Personal Liabilities of Company Directors in German Law*

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I. Introduction

1. Types of companies in Germany (Aktiengesellschaft [AG] vs. Gesellschaft mit beschränkter Haftung [GmbH])

It might be helpful at the outset to say a few words about the types of companies found within the German system. Essentially the formal division of corporations in Germany is between stock corporations or Aktiengesellschaften (AG) and private limited companies (Gesellschaften mit beschränkter Haftung or GmbH). The differences between these two types of companies seem greater than those between the English public and private limited companies. AG and GmbH are governed by different laws, although some basic principles of corporate law apply equally to both types. As to the liability of directors, both forms have some rules in common, whereas other rules diverge. I will mention differences in the following where necessary.

2. Management board ("Vorstand") and supervisory board ("Aufsichtsrat")

A second specific feature of German corporate law is the separation between a management board ("Vorstand") and a supervisory board ("Aufsichtsrat").[1] This separation is obligatory for stock corporations and large limited liability companies. The management board consists of inside directors only and runs the day-to-day business of the firm. The supervisory board is exclusively made up of outside directors, that is, representatives elected by the shareholders or appointed by the employees of the firm.[2] The differences between the tasks and duties of the management and supervisory boards are reflected also in the standards underlying their liabilities.

According to provision 4.3 of the Cadbury Code all directors of a British company are "equally responsible in law for the board's actions and decisions".[3] Such a provision does not exist for directors of a German company as they are segregated into two groups with different tasks and duties. My following remarks will deal with the liability of the managing directors only.

II. Functions and Practical Importance

What is the place and function of the liability of managers in our corporate law, and is it of any practical importance?

1. Principal-agent relationship and liability

Modern microeconomic and legal theories see managers as "agents" and the owners or stakeholders in a firm as their "principals".[4] The separation between principals and agents leads to specific problems[5] such as

- traditional conflicts of interests as, for example, unfair self-dealing;
- shirking of managers whose effort cannot be observed;
- positional conflicts. Positional conflicts may occur in a great variety of ways: among other measures, managers can make it particularly difficult to monitor their performance, impose high barriers to their own removal, seek to increase corporate size and so on.[6]

Liability of directors is only one of various instruments and devices which have been developed to align the interests of the management with those of the stockholders, employees, and creditors of the firm. Other institutional control mechanisms and market forces are:

- incentives in contracts, with the compensation of managers tied to their performance;
- monitoring of the management by the supervisory board and auditors;
- rules of procedure and disclosure in corporate law and provisions against criminal behaviour in penal law;

- pressure from the various factor markets (product, capital, labour) as far as these are competitive;
- monitoring by creditors;
- competition in the market for managers.

Certainly, not all of these devices have the same objectives. The liability rules, for example, are more concerned with misbehaviour such as self-interested conduct by management, rather than with monitoring managerial efficiency. It will be one task of my following remarks to describe the focus and place of these liability rules in our corporate governance system in more detail.

2. Practical importance

How important is directors' liability in practice today? There are no reliable econometric assessments of this for Germany.[7] Court decisions are comparatively rare, albeit with an upward tendency in recent years. Most of these decisions deal with two typical situations: The company is bankrupt, and the trustee in bankruptcy sues the former directors of the company. The second typical situation is that a former director disputes his pension claims or outstanding payments with the company and the company defends itself by set-offs with liability claims. One insurance company reported recently that liability disputes between directors and their companies are settled outside the courtroom in 90 % of cases.[8]

One could argue that the meaning and importance of liability rules cannot simply be assessed by looking at court decisions and insurance statistics because the most important task of such rules lies in their preventative function which is not recorded by those numbers. But this preventative function itself depends on the appraisal of the liability risk by the directors concerned. Hence widely published cases and court decisions do play a role also for the preventative function. I will return to the reasons why there are only comparatively few liability cases and decisions so far.[9]

III. Duties of Directors

1. Duties, intentional violation and negligence

The director of a company is, apart from cases of tort, legally liable to his company under the following conditions:

- first, breach of a contractual or statutory duty owed to the company;
- second, that this breach occurred either intentionally or negligently;
- third, that this has caused damage to the company.

a) No strict liability; no vicarious liability

There is, as in English law, no strict liability of directors which would make managers legally liable for any loss suffered by the company. Permanent failure or bad performance will, of course, sooner or later have consequences for the unsuccessful management, but not its liability for the company's loss. Liability of directors requires the intentional or negligent breach of directors' duties. Similarly, there is no vicarious liability of directors for the faults of the company's employees although courts tend to emphasize the organizational duties of directors in order to prevent mistakes by employees.[10]

b) The distinction between breach of duty and negligence

Some basic duties of a director to his company will normally be mentioned in his contract. Furthermore, our corporation acts list several obligations of the management board and its members such as to prepare accounts, call meetings etc. Apart from that, the Stock Corporation Act as well as the Limited Liability Company Act each contain a general basic rule concerning the liability of directors.[11] These rules say that directors have, in the conduct of business, to act with the diligence of a prudent business man. Admittedly, at first sight this says more about *how* a director has to act rather than *what* he has to do or should have done. In other words, these general rules are more concerned with the *level* of care, skills and knowledge rather than with the *content* of the obligations of a director. At least in theory, the obligations of directors, as, for instance, to prepare the accounts, must be distinguished from the question of what level, or standards of care, skill and knowledge a director has to meet and whether this skill, knowledge etc. were applied actually. In many cases, however, both aspects reduce to one and the same question. Take a company that has suffered a loss from speculation in derivatives and sues its directors for not having monitored the respective activities of the employees closely enough. In such a case the judge will ask what a diligent and prudent manager would have done in this situation in terms of formulating a policy, organisation of the derivative business and controlling it. In other words, the court will develop the duties of a director in such a situation ad hoc, where neither the contract nor the statute says anything about the concrete oligations of a director in this respect; and the court will develop the obligation by asking what a diligent and prudent manager would have done. As soon as the obligation has been formulated it will normally be impossible for the defendant to object on the ground that he personally did not meet that objective and absolute standard of a prudent and diligent executive. I return to the objective standard of diligence in German law later.[12] What I want to emphasize here is, first, that the breach of an obligation and negligence have to be distinguished in theory whereas in practice in most cases, both aspects reduce to one question, that is, how a prudent and diligent manager would have acted. Second, that this standard of diligence is an objective one. That means that the defendant will not be successful, for example, with the defence that he has acted with similar care to that applied in his own affairs.

2. The content of directors' duties

From the common law systems we know the difference between the "duty of loyalty" and the "duty of care". Although German law does not differentiate in this way, there are apparent similarities between both legal systems in this respect. That is unsurprising as they are basically dealing with the same problems. Little would therefore be gained from listing all these duties here. Let me mention some differences and peculiarities instead.

a) To whom do directors owe their duties?

One question which might perhaps be more of theoretical interest than of practical importance is to whom do directors owe their duties.[13] The general rule is that these duties are owed to the company itself, and that it is primarily the company which has the task of, and the responsibility for, enforcing them. This rule prevents shareholders from arguing that the directors owe them their duties directly as the company itself is not identical with the collective of all shareholders. There may be, in rare cases, instances where directors owe well defined duties directly to shareholders; I will return to that.[14] But the general rule is that the directors' duties are owed to the company itself. There are sophisticated considerations in German legal literature about the question whether the company is an "enterprise" with all interested groups like employees, shareholders, creditors and other as "stakeholders" whose interests management has to pursue.[15] But even those who do not skate on this ice agree that the management is not obliged solely and exclusively to pursue the interests of the present shareholders. There is no duty to maximize the value of the shares; management may and has also to take the interests of the employees, creditors, and the community at large into account. Management has, on behalf of the company, to act as a "good citizen". It may (and should[16]), for instance, make donations to a university even though its competitors could profit from the research there. It may make provisions for employees about to lose their jobs even if there is no benefit from this for the company because it is about to cease trading as a result, say, a merger with another company or a shutdown.

b) Duties of directors in corporate groups

Let me make one further remark here on the duties of the directors of a subsidiary in a group of companies. Particularly where it is not a wholly owned subsidiary, its directors must not subordinate the company's interests entirely to the interests of the other companies in that group. However, that is not to say that the directors of a subsidiary cannot take the interests of the group or the interests of the holding company into account. § 317 Stock Corporation Act states that the director of a subsidiary cannot be held liable for actions taken in the interest of the group or companies of the group if a respectable and conscientious director of an independent company would have acted in the same manner.

c) The principles of agency and trust law vs. the concept of directors as "organs"

Although it is agreed that directors owe a duty of loyalty ("Treuepflicht") to their company[17] the range of the fiduciary duty developed by the English law system[18] seems somewhat wider and more developed than its German counterparts. That may have to do with the different concepts and sources or bodies of law from which directors' duties are derived in each system. Common law falls back on the principles of agency and trust law in order to develop the duties of directors, whereas German law considers management and supervisory board as "organs" of a company.[19] This is a concept which shows a tendency to ascribe these organs an autonomous position and independent competences, and seems less suitable to underline their serving function.

d) Duty of loyalty and information

Consider an example of the different stages of development of fiduciary duties in each system. According to Section 317 (1) of the U.K. Companies Act 1985 it is "the duty of a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company to declare the nature of his interest at a meeting of the directors of the company". German corporate law does not go that far. § 112 Stock Corporation Act provides that not the management board but rather the supervisory board represents the company vis-à-vis its managing directors in order to prevent self-dealing. But this rule does not apply to contracts with, say, a company in which a member of the management board holds a majority or to a contract with relatives of a director. There is also, as far as I see, no general practice in our companies of urging directors to disclose such personal interests to the supervisory board. In a limited liability company, the position is similar. Here the company may be represented vis-à-vis its directors even by employees with a power of representation.[20] The discussion centres only on the question of whether the shareholders must be informed as far as contracts with the directors themselves are concerned.[21] Only recently, following an incident at Mannesmann Aktiengesellschaft, the Social Democrats have tabled a bill that would provide for a disclosure of certain personal business interests of directors to the public.[22]

e) Duty of care and business judgement

Moving on to the duty of care and the business judgement rule. At first sight the general principle in German corporate law that the director of a company has to act with the diligence of a prudent business man[23] takes a rigorous stance. For it looks as if the "competent businessman" serves as a kind of a rôle model by which the courts have to assess the acts of management in an objective manner (and are capable of doing so). There appears to be no place for a "business judgement rule" corresponding with judicial self-restraint. But the basic idea of the business judgement rule - that company law should encourage, and afford broad protection to, informed business judgements in order to stimulate risk taking, innovation, and other creative entrepreneurial activities - is also accepted by German law. It is implemented in two main ways. First, as was already mentioned before,[24] the standard of a "prudent business man" says more about *how* a director has to act rather than *what* he has to do or should have done. In other words, the courts will themselves develop and crystalise the directors' duties in a given situation. This leaves room for judicial self-restraint. In an interesting decision in 1992 on the duties of a company vis-à-vis its bonus-shareholders the Supreme Civil Court ruled that these shareholders will and may only expect first, that the company keeps within its objectives and secondly, that their capital investment will not be endangered by actions which "simply no honest businessman would undertake".[25] This standard would also apply in the context of the liability of directors themselves.

A second way in which the management is protected from interference in its business decisions is more doubtful: It has been made particularly difficult regarding stock corporations for shareholders to sue the management, among other reasons on the grounds that an individual right of each shareholder to sue the management would paralyze it.[26] As this curtailment of shareholders' rights does not only affect the duty of care but also breaches of fiduciary duties, this does not appear a convincing way in which to deal with the business judgement problem.

f) Division of tasks and reliance on others

Directors cannot run the entire business themselves. In larger companies there will always be joint decisions, depending on the importance of the issue concerned, and a division of tasks. Where joint decisions are taken by the whole board, each member who has taken part in that decision will be responsible accordingly. On the other hand, there is no liability for the faults of the other members of the management board. There is also, at least in principle, no duty to supervise one's colleagues in fulfilling their duties. Court decisions as well as commentators, however, take a comparatively rigorous stance here. The importance of certain transactions may require that a board and its members ask for (prior) information on those issues, and adopt a policy that they be informed and asked for their consent in advance. And as soon as there are grounds for suspicion a co-director will have to act by himself asking for information etc.[27]

On principle, a director is also entitled to rely on information, opinions, judgements and the like of employees or experts provided that he reasonably believes that these people merit confidence.

3. The Standard of Diligence

a) Objective and compulsory standard

As mentioned earlier, the breach of a duty and the question of whether it accurred negligently must be distinguished in theory, although in practice these two questions often merge into one. The defendant carries the burden of proof to show that he has not acted negligently. "Negligence" means that the defendant did not act with the diligence of a prudent business man.[28]

That is an objective and comparatively high standard. Directors need not take all possible care but more than the usual care that might be expected from an ordinary man. The standard is objective in the sense that a director will not succeed with the defence that he has acted with such care as he would apply in his own affairs. In this respect the English and German systems appear to differ.[29] Most commentators hold that this standard is compulsory and cannot be moderated by the articles of association of the company or the contract with the director.[30]

b) Skill and care

These rules apply not only to the care that a director is expected to take but also to the level of skill, knowledge and experience that will be expected from him. If a director is, as usual, appointed to run a particular division or field, he has to have the necessary skills and knowledge. If his own knowledge does not enable him to judge important questions, such as, for example the derivative business of the company on which the board as a whole has to take a conclusion, he will have to acquire that knowledge or seek advice and judgement from outside experts. If a director has a special skill he will be expected to use it fully and continuously in the service of the company.

4. The burden of proof

The company or a shareholder challenging the conduct of a director has the burden of proving that the company has suffered a damage whereas the director has the burden of proving that he has acted with the diligence of a prudent business man.[31] The problem lies in the differentiation between breach of duty and negligence in German law.[32] Most commentators tend to place the burden of coming forward with evidence and the ultimate burden of proof of a breach of duty also on the director, not on the company.[33] The courts seem more reserved in this respect: As a principle the plaintiff has the burden of proof of the breach of duty but it will be placed on the defendant where he has the necessary information on the circumstances or if a presumption helps the plaintiff as, for instance, in cases of a cash deficit.[34]

IV. Enforcement

As to the enforcement of directors' duties and the right of action we have to differentiate between the stock corporation and the limited liability company.

1. Stock Corporation

Vis-à-vis its managing directors a stock corporation is represented by the *supervisory board*.[35] This includes the power to commence an action against a wrongdoing director in the company's name. The problem with this solution is that very often in case of a fault of managing directors the supervisory board could as well be blamed for not having fulfilled its monitoring tasks correctly. Hence the supervisory board will normally be reluctant to take action against a colleague on the management board. Only recently a county court held that the supervisory board can even be obliged to sue management[36] but this judgement was repealed.[37]

The *creditors* of an insolvent company can sue management in cases of gross negligence.[38] The *single shareholder* does, apart from specific situations in groups of companies,[39] not have the right to bring a (derivative) action against management on behalf of the company. According to § 147 Stock Corporation Act the *majority of shareholders* in a general meeting can decide that management be sued either by the supervisory board or by special representatives. Furthermore this paragraph provides that a *minority* with at least a 10 % share of the company's capital can demand that the supervisory board or a special representative take action against managing directors. The problem here is, however, the high threshold of 10 % of the equity capital. In the case of Daimler Benz, for example, with an equity capital of about DM 2.3 bn this means that one would have to hold shares with a nominal value of DM 230 million or gather and convince other shareholders with equivalent shareholdings. The second problem is that the shareholder(s) who bring this action will have to bear all costs and expenses of the other party and the company should the action be dismissed.[40] The Federal Government is currently considering an amendment of the rules concerning actions against directors by shareholders.

2. Limited Liability Company

In limited liability companies without a supervisory board the position is different. Here the majority of shareholders will decide on actions against managers.[41] There is no right of action for single shareholders or for a minority in the limited liability company.[42]

V. Indemnification, Ratification and Waiver

1. Indemnification

As far as stock corporations are concerned, statutory duties of directors are compulsory except where the Stock Corporation Act provides otherwise.[43] Regarding limited liability companies, directors' duties relating to creditors' interests are compulsory whereas duties relating to the shareholders may be moderated. A different question is whether the general standard that a director has, in fulfilling his duties, to act with the diligence of a prudent business man, may be moderated, by provision in the company's articles or in his contract with the company. The majority of commentators holds that this standard is compulsory;[44] there are no court decisions on this.[45]

A company may indemnify a director against liability to third parties so long as his action does not constitute a breach of his duties to the company at the same time, as well as against liability incurred in any civil or criminal proceedings where judgement is given in his favour.

2. *Consent and instructions by shareholders*

Where directors are obliged to follow the instructions of the shareholders, their liability will be excluded accordingly provided that the instruction itself was lawful.[46] This rule is more important for limited liability companies than for stock corporations where the competences of the shareholders are very limited. But here also the management could, in order to avoid its liability, ask the shareholders' meeting for a conclusion on the conduct of business and by that avoid its liability.[47] The consent of the supervisory board to a certain transaction will not relieve the managing directors of their liability.[48]

3. *Legal meaning of the formal approval*

At their regular annual meeting shareholders will decide on whether or not to approve the conduct of business by management and supervisory board during the last year. This formal approval does not waive liability claims of a stock corporation against its directors.[49] In limited liability companies, however, the formal approval has a (limited[50]) precluding effect.

4. *Waiver*

Legislation has made waiver and settlement difficult for stock corporations. Only after three years can the supervisory board waive or reach a settlement of the company's claims, with the consent of the shareholders' meeting. A minority of shareholders (10 % of the equity capital) may object,[51] and the waiver or settlement does not preclude a creditor of the company from sueing the management on behalf of it.[52]

In limited liability companies waiver and settlement depend also on the consent of the shareholders, but there are no time-limits or formal minority rights.

VI. Liability to Third Parties

In recent years liability to third parties has become more and more important. Listed are some typical cases and circumstances under which third party liability claims against a director might arise.

1. Torts and direct claims of the state and creditors

The state may try to achieve its objectives - payment of taxes or contributions to the social security system - by imposing those responsibilities not only on the company but also on its directors personally.[53] That means, for instance, that the tax office may collect arrears of corporation taxes from the company's directors personally, provided that the non-payment is due to gross negligence of the directors.

Other private third parties may sue the directors of a company in cases of torts committed by them. "Tort" comprises three cases: First, intentional wrongful injury.[54] Second, breach of an explicit statutory provision the violation of which entitles to damages.[55] The most important case here is when the directors of an insolvent company wilfully or by negligence fail to file a bankruptcy petition[56]. Thirdly, wilful or negligent violations of certain defined rights or protected interests such as life, health or property, which may also lead to personal liability of directors vis-à-vis third parties. Here the courts developed far-reaching obligations of directors to make sure by organizational provisions, that rights or protected interests of third parties will not be injured.[57]

2. Tortious and contractual claims of shareholders

Shareholders of a company would also have personal claims against the company's directors, at least in principle, under the same conditions, in cases of tort.[58] In German law the directors of a company are not considered trustees or mandatories of the shareholders. They owe their contractual obligations and duties to the company itself. This doctrine makes practical sense if, for instance, in case of a theft the missing amount is repaid to the company and by that the "reflex damage" suffered by the shareholders is levelled out. There remain, however, instances where the company as such is not affected and, at the same time, the breach of its director's contractual obligations is not a tort. One example of this is the negligently wrong information of shareholders by the directors, on the current financial status of the company. The shareholders then invest further equity capital and subsequently lose that money because the firm goes bankrupt. In such cases the shareholders may sue the directors personally on grounds that they violated their contractual duties to the shareholders of the company.[59] Another example would be the giving of wrong information to the shareholders in the course of a take-over of the firm.

VII. Directors' Insurance

Insurance against the liability of directors is a recent development in Germany. The first D&O insurance was offered in 1986.[60] Cover will normally be taken out by the company which will pay the premium. The insurance cover that might be taken out would relate to claims by third parties against the directors, be they domestic parties or claims from abroad. There is also insurance to cover claims arising from breaches of duties owed to the company itself. The insurance cover does not extend however, to cases involving wilful breaches of duties, fraud, dishonesty, criminal behaviour and the like.

Commentators dispute whether the D&O insurance in fact indemnifies the director against his liability to the company, and is thus void at least in so far as an indemnification ex ante or a waiver would be void.[61] An insurance without self-retention with the premium paid by the company would certainly destroy incentives. On the other hand the company would have to pay the premium as well (as a part of the directors' payment) if he had to take out the insurance cover in his own name. And at least the blemish remains that the company has suffered damage from an action taken by its directors and has raised claims which had to be settled by insurance. Hence the majority of commentators argues that such insurance cover may be taken out.

The Business Week of September 1986 argued that the position of a director will become "a job nobody wants".[62] This prediction apparently has not yet come true. But one has to admit that public awareness and criticism as well as the willingness to raise claims against directors have been growing ever since. This explains the rising interest in, and importance of, D&O insurance.

* Speech at the Stratford-upon-Avon Conference of the British-German Jurists' Association, April 21, 1996

[1] Cf. the detailed description by *A. F. Conard* "Comparative Law: The Supervision of Corporate Managements: A Supervision of Developments in European Community and United States Law" (1984) 82 Mich.L.Rev. 1459 ff. and *C. Meier-Schatz*, "Corporate Governance and Legal Rules: A Transnational Look at Concepts of International Management Control" (1980) 13 Journal of Corporation Law 413 ff.

[2] For a description of the German codetermination system see *H. Wiedemann*, "Codetermination by Workers in German Enterprises" (1980), 28 Am.J.Comp.L. 79 ff.

[3] Report of the Committee on the Financial Aspects of Corporate Governance, December 1st, 1992, at p. 20.

[4] Cf. *Jensen/Meckling*, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure", Journal of Financial Economics (1976), 305 ff.

[5] The basic book on the split between managers and owners in the publicly held corporation is *Adolf Berle/Gardiner Means*, The Modern Corporation and Private Property. New York (1933).

[6] Cf. in more detail *Melvin Eisenberg*, "The Structure of Corporation Law", in: Columbia Law Review (1989), 1471 ff., 1474 ff.

[7] On the U.S. see *Daniel Fischel/Michael Bradley*, "The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis", in: Cornell Law Review (1986), 261 ff. with comments by *Kenneth Scott* p. 299 ff. and *Donald Schwartz* p. 322 ff.

[8] *Chubb Insurance Company of Europe S.A.*, Duesseldorf, "Managerhaftung" (1993), at p. 3.

[9] IV., below.

[10] Cf. *Bundesgerichtshof*, 5.12.1989, BGHZ 109, 297 (305) with further references; thorough report in *Peter Schlechtriem*, "Schadensersatzhaftung der Leitungsorgane von Kapitalgesellschaften", in: Karl Kreuzer (ed.), Die Haftung der Leitungsorgane von Kapitalgesellschaften (1990), 9 (31 f.)

[11] § 93 AktG (Stock Corporation Act); § 43 GmbHG (Limited Liability Company Act).

[12] 3. a), below.

[13] Cf. *Klaus* Hopt, "Directors' Duties to Shareholders, Employees and Other Creditors: A View from the Continent", in: E. McKendrick (ed.), Commercial Aspects of Trusts and Fiduciary Obligations (Oxford 1992), 115 ff.; for a comparative discussion of this question cf. *Lord Wedderburn*, "The Legal development of Corporate Responsibility:

For Whom Will Corporate Managers Be Trustees?", in: Klaus Hopt/Gunther Teubner (eds.), Corporate Governance and Directors Liabilities (1985), at p. 3 ff.

14 IV. 2., below.

15 Cf. *Mertens*, Kölner Kommentar zum Aktiengesetz Vol. 2, 2nd ed. (1988), § 76 n. 6 ff. with further references.

16 The author is a professor at a new, small, state university in the poor state of Lower Saxony.

17 Cf. *Herbert Wiedemann*, Organverantwortung und Gesellschafterklagen in der Aktiengesellschaft (1989), at p. 17 ff.

18 S. the report by *Robert Drury*, "The Liability for Corporate Acts in English Law", in: Karl Kreuzer (ed.), Die Haftung der Leitungsorgane von Kapitalgesellschaften (1991), 103 (124 ff.).

19 For a detailed description and criticism cf. *Baums*, Der Geschäftsleitervertrag (1987).

20 *Bundesgerichtshof*, 13.6.1984, BGHZ 91, 334 (336 f.).

21 Cf. *Axel Zitzmann*, Die Vorlagepflichten des GmbH-Geschäftsführers (1991), at p. 181 ff. with further references.

22 *Bury et al.*, Gesetzentwurf eines Transparenz- und Wettbewerbsgesetzes, Bundestags-Drucksache 30.1.95 (Federal Parliament printed matter) 13/367, Art. 1 § 285 Handelsgesetzbuch (Commercial Code). - The amendment would oblige directors to disclose their equity participations in other firms and the transactions of such firms with the company in the annual balance sheet.

23 § 93 AktG (Stock Corporation Act); § 43 GmbHG (Limited Liability Company Act).

24 See III. 1., above.

25 *Bundesgerichtshof*, 5.10.1992, Juristen-Zeitung 1993, 958 (964).

26 Cf. the historical report in *Bernhard Großfeld*, Aktiengesellschaft, Unternehmenskonzentration und Kleinaktionär (1968), at p. 228 ff.

27 For details see the list of court decisions in *Schlechtriem*, op.cit. (supra n. 10), at p. 60 footnote 209; most recently OLG Hamm, 10.5.95, Zeitschrift für Wirtschaftsrecht 1995, 1263; furthermore *Rowedder/Koppensteiner*, GmbHG, 2nd ed. (1990), § 43 N. 9-11; *Mertens*, op.cit. (n. 15, supra), § 93 N. 54 f. with further references.

28 § 93 (1) Stock Corporation Act; § 43 (1) Limited Liability Company Act.

29 See *Farrar*'s Company Law, 3rd ed. (1991), at p. 396 ff.

[30] See *Mertens*, op.cit. (n. 15, supra), § 93 N. 4; *Rowedder/Koppensteiner*, op.cit. (n. 27, supra), § 43 N. 4.

[31] § 93 (2) (2) Stock Corporation Act; this rule is applicable also on Limited liability Companies; *Rowedder/Koppensteiner*, op.cit. (supra n. 27), § 43 N. 33.

[32] Cf. III. 1. b), supra.

[33] Most recently thereto *Wulf Goette*, Zeitschrift für Unternehmens- und Gesellschafts-recht (1995), 648 ff. with further references.

[34] Details in *Goette*, op.cit.

[35] § 112 Stock Corporation Act.

[36] Landgericht Düsseldorf, 14.3.94, Zeitschrift für Wirtschaftsrecht 1994, 628.

[37] Oberlandesgericht Düsseldorf, 22.6.1995, Betriebs-Berater 1996, 230.

[38] § 93 (5) Stock Corporation Act.

[39] Cf. §§ 309 (4) (2), 310 (4), 317 (4), 318 (4), 323 (1) Stock Corporation Act.

[40] § 147 (4) Stock Corporation Act.

[41] §§ 46 Nr. 8, 47 (1) Limited Liability Company Act.

[42] Bundesgerichtshof, 28.6.1982, Wertpapier-Mitteilungen 1982, 928; the majority of commentators, however, advocates such a right of action for the shareholder in a GmbH (cf. *Rowedder/Koppensteiner*, op.cit. [n. 27, supra], § 43 N. 42 with further references).

[43] § 23 (5) Stock Corporation Act.

[44] For stock corporations cf. *Mertens*, op.cit. (n. 15, supra), § 93 N. 4; for limited liability companies *Rowedder/Koppensteiner*, op.cit. (n. 27, supra), § 43 N. 4, both with further references.

[45] Except from a judgement of the former Reichsgericht on co-operative societies, RG, 31.3.1936, Juristische Wochenschrift 1936, 2313 (compulsory standard).

[46] § 43 (3) (3) Limited Liability Companies Act; § 93 (4) (1) Stock Corporation Act. There is an exemption from this latter rule in § 93 (5) (3) if a creditor sues a director on behalf of the company. In this case the director will be not be successful with the defence that he has carried out a conclusion of the shareholders. There will, however, be no liability to the company if this conclusion itself was lawful. Cf. *Mertens*, op.cit. (supra n. 15), § 93 N. 122.

[47] §§ 119 (2), 83 (2), 93 (4) (1) Stock Corporation Act.

[48] § 93 (4) (2) Stock Corporation Act.

[49] § 120 (2) Stock Corporation Act.

[50] Details in *Hachenburg/Hüffer*, Großkommentar zum GmbHG, 8. ed. (1991), § 46 N. 62-64.

[51] § 93 (4) (3) Stock Corporation Act.

[52] § 93 (5) (3) Stock Corporation Act.

[53] Details in *Rowedder/Koppensteiner*, op.cit. (supra n. 27), § 43 n. 63, 64.

[54] § 826 Civil Code.

[55] § 823 (2) Civil Code; thereto, e.g., *Westermann/Mutter*, Deutsche Zeitschrift für Wirtschaftsrecht 1995, 184 (189 ff.).

[56] Here the Supreme (Federal) Civil Court (Bundesgerichtshof) only recently overturned its former practice and held that a third party which became a creditor after the company became insolvent may sue the negligent director for his full loss; *Bundesgerichtshof*, 6.6.1994, BGHZ 126, 181 (190 ff.).

[57] On such "guarantor's obligations" of directors most recently *Bundesgerichtshof*, 5.12.1989, BGHZ 109, 297 ff.; thereto, e.g., *Lutter*, Der Betrieb 1994, 129 ff.

[58] On the different question of whether shareholders may act on behalf of the company, cf. IV., above.

[59] Cf. *Baums* Der Geschäftsleitervertrag (1987), at p. 230 ff., 243 ff.; for a different view, however, *M. Habersack*, Die Mitgliedschaft - subjektives und "sonstiges" Recht (1996), 205 with further references.

[60] For a more detailed overview of D&O - related legal issues cf. *U. H. Schneider/Ihlas*, Der Betrieb 1994, 1123 ff.

[61] *U. H. Schneider/Ihlas*, supra, 1123 (1124); *Mertens*, op.cit. (n. 15, supra), § 84 N. 83; *Habetha*, Direktorenhaftung und gesellschaftsfinanzierte Haftpflichtversicherung. Ein deutsch-englischer Rechtsvergleich (1995), at p. 184.

[62] Business Week, Sept. 8, 1986, at p. 50 ff.