Noack § 37 Rz. 40; Zacher GmbHR 1994, 842, 846; Roth/Altmeppen § 37 Rz. 42; Scholz/Schneider § 35 Rz. 137; Flume AT I 2 § 10 II d, AT II § 45 II 3.

[65] BGH NJW-RR 1989, 642; Lutter/Hommelhoff § 35 Rz. 14; Roth/Altmeppen § 35 Rz. 42.

Legal consequence for the abuse of power is that the contract is not legally binding for the company according to § 177 I BGB. But the company may choose to approve the contract if it appears to be advantageous.[66] If the company does not approve the contract subsequently, on a first glance the manager would be liable against the counterparty pursuant to § 179 I BGB. But in fact the manager is exempted from the liability according to § 179 III 1 BGB because the counterparty either knew about the transgression or had to have knowledge about it.[67] Another opinion especially within the jurisprudence grants the company the defence of bad faith according § 242 BGB.[68]

In summary, when the manager breaches internal restrictions and if the contract is valid, he is then liable against the company according to § 43 II GmbHG. If the contract is not binding for the company, a damage cannot occur.
The manager is never liable against the counterparty when breaching internal restrictions because either the contract is valid due to unlimited (external) power of the manager or in the case of application of the doctrine of abuse of power, § 179 III 1 BGB prevents the liability of the manager.

3. Duty to file for insolvency

According to § 64 I GmbHG the manager must file for insolvency when the company is unable to pay its debts or is over-indebted.

Pursuant to § 17 II InsO the company is *unable to pay* if the company is unable to settle its due demands. The inability to pay has to be demarcated from both the lack of willingness to pay and the merely stagnation to settle

[66] OLG Stuttgart NZG 1999, 1009, 1010; OLG Zweibrücken NZG 2001, 763; Zacher GmbHR 1994, 842, 848; Michalski GmbHR 1991, 349, 356; Schmidt § 10 II 2 d; Flume AT II § 45 II 3; Scholz/Schneider § 35 Rz. 139; Lutter/Hommelhoff § 35 Rz. 12; Münch. Komm. BGB/Schramm § 164 Rz. 111; Roth/Altmeppen § 37 Rz. 44; Hachenburg/Mertens § 37 Rz. 50.
[67] Schmidt § 10 II 2 d; Roth/Altmeppen § 37 Rz. 44.
[68] BGHZ 50, 112, 114; BGH WM 1980, 953, 954; BGH NJW 1984, 1461, 1462; BGH WM 1988, 1199, 1200 = NJW 1988, 3012.

debts. Neither the lack of willingness to pay[69] nor the stagnation to settle debts[70] constitute the inability to pay debts. Stagnation in this term means the transitory absence of liquid assets to settle debts, which can occur for instance due to delayed payment of debtors of the company.[71]

Another reason that contributes to the duty to file for insolvency is the *over-indebtedness* of the company. Pursuant to § 19 II InsO, over-indebtedness applies when the debts of the company exceed its assets. Following this, the manager has to keep track the financial situation of the company. If it appears that the company enters into financial difficulties, he then has to prepare a balance sheet.[72] If the going-concern of the company appears to be more likely to happen than the liquidation, then the manager has to value the assets with its "going-concern values".[73] If the liquidation is more likely, then he must use the "liquidation values" for the asset valuation.

In the event of inability to pay or over-indebtedness occurs to the company, the manager has to file for insolvency without undue delay but latest within three weeks after becoming knowledge of the facts.[74] If the manager does not file for insolvency within the stipulated time, he will be liable to the counterparties of the company pursuant to § 64 I GmbHG, § 823 II BGB. This is because the prevailing opinion holds that only the creditors of the company are protected by § 64 I GmbHG and not the company itself or its shareholders.[75]

With respect to the creditors' claims one has to distinguish: Creditors that already became creditors of the company *before* the date that the duty to file

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[69] Nerlich/Römermann/Mönning § 17 Rz. 13, 21; Frankf. Komm. InsO/Schmerbach § 17 Rz. 6; Scholz/Schmidt Vor§ 64 Rz. 14; Lutter/Hommelhoff § 64 Rz. 7.
[70] Eckhardt/v.Zwoll S. 131.
[71] RGZ 50, 39, 41 f.; BGH WM 1975, 6; Rowedder/Schmidt-Leithoff § 63 Rz. 26.
[72] Lutter/Hommelhoff § 64 Rz. 16.
[73] Klumpp S. 28 f.; Rowedder/Schmidt-Leithoff § 63 Rz. 71; Lutter/Hommelhoff § 64 Rz. 15.
[74] Plück/Lattwein S.82.

for insolvency came into existence; these creditors can claim as damage the difference between the amount they in fact received from the remaining assets of the company and the amount that they would have had received if the manger had filed for insolvency on time.[76] According to recent jurisprudence those creditors that became creditors *after* the duty emerged, they can claim all the money they lost due to the insolvency of the company.[77] This is because the latter would not have entered into a contract with the company at this time anymore after knowing about the insolvency proceedings.[78]

4. Payments after inability to pay or over-indebtedness

According to § 64 II GmbHG the manager is liable to the company for restitution of payments made after the inability to pay has occurred or after the over-indebtedness has been ascertained. With this rule the legislator intends to prevent the undue preference of certain creditors at the expense of others as well as the diminution of the insolvency assets as whole.[79]

The definition of inability to pay and over-indebtedness is discussed in the chapter above.

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[75] BGHZ 29, 100, 102 ff.; 75, 96, 106 = NJW 1979, 1823, 1825 ff. = BB 1979, 1625, 1627; BGHZ 126, 181, 190 = NJW 1994, 2220, 2222 = BB 1994, 1657, 1659; BGHZ 138, 211, 214 = NJW 1998, 2667 = WM 1998, 944, 945; Hachenburg/Ulmer § 64 Rz. 47; Meyer-Landrut/Miller/Niehus § 64 Rz. 15; Lutter/Hommelhoff § 64 Rz. 41; Baumbach/Hueck/Schulze-Osterloh § 64 Rz. 90; Rowedder/Schmidt-Leithoff § 64 Rz. 38; Klumpp S. 29; Plück/Lattwein S. 83; dissenting: Glozbach S. 77; Roth/Altmeppen § 64 Rz. 94.

[76] BGHZ 126, 181, 190 = NJW 1994, 2220, 2223 = ZIP 1994, 1103, 1107; BGHZ 138, 211, 222 = NJW 1998, 2667, 2670 = WM 1998, 944, 945; Daumke/Keßler S. 235; Lutter/Hommelhoff § 64 Rz. 47; Rowedder/Schmidt-Leithoff § 64 Rz. 42; Hachenburg/Ulmer § 64 Rz. 53.

[77] BGH GmbHR 1995, 126, 131, 227; BGH NJW 1999, 2182, 2183; BGH ZIP 2003, 1713, 1714; OLG Köln NZG 2001, 411; OLG Thüringen GmbHR 2002, 112; Lutter DB 1994, 129, 135; Medicus DStR 1432, 1435; Daumke/Keßler S. 235 f.; Kübler ZGR 1995, 481, 493 f.; Bork ZGR 1995, 505, 512 ff.; Haas DStR 2003, 423, 427 ff., Rowedder/Schmidt-Leithoff § 64 Rz. 44; Lutter/Hommelhoff § 64 Rz. 48.

[78] BGHZ 126, 181, 192 = GmbHR 1994, 539 = NJW 1994, 2220 = ZIP 1994, 1103; Grube/Maurer GmbHR 2003, 1461, 1463.

[79] BGHZ 143, 184, 186; BGH ZIP 2001, 235, 239; BGH ZIP 2003, 1005, 1006; Goette DStR 2003, 887, 893; Glozbach S. 50; Baumbach/Hueck/Schulze-Osterloh § 64 Rz. 79; Lutter/Hommelhoff § 64 Rz. 58; Daumke/Keßler S. 239; Rowedder/Schmidt-Leithoff § 64 Rz. 26; partially dissenting: Scholz/Schmidt § 64 Rz. 23.

Payment in the term of § 64 II GmbHG not only means the transfer of money but also any benefit to a creditor which reduces the companies' assets, like e.g. the delivery of goods, the transfer of rights and provision of services.[80]

As for the liability of the manager the § 64 II 1 GmbHG seems to require that the over-indebtedness is reflected in the financial statement or that the manager positively is aware about it. But according to the prevailing opinion it is sufficient even if the manager could have had knowledge on the over-indebtedness of the company.[81]

Pursuant to § 64 II GmbHG only the company is in the position to claim liability of the manager. Because this article indirectly intends to protect the creditors of the company, the shareholders' meeting neither can exempt the manager nor subsequently can approve the payment (§§ 64 II 3, 43 III 3 GmbHG).[82] In the event of undue payment the manager has to compensate the company the entire amount.[83] The prevailing opinion holds, if the company receives an equivalent value in exchange for the payment, then the manager can reduce his liability by the received amount, because of this compensation the company did not suffer any loss in the sum of its assets.[84]

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[80] BGH 126, 181, 194; OLG Düsseldorf GmbHR 1996, 616; Wilhelm ZIP 1993, 1833,1836; Eckhardt/v.Zwoll S. 143; Roth/Altmeppen § 64 Rz. 80; Baumbach/Hueck/Schulze-Osterloh § 64 Rz. 81; Lutter/Hommelhoff § 64 Rz. 59; Hachenburg/Ulmer § 64 Rz. 40; Rowedder/Schmidt-Leithoff § 64 Rz. 27 ff.; Scholz/Schmidt § 64 Rz. 23.

[81] BGHZ 143, 184, 185 = NJW 2000, 668 = GmbHR 2000, 182 = ZIP 2000, 184; OLG Hamm NJW-RR 1993, 1445, 1447; OLG Düsseldorf GmbHR 1993, 159; Scholz/Schmidt § 64 Rz 25; Lutter/Hommelhoff § 64 Rz. 59, 62; dissenting: Schulze-Osterloh in FS für Bezzenberger, S. 415, 425 f.

[82] Baumbach/Hueck/Schulze-Osterloh § 64 Rz. 85; Lutter/Hommelhoff § 64 Rz. 64.

[83] BGHZ 146, 264, 278 ff. = NJW 2001, 1280, 1283 = GmbHR 2001, 190, 194; Rowedder/Schmidt-Leithoff § 64 Rz. 35.

[84] BGH NJW 1974, 1088, 1089; BGH ZIP 2003, 1005, 1006; OLG Brandenburg GmbHR 2002, 910, 911; Lutter/Hommelhoff § 64 Rz. 64; Glotzbach S. 26; Rowedder/Schmidt-Leithoff § 64 Rz. 35; Scholz/Schmidt § 64 Rz. 34; dissenting: Baumbach/Hueck/Schulze-Osterloh § 64 Rz. 84.

5. Payments to the shareholders

According to § 43 III 1 GmbHG the manager is liable for damages if, contrary to the provision of § 30 GmbHG, payments were made out of the assets of the company which are required for the preservation of the registered share capital.

This so-called deficit cover is given if – after the payment – the net assets are lower than the amount of the registered share capital.[85] As seen the manager is responsible that the net assets do not fall below the amount of the registered capital as a result of the payment itself. Of course, are the net assets already from the beginning not sufficient to cover the registered share capital, then the manager must not make *any* further payment to the shareholders.[86] Otherwise he will be liable pursuant to § 43 III 1 GmbHG.[87]

Payment in the terms of § 43 III GmbHG is not only the transfer of money. Additionally, payment is considered through the disposal of goods, the cession of rights, the set-off of claims, the release of titles as well as the simple non-assertion of claims.[88] But on the other hand not every transfer of money constitutes a payment in terms of § 43 III GmbHG. If the company pays compensation to a shareholder based upon a shareholders' tort claim or compensation for outlays, these payments do not fall into the scope of § 43 III GmbHG. Even the payment of profit distribution is not considered as a payment in terms of this article, but only if it rests upon a legally effective resolution of the shareholders' meeting.[89]

According to § 30 GmbHG only payments to shareholders are prohibited. Payment to third parties are not included in the prohibition of § 43 III 1

[85] Meyke Rz. 113; Lutter/Hommelhoff § 30 Rz. 2a.
[86] KG NZG 2000, 1224, 1225; BGH NJW 1990, 1730, 1732; Lutter/Hommelhoff § 30 Rz. 2.
[87] BGH GmbHR 2002, 549, 550; BGH ZIP 1990, 451, 453.
[88] BGH WM 1984, 137; BGH ZIP 2000, 1251 ff.; Lutter/Hommelhoff § 30 Rz. 8; de Angelis/Bodenbenner MDR 2003, 1145, 1146.
[89] In detail Scholz/Westermann § 30 Rz. 19; Hachenburg/Goerdeler/Müller § 30 Rz. 59 ff.; Rowedder/Schmidt-Leithoff/Pentz § 30 Rz. 31 f.; BGHZ 13, 49, 54 = NJW 1954, 1157; KG NZG 2000, 1224, 1225.

GmbHG.[90] But, if the third party is associated with the shareholder, then the payment again falls into the scope of the prohibition.[91]

These provisions are established only to protect the amount of the assets of the company not the type of assets. For this reason the manager is not liable if the company obtains an equivalent value for the payment.[92]

Initially, if a prohibited payment occurs the manager is responsible to demand from the receiving shareholder that the latter should return the obtained money or benefit to the company. Further the manager is liable – according to § 31 I GmbHG together with the respective shareholder[93] – against the company.[94] The manager has to compensate the company until the amount that the registered share capital is covered again.[95]

The counterparties of the company cannot claim the restitution neither from the shareholder nor from the manager. According to § 43 III 1 GmbHG only the company has the right to the claim.[96] But in order to protect the counterparties, § 43 III 1 GmbHG can only be waived by the shareholders if the compensation from the manager is not required for the satisfaction of the creditors of the company (§ 43 III 3 GmbHG).[97]

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[90] BGH ZIP 1998, 793, 795; in detail Mülbert ZGR 1995, 578, 601 ff.; Steinbeck WM 1999, 885, 888; Lutter/Hommelhoff § 30 Rz. 2a, 24.

[91] Eingehend Altmeppen in FS für Kropff, S. 641 ff.; Steinbeck WM 1999, 885, 888; Rowedder/Schmidt-Leithoff/Pentz § 30 Rz. 21 ff.; BGH NJW 1992, 2023 ff.; BGHZ 81, 365, 369; KG NZG 2000, 1224, 1225; OLG Hamm GmbHR 1999, 1095, 1097.

[92] Meyke Rz. 71.

[93] BGHZ 81, 252, 259 = ZIP 1981, 974, 976; BGH ZIP 1990, 451, 453 = NJW 1990, 1730, 1732; Hachenburg/Goerdeler/Müller § 30 Rz. 46; Baumbach/Hueck/Fastrich § 31 Rz. 8; Rowedder/Schmidt-Leithoff/Pentz § 31 Rz. 69.

[94] Altmeppen ZIP 2002, 961; BGH = NJW 1992, 1166, 1167 = ZIP 1992, 108 = WM 123, 124; Meyke Rz. 116; Baumbach/Hueck/Zöllner/Noack § 43 Rz. 49; Roth/Altmeppen § 43 Rz. 83; Scholz/Schneider § 43 Rz. 198.

[95] OLG Jena NJOZ 2007, 324, 330; Altmeppen ZIP 2002, 961; Roth/Altmeppen § 43 Rz. 83; Rowedder/Schmidt-Leithoff/Pentz § 31 Rz. 13, 69.

[96] BGHZ 110, 342, 359; BGH NZG 2001, 893, 894 = GmbHR 2001, 771, 772; Lutter/Hommelhoff § 30 Rz. 1; Rowedder/Schmidt-Leithoff/Pentz § 30 Rz. 44.

[97] Kaffiné S. 131; Heisse S. 108 f.; Rowedder/Schmidt-Leithoff/Koppensteiner § 43 Rz. 4.

6. Credits that substitute equity capital

§§ 32 a and b GmbHG provide rules regarding loans given by shareholder to the company: If a shareholder grants a loan to the company in a situation when an diligent businessman would instead have contributed capital to it, then the shareholder within the insolvency proceedings can only assert the claim for repayment of the loan as subordinated creditor.

The law does not contain any rules for the question of what shall apply outside the insolvency proceedings. For this reason the Federal Court of Justice applied the principles of §§ 30 GmbHG onwards and decided that such a loan must not be repaid to the shareholder, as far as the loan is necessary to cover the registered share capital (so-called jurisprudence rules).[98]

The situation that a diligent businessman would have contributed capital to the company (so-called crisis of the company) occurs when an objective third party would not grant a loan to the company or at least would not grant the loan due to common market conditions.[99] As to whether or not the company incurs a crisis, the following circumstances can give indication:

- cancellation of loans;
- refusal of other creditors to participate in a joint loan;
- inexistence of credit facilities with banks;
- lack of trust with respect to the shareholders; and
- the products of the company;
- lack of profit expectations;
- absence of hidden reserves;
- loss of registered capital;
- poor relation between revenues and expenses; and

[98] BHG 90, 370 = ZIP 1984, 698 = NJW 1984, 1891

[99] BGH WM 1972, 74 ff.; BGH 81, 252, 255 f.; Fleck in: FS für Werner, S. 107, 117 f.; BGH ZIP 1987, 1541 = GmbHR 1988, 58; BGH ZIP 1990, 98, 99 f.; Plück/Lattwein S.79.

- non-payments of debts.[100]

But all circumstances have to be taken into consideration and evaluated objectively.[101]

If a shareholder concedes a loan within the crisis of the company, the loan must not be returned to the shareholder as long as it is needed to cover the registered share capital (§ 30 I GmbHG analogous). The loan is considered as a capital contribution of the shareholder.

These principles do not only apply when the loan is granted within the crisis of the company. If the loan was conceded before the company entered into a crisis, then the shareholder has to demand its return within appropriate time. This means if the shareholder does not demand the restitution within two or three weeks[102] after the company enters into a crisis then the same rules as above applies: The loan will be considered as a capital contribution and must not be returned as far as it is necessary to cover the registered share capital (§ 30 I GmbHG analogous).[103] With respect to the loan in this situation the shareholders is entitled to an extraordinary right of cancellation according to §§ 490 I, 543 I BGB.[104]

Is the loan considered as a capital contribution then the manager is liable against the company according § 43 III GmbHG analogous if he returns the loan to the shareholder.[105]

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[100] Goette DStR 1997, 2027, 2031; BGH ZIP 1996, 273, 274; BGH ZIP 1996, 275, 276 f.; OLG Celle ZIP 1996, 1994; OLG Celle DStR 2000, 1484; OLG Düsseldorf GmbHR 1997, 350, 351; OLG Stuttgart NZG 1998, 308, 310; Lutter/Hommelhoff § 32a/b Rz. 20 ff.

[101] BGH 119, 201, 207; BGH WM 1987, 1488, 1489; Hachenburg/Ulmer §§ 32a, b Rz. 49, 57; Lutter/Hommelhoff § 32a/b Rz. 19; Goette DStR 1997, 2027, 2031.

[102] BGH NJW 1995, 658, 659; BGH GmbHR 1997, 501, 503; BGH NZG 1998, 771, 772; BGH NJW 1998, 3200; OLG Düsseldorf GmbHR 1999, 1039; 1040.

[103] BGH ZIP 1996, 273, 274; Plück/Lattwein S. 79.

[104] Lutter/Hommelhoff § 32a/b Rz. 49; Roth/Altmeppen § 32a Rz. 35; Baumbach/Hueck/Fastrich § 32a Rz. 43.

[105] Hachenburg/Ulmer § 30 Rz. 18; Roth/Altmeppen § 43 Rz. 83; Scholz/Schneider § 43 Rz. 193; Lutter/Hommelhoff § 43 Rz. 35; Baumbach/Hueck/Zöllner/Noack § 43 Rz. 49; Rowedder/Schmidt-Leithoff/Pentz § 32a Rz 222; zweifelnd Rowedder/Schmidt-Leithoff/Koppensteiner § 43 Rz 32; dissenting: Haas S. 66; Michalski/Haas § 43 Rz. 219.

IV. Special duties that focus primarily on the protection of the counterparty of the company

1. Acquisition of own shares

According to § 43 III 1 GmbHG the manager is liable to pay damages if the company acquires its own shares under violation of § 33 GmbHG.

§ 33 GmbHG states the conditions that the company has to comply with if it wishes to acquire its own shares.[106]
The first prerequisite is that the share capital contribution has been *fully paid* (§ 33 I GmbHG). The reason for this provision is that in the case of acquisition of "non-paid" shares, the right to the capital contribution ceases because of so-called confusion, which exists because the company is the creditor and debtor of the capital contribution at the same time.[107]
The second prerequisite for the purchase of own shares is that the acquisition costs can be paid out of *assets exceeding the registered share capital* and that the reserve required by § 272 IV HGB can be set up without reducing the share capital or a reserve to be set up is in accordance with the articles of incorporation which may not be used for payments to shareholders (§ 33 II GmbHG).

According to the prevailing opinion the company must not acquire *all* existing shares because in this case the company itself would be its own and only shareholder. If this is the case for more than a transitory time, then the company has to be liquidated.[108]

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[106] Lutter/Hommelhoff § 33 Rz. 1; Rowedder/Schmidt-Leithoff § 33 Rz. 2.
[107] Lutter/Hommelhoff § 33 Rz. 4; Roth/Altmeppen § 33 Rz. 5; Rowedder/Schmidt-Leithoff/Pentz § 33 Rz. 2.
[108] Not even transitory acceptable: Lutter/Hommelhoff § 60 Rz. 24; Rowedder/Schmidt-Leithoff/Pentz § 33 Rz. 27; Rowedder/Schmidt-Leithoff/Rasner § 60 Rz. 13; Hachenburg/Hohner § 33 Rz. 91; Hachenburg/Ulmer § 60 Rz. 60; transitory acceptable: Paulik S. 92; Roth/Altmeppen § 33 Rz. 22; Scholz/Westermann § 33 Rz. 44; Scholz/Emmerich § 13 Rz 9; in general acceptable: Kreutz in FS für Stimpel, S. 379 ff.

When the company acquires own shares for which the capital contribution is not fully paid yet (§ 33 I GmbHG), both the purchase agreement and the disposal of the shares are invalid.[109] If the contribution is fully paid but the provision of § 33 II GmbHG is violated then only the purchase agreement is invalid but the disposal still effective.[110]

Thus, before acquiring own shares the manager diligently has to ensure whether the prerequisites mentioned above are fulfilled.[111] If the manager acquires shares even though the requirements are not met, he will be liable according to § 43 III 1 GmbHG.[112] Firstly, he has to claim restitution of the purchase price – paid by the company – from the (former) shareholder pursuant to § 31 I GmbHG or § 812 BGB.[113] If the purchase price cannot be obtained then the manager has to compensate the company for this amount.[114]

2. Absence of the GmbH-addition

Rules regarding the name of the company can be found in § 4 GmbHG. The shareholders are basically free to choose any name for its company[115] but have to follow the restrictions of §§ 18 and 30 HGB.

Further § 4 GmbHG contains provision that the company's name has to include the addition "Gesellschaft mit beschränkter Haftung" (Private Limited Company) or a common abbreviation of this. With this provision the legislator intents to protect the company's potential counterparties: A potential counterparty shall know that it is entering into a contract with a

[109] BT-Drucksache 8/1347, S. 41; Scholz/Westermann § 33 Rz. 15; Roth/Altmeppen § 33 Rz. 4, 9; Lutter/Hommelhoff § 33 Rz. 5; Rowedder/Schmidt-Leithoff/Pentz § 33 Rz. 13; Klasen, S. 183.

[110] BT-Drucksache 8/1347, S. 42 f.; Klasen, S. 184; Rowedder/Schmidt-Leithoff/Pentz § 33 Rz. 36; Lutter/Hommelhoff § 33 Rz. 9; Roth/Altmeppen § 33 Rz. 26 f.; Scholz/Westermann § 33 Rz. 29.

[111] Scholz/Westermann § 33 Rz. 31; Hachenburg/Hohner § 33 Rz. 47; Rowedder/Schmidt-Leithoff/Pentz § 33 Rz. 39.

[112] Rowedder/Schmidt-Leithoff/Pentz § 33 Rz. 15.

[113] Lutter/Hommelhoff § 33 Rz. 9; Baumbach/Hueck/Fastrich § 33 Rz. 14; Roth/Altmeppen § 33 Rz. 27; Scholz/Westermann § 33 Rz. 16, 29; Rowedder/Schmidt-Leithoff/Pentz § 33 Rz. 37 f.

[114] Lutter/Hommelhoff § 33 Rz. 9; Scholz/Westermann § 33 Rz. 16.

legal person and that the liability of its shareholders is limited to their capital contribution. This is because in civil law the basic principle of unlimited liability applies; if a person enters into a contract with another party, then the person may take for granted that the liability of the other party is unlimited, unless the other party discloses its limited liability.[116]

If the manager enters into a contract on behalf of the company then he must give notice that he acts on behalf of a legal person with limited liability: the PLC. Following this, § 35 III GmbHG provides that when the manager signs, he has to add the (full) name of the company – including the PLC-addition. Furthermore, any business letter and order form has to carry among others the full name of the company (§ 35a GmbHG).

But in order to facilitate business, as an exception to this rule, in the case of verbal negotiations or if the manager enters into contracts by the means of telephone conversation he is not obligated to notify the counterparty on the limited liability.[117] If the counterparty requests for the existence of any limitation of liability then the manager of course must inform the other party accordingly.[118]

If the manager fails to inform the counterparty on the limitation of liability although this is required, then he is liable to the counterparty with his personal assets jointly and severally together with the company.[119] The right to claim damages from the manager is excluded if the counterparty either

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[115] Roth/Altmeppen § 4 Rz. 4 ff.; Lutter/Hommelhoff § 4 Rz. 4 ff.

[116] BGHZ 64, 11, 17; BGH NJW 1975, 1166, 1167 = GmbHR 1975, 129; BGH NJW 1981, 2569 = GmbHR 1982, 154; BGH NJW 1990, 2678; 2679 = BB 1990, 653; BGH 1991, 2627; OLG Naumburg NJW-RR 1997, 1324; OLG Naumburg GmbHR 2000, 1258; Sandberg S. 41; Wellenkamp DB 1994, 869; Bühler GmbHR 1991; 356; Meyke Rz. 370 f.; Roth/Altmeppen § 4 Rz. 49; Lutter/Hommelhoff § 43 Rz. 55; Rowedder/Schmidt-Leithoff § 4 Rz. 56; Rowedder/Schmidt-Leithoff/Koppensteiner § 43 Rz. 81; Scholz/Emmerich § 4 Rz. 54; Scholz/Schneider § 43 Rz. 222.

[117] BGHZ 64, 11, 17 = NJW 1975, 1166; BGH NJW 1981, 2569, 2570 = GmbHR 1982, 154; BGH NJW 1996, 2645 = DB 1996, 1915; OLG Hamm 1995, 661; OLG Hamm NJW-RR 1988, 1308, 1309; OLG Naumburg GmbHR 1997, 445, 446; LG Wuppertal NZG 2002, 297, 298; Meyke Rz. 372; Rowedder/Schmidt-Leithoff § 4 Rz. 56; Scholz/Emmerich § 4 Rz. 56; Roth/Altmeppen § 4 Rz. 49.

[118] BGH NJW 1981, 2569, 2570 = GmbHR 1982, 154; Rowedder/Schmidt-Leithoff § 4 Rz. 56.

[119] BGH NJW 1991, 2627, 2628 = ZIP 1991, 1004 = GmbHR 1991, 360; BGH NJW 1990, 2678, 2679; Roth/Altmeppen § 4 Rz. 49; Meyke Rz. 370, 374.

knew about the limitation of liability or must have known about it.[120] The burden of poof on this knowledge is incumbent on the manager.[121]

[120] BGH NJW 1975, 1166, 1167 = GmbHR 1975, 129; BGH NJW 1981, 2569, 2570 = GmbHR 1982, 154; LG Heidelberg GmbHR 1997, 446, 447; Sandberg S. 41; Meyke Rz. 374; Scholz/Emmerich § 4 Rz. 55; Roth/Altmeppen § 4 Rz. 49.

[121] BGHZ 64 11, 18 f.; BGH NJW 1975, 1166, 1167 = GmbHR 1975, 129; BGH NJW 1981, 2569, 2570 = GmbHR 1982, 154; LG Heidelberg GmbHR 1997, 446, 447; Sandberg S. 41 f.; Scholz/Emmerich § 4 Rz. 55; Meyke Rz. 374.