

## Inspection of the books by a retired limited partner

The Supreme Court (*Oberste Gerichtshof*) has changed its case-law on the right of a retired limited partner to inspect the books and accounts of a limited partnership. The information and control rights of a retired limited partner have to be asserted in non-contentious proceedings. Due to their flexibility, non-contentious proceedings are better suited to clarifying information claims. The Austrian Supreme Court had previously ruled that a retired partner has to assert such information and control rights in contentious proceedings.

What happened? A former limited partner and the heir of a former limited partner of a limited partnership requested that they be given access to the books and provided with information by the limited partnership (the defendant) by bringing an action in contentious proceedings. The defendant disputed the form of relief being sought, arguing that contentious proceedings were inadmissible.

Under Section 166 para. 1 of the Commercial Code (*UGB*), limited partners are entitled to receive the annual financial statements and verify their accuracy by inspecting the books of the limited partnership. If there is good cause, the right to information provided for in Section 166 para. 1 of the Commercial Code can be enhanced by the extraordinary control right enshrined in Section 166 para. 3 of the Commercial Code. In this respect, the court orders far-reaching rights regarding audits and inspections upon the application of a limited partner if there is an urgent need for immediate information and auditing and if the rights under para. 1 are insufficient. Whereas the claims of a limited partner with the status of shareholder are by operation of law to be heard in non-con-

tentious proceedings with regard to the enforcement of the extraordinary right of control under Section 166 para. 3 of the Commercial Code, there is no such explicit regulation for Section 166 para. 1 of the Commercial Code. According to the settled case-law, however, claims under para. 1 are also to be pursued in non-contentious proceedings. All information and auditing rights expire after the person ceases to hold the position of partner, but according to the settled case-law, such rights remain in full force and effect for the retired partner insofar as they relate to the period during which he/she held the position of partner.

In reaching its decision in case 3 Ob 667/80, the Supreme Court stated that in contrast to a limited partner with the status of shareholder, there is no doubt that a retired limited partner can demand his statutory right to inspect the books of the limited partnership only in contentious proceedings. In that same decision, the Supreme Court made reference to two further decisions in which it was correct for the retired partner to take legal action in contentious proceedings to enforce his right of control. The Supreme Court based its decision on the German legal position. According to the case-law of the German Federal Supreme Court, the control rights of a retired limited partner have to be asserted exclusively in contentious proceedings.

After the court of first instance granted the form of order being sought, the court of appeal declared the judgment of the court of first instance null and void. Contrary to the opinion of the court of first instance and the settled case-law of the Supreme Court, the right of a retired limited partner to inspect the books must be asserted in non-contentious proceedings. The Supreme Court as ap-



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pellate court now shares this view and has consequently disregarded its own settled case-law on the issue.

It is clear from the Supreme Court's current legal reasoning that there is no reason to make a distinction between those who have already ceased to be partners and those who are still partners. This is because the person who has ceased to hold the position of partner is entitled to all information and control rights only with regard to his position as partner. Further, the opinion espoused in the literature cited by the Supreme Court is that a person's current status as partner is not a relevant criterion for distinguishing between contentious and non-contentious proceedings. Furthermore, the retired partner continues to be entitled to pursue claims resulting from membership after he ceases to be a partner in order to enforce a legal position based on the person's former status as partner. Therefore, the reference to non-contentious proceedings should also be justified for the retired limited partner. Not least because the information claim of a retired limited liability company partner also has to be pursued in non-contentious proceedings. However, this is due to an explicit legal basis which is

lacking for the right of control of the retired limited partner under Section 166 of the Commercial Code.

Accordingly, the information and control rights of a retired partner under Section 166 of the Commercial Code must also be asserted in non-contentious proceedings. The only exception is if not only the control and monitoring rights of a partner are disputed as such, but also their factual and legal bases.

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