Caption: According to consistent case-law of the Federal Court of Justice [Bundesgerichtshof – BGH], shareholders can assert certain claims against a fellow partner as litigants in the way of “actio pro socio”. Up to now, it had been a matter of dispute whether or not the limited partner of a GmbH & Co KG is also granted the right to assert claims of a limited partnership against a third-party managing director of the GmbH & Co KG’s general partner. In its decision II ZR 255/16 dated 19.12.2017, the BGH denied this right.

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I. Characteristics of “*actio pro socio*”

“*Actio pro socio*” means the right of each shareholder to demand a fulfilment of obligations towards the company from their fellow partners and - if necessary - to pursue their claims through a judicial process. This minority right enables the sole shareholder to assertion of internal prerogatives whenever he cannot assert the claim independently due to insufficient management or authorization rights. The “*actio pro socio*”, therefore, is only applicable to so-called “*social entitlements*”, meaning company claims against each shareholder, with indirect or direct basis within the partnership agreement. The most relevant examples for such claims are all rights to payment of amounts due or compensation for damages due to the violation of contractual obligations or of management duties. Conversely, an “*actio pro socio*” can generally not be applied to assertion of claims against third parties, as in such cases, legal and contractual manage-

ment and representation authorization take precedence over the interest in legal enforcement of company claims. In exceptional cases, however, an "*actio pro socio*" is applicable to claims against third-parties. Such an exception is on hand, if the shareholder has a special interest in taking direct measures against the third-party.

II. No applicability of the "*actio pro socio*" to claims of a GmbH & Co. KG against the third-party manager of its general partner

1. Previous legal interpretation

The BGH considers such a special interest regarding the applicability of the "*actio pro socio*" in cases of assertion of claims of the limited commercial partnerships against its managing shareholder as feasible (BGH, II ZR 94/71 dated 2.7.1973). Based on this decision, the applicability of the "*actio pro socio*" with regard to claims against third-party managing directors of the GmbH & Co. KG's general partner had been assumed in literature. In this case as well, such a special interest should be acknowledged, as the managing director of a GmbH & Co. KG's general partner cannot be compared to just any debtor and therefore the interest is the same as it would be with an assertion of claims against the managing shareholder. However, the BGH had not yet ruled on such question.

2. The ruling of the BGH

With its ruling II ZR 255/16 of 19.12.2017, the BGH denied the applicability of the "*actio pro socio*" for assertion of claims by a GmbH & Co. KG against the third-party managing director of its general partner. Financial compensation from the defendant's third-party manager of the general partner had been demanded by the plaintiffs, the limited partners of the GmbH & Co. KG. This compensation was requested in consequence of an excessively priced property purchase and to be paid to the limited partnership. This property purchase had been made by the general partner, acting as managing shareholder of the GmbH & Co. KG. Hereby, the general partner had been represented by the defendant, the managing director, who had the authority of sole representation. The legal action has already been dismissed by the BGH as inadmissible, on the grounds that the plaintiffs, being limited partners, had no right for assertion of claims for the limited partnership against the managing director. They were not empowered to conduct litigation, which is a mandatory prerequisite for the admissibility of the legal action. This is due to the fact that the limited partners as plaintiffs had not asserted a claim for payment arising from their corporate relationship against their fellow partner. In fact, this claim was directed against the third-party managing director, a non-shareholder. To assert a claim of the GmbH & Co. KG is a management task, thus, has to be undertaken by the managing shareholder of the limited partnership, in this case the GmbH. Therefore, no shareholder had to tolerate a decision, made independently by an unauthorized shareholder and without respecting the management regulations, about a pursuit of claims through a judicial process against a third-party. The possibility of the BGH applying an "*actio pro socio*" (laid out within section 1) to its rulings of claims of a limited partnership against a managing partner does not cause any change, as an "*actio pro socio*" cannot be extended to claims against third-parties, for instance non-shareholders. In the view of the BGH, no necessity of extending the principles of the "*actio pro socio*" to cases just like the ones presented exist. The limited partners' right to take action against the third-party managing director of the general partner is also not required against the background, being likely that the third-party managing director will not bring any claims against himself. Between the general partner and the limited partnership, such a breach of duty causes a compensation claim that can be asserted by the limited partnership against the its general partner, which hereby is being held accountable for the breach of duty of its managing director. This compensation claim of the limited partnership against its general partner could be indisputably enforced in the way of an "*actio pro socio*" by each limited partner, and, thus, obtaining a title by litigation against the general partner and then execute against the general partner's claim towards its managing director.

III. Practical Consequences

The result of the ruling by the BGH: The principles of the “*actio pro socio*” cannot be applied to the judicial assertion of claims against the management of an GmbH & Co. KG’s general partner by the limited partners of such limited partnership, who are not shareholders of the general partner. Such a claim is generally inadmissible. Limited partners should assert claims against the general partner, the general partner can assert claims against its managing director. Within such constellation, the possibilities of enforcement of claims, with the GmbH through the appointment of a special representative in accordance with section 48 no. 8 GmbHG and with the limited partnership in analogous application of regulations, ought to be contemplated. Even though this had been declined by the BGH, one could contemplate including an empowerment of the limited partners to conduct litigation during the draw up of the partnership agreement of a GmbH & Co. KG, in order to create the possibility for the limited partners to take action against non-shareholders, who are debtors of the limited partnership’s general partner, so that it is within the limited partners’ right to assert claims in their own name.[/av_textblock] [/av_two_third][av_one_third min_height='' vertical_alignment='av-align-top' space='' margin='0px' margin_sync='true' padding='7px,0px,0px,0px' border='' border_color='' radius='0px' radius_sync='true' background_color='' src='' attachment='' attachment_size='' background_position='top left' background_repeat='no-repeat' animation='' custom_class='sy-only-desktop hide_on_print' av_uid='av-89kqun'] [av_sidebar widget_area='Sidebar Blog' av_uid='av-5g4wsv'] [av_textblock size='' font_color='' color='' av-medium-font-size='' av-small-font-size='' av-mini-font-size='' av_uid='av-k06qoa25' id='' custom_class='' admin_preview_bg='']

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