The liability of shareholders for obligations of the company in Germany and the People's Republic of China

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Dissertation

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A. Foundations

I. Introduction

This article deals with the question, whether shareholders can be held liable for obligations of the company in addition to the company itself. It aims to examine situations in which the separate legal personality of companies is disregarded by way of an exception under German Law and aims to compare it with the respective legal regime in the People's Republic of China (“PRC”, “China”). In Common Law jurisdictions the so-called “piercing of the corporate veil doctrine” deals with this issue. As will be discussed later, this doctrine is not applied in Germany. Therefore the term “direct liability” is used instead in this article to describe the liability of shareholders for obligations of their company.

This field of law went through remarkable changes during the last few years. The German Federal Court of Justice (“Bundesgerichtshof”, “BGH”) recently gave up his position on one group of cases in which shareholders were held directly liable towards creditors of the company (“qualified de facto group”) and established a new cause of action instead ("liability for causing the company's insolvency"). The Chinese Company Law was amended in 2005, since then it contains for the first time provisions that explicitly deal with situations in which shareholders can be held liable by creditors of the company.

This article starts with an introduction of the separate legal personality of companies and the piercing of this corporate veil by holding shareholders responsible for debts of the company (A.II.). In part B. the basic principles and groups of cases of direct liability under German Law are discussed in detail. Part C. deals with piercing of the corporate veil under Chinese Law and contains comparisons between the German and the Chinese approach.

II. Separate legal personality of companies and limitation of liability under German and Chinese law

Under German law there exist two different types of companies, the “Aktiengesellschaft” (“AG”, “public limited company”) and the “Gesellschaft mit beschränkter Haftung” (“GmbH”, “private limited company”). The first is governed by the “Aktiengesetz” (“AktG”, “Companies Act”) while

the latter is governed by the "GmbH-Gesetz" ("GmbHG", "private limited companies act"). Other than a public limited company the form of a private limited company is designed for a smaller number of shareholders and is especially suitable for medium-sized companies. Due to this different purpose this it is more difficult to dispose of the shares of a private limited company than of those of a public limited company. However, the advantage of private limited companies is that the private limited companies act contains less binding regulations, which leaves much more opportunities for contractual arrangements. The Chinese Company Law regulates two comparable forms of companies, public limited companies (or Joint Stock Companies)[1] and private limited companies (or Limited Liability Companies).[2]

According to § 1 I AktG and § 13 I GmbHG public limited companies and private limited companies are legal persons under German Law. They are entities distinct from their shareholders and have legal capacity. Therefore they hold rights and obligations themselves and have the right to sue and to be sued. Under German Law this principle of separation is conceived in a comprehensive way. In contrast to Common Law jurisdictions the ultra-vires doctrine which limits the legal capacity of a company to its scope of business is not applied in Germany.[3] With regard to Chinese companies Art. 3 Company Law provides that "a company is an enterprise legal person, has independent property of legal person, and shall enjoy the right to the entire property of the legal person. A company shall be liable for its debts to the extent of all its assets."

According to § 1 I 2 AktG and § 13 II GmbHG private limited companies and public limited companies are exclusively liable with all their assets. Thus there is no limitation of the company's liability at all. The liability of the shareholders however is limited. They are solely liable for providing the capital contributions which haven been taken over by them. With regard to Chinese companies Art. 3 Company Law provides "In the case of a limited liability company, shareholders shall assume liability towards the company to the extent of the amount of the capital contribution subscribed for by them respectively; in the case of a joint stock limited company, shareholders shall assume liability towards the company to the extent of the shares subscribed for by them respectively."

There are however exceptions to the principle that a company and its shareholders are separate legal

1 See Art. 77ff. Company Law.
2 See Art. 23ff. Company Law.
3 Kropff, Bruno and Semler, Johannes (ed), *Münchener Kommentar zum Aktiengesetz, Band 1, §§ 1-53*, (2nd edn Verlag C. H. Beck/Verlag Vahlen, München 2000), § 1 AktG, Rn. 24.

entities that have to be distinguished strictly. The most important exception is the case in which a creditor of the company is allowed hold a shareholder of this company liable with his personal assets for an obligation of the company. This direct liability constitutes an exception of the basic principle of separation of the companies' and the shareholders' assets and will be examined in this article. This exception of a personal liability of the shareholder has to be distinguished from other exceptions to the separation of the legal entities. Those are for example cases in which a certain knowledge, conduct or characteristic of a shareholder is allocated to the company and vice versa. They will not be examined in this paper.

The necessity to hold a shareholder liable for obligations of his company arises from the economic connection between the assets of the company and those of the shareholder. There are cases in which the application of the separation principle would be disadvantageous to the creditors of the company in a way that would be considered as unjust. It is for example necessary to protect the interests of shareholders in cases, where shareholders do not sufficiently separate the assets of the company from their personal assets. This problem occurs oftentimes, but not exclusively, in one-man companies. Another example for the necessity to disregard the separate legal personality could be seen in certain cases in which the conduct of the shareholders causes a loss of the companies' assets and thus impairs the probability that the company will be able to satisfy its creditors.

B. The legal situation in Germany

I. Fundamental Questions

With regard to legal dogmatic there are two different ways, a shareholder can be held liable with his personal assets under German Law which have to be distinguished. On the one hand there is the direct liability of shareholders in a narrower sense. This term refers to cases in which the separate legal personality of a company is disregarded by way of an exception and a shareholder of this company is directly held liable for obligations that are originally exclusive obligations of the company.4 There exists no provision under German Law, that explicitly deals with these situations. But there are certain groups of cases in which a personal liability of shareholders is acknowledged by German courts. These groups of cases will be discussed in detail in the following in this part of

4 See Baumbach, Adolf and Hueck, Alfred (ed), *GmbH-Gesetz*, (18th edn Verlag C. H. Beck, München 2006), § 13 GmbHG, Rn. 13.

the article.

On the other hand there are situations in which shareholders can be held personally liable, that are not cases of direct liability in the narrower sense. In these cases the liability refers to the shareholders' independent obligations that are separate from obligations of the company. Examples for this kind of liability are guarantees assumed by a shareholder in favour of his company and the liability for negligence in contracting (culpa in contrahendo, § 311 III Bürgerliches Gesetzbuch (“German civil code”, “BGB”)), if the shareholder inspires the confidence of the negotiating party to a great extent during the negotiation of a contract and a damage occurs to the other party' interests based on that. Another example of a shareholders' separate personal obligation is his liability based on the violation of tort provisions. With regard to creditors of a company particularly § 826 BGB comes into consideration, which is a tort provision, dealing with intentional damnifications contra bonos mores. The liability of the shareholder in the aforementioned cases is no exception from the principle, that the liability of a shareholder is limited to his capital contributions because this principle applies exclusively to claims that are originally directed at the company. Since these cases cannot be regarded as an exception from the separation of the legal entities of the company and the shareholders in the narrower sense they are not discussed in the following as far as they are not connected with the discussion of groups of cases of direct liability in the narrower sense.

II. Dogmatic foundation of the direct liability

There is no provision of German Law that explicitly allows for holding a shareholder directly liable for obligations of his company. Furthermore it is also not possible to simply apply the doctrine of piercing the corporate veil which is a core feature of Common Law, because of the principle of legality in German constitutional law . This principle of legality can be derived from Art. 20 III Grundgesetz (“GG”, “Constitution”) which provides, that the judicature is bound to law and justice. This provision is interpreted in that courts are not allowed to decide without a legal basis but depend on a statutory provision to intervene. According to this a direct liability of shareholders requires a legal basis.

There are mainly two grounds discussed for holding a shareholder liable for obligations of his company under German Law. The first argument is that an exception from the principle of

separation between the legal entity of the company and the shareholder has to be made, if the separate legal personality is abused ("abuse doctrine").[5] Furthermore the separate legal personality of a company shall be disregarded, if it does not correspond with the legal system or if the reference to this separation would violate good faith. The principle of "good faith"latter is core a principle of German Law, which is stipulated in § 242 BGB. This provision says that in exercising its rights and in performing its obligations everybody has to act in accordance with good faith. The other argument for holding a shareholder directly liable does not take the legal person as such and the abuse of the separation of the separate legal personalities as its basis.[6] It rather refers to the respective applicable provision. For example in cases where the question arises whether a shareholder can be held liable for obligations that are based on a loan of the company this is § 488 BGB which obliges the company to pay the principle and the interest to the lender. The argument interprets the purpose of the respective applicable provision, whether it allows for the direct liability of the shareholder ("purpose of the norm doctrine"). The German courts have not decided in favour of one of the two doctrines but rather use the arguments of both on a case by case basis.[7]

The Federal Court of Justice is of the opinion, that using the separate legal personality and the limited liability of companies to avoid personal liability is basically is a legitimate purpose of shareholders. In his judgements he therefore emphasises the exceptional character of direct liability and points out, that the separate legal form of legal persons should not be disregarded thoughtlessly and without bounds.[8] Hence strict requirements have to be observed. The German courts have not generated a catalogue of abstract constituent elements of a general direct liability of shareholders. There are rather groups of cases in which direct liability is discussed by German courts and scholars. These are the cases of capital withdrawal, undercapitalization, liability for causing the company's insolvency and commingling of assets, which will be discussed extensively in the following.

5 Baumbach, Adolf and Hueck, Alfred (ed), *GmbH-Gesetz*, (18th edn Verlag C. H. Beck, München 2006), § 13 GmbHG, Rn. 10.
6 Baumbach, Adolf and Hueck, Alfred (ed), *GmbH-Gesetz*, (18th edn Verlag C. H. Beck, München 2006), § 13 GmbHG, Rn. 10.
7 Baumbach, Adolf and Hueck, Alfred (ed), *GmbH-Gesetz*, (18th edn Verlag C. H. Beck, München 2006), § 13 GmbHG, Rn. 11.
8 BGHZ 20, 11; 26, 37; 54, 224; 61, 383; 78, 333; 102, 95, 101.

III. Groups of cases

1) Capital withdrawal

a) Provision of capital and capital maintenance

According to § 1 I 2 AktG only a public limited company as such is liable for the companies' debts but not its shareholders. The same applies to private limited companies, pursuant to § 13 II GmbHG its shareholders cannot be held liable for liabilities of the company. In order to compensate for this limitation of liability the German Company Law protects the companies' creditors by the principles of capital provision and capital maintenance. These principles are based on certain provisions of the AktG and the GmbHG that will we discussed in detail in the following. They shall ensure that the shareholders make a certain amount of share capital available to the company (capital provision) and that this amount of share capital will not be reduced by payments to shareholders that do not satisfy certain requirements (capital maintenance). The purpose of this principle is to ensure the existence of a particular amount of assets available for the satisfaction of creditors' claims. The provisions on capital provision and capital maintenance in the Companies Act and the private limited companies act, which will be discussed in the following, are binding. They are not subject to being contracted away by the articles of association.[9] Furthermore, the share capital has to be disclosed in the Register of Companies according to § 3 I Nr. 4 GmbHG and § 23 III Nr. 3 AktG respectively. Creditors of the company are therefore able to inform themselves about the amount of the companies' share capital. There is however a difference between the constant share capital and the variable assets to the company. The latter reflects the actual value of the companies' assets and does not necessarily reach to the amount of the share capital. The system of a constant share capital can therefore neither prevent that operational losses diminish the capital basis nor can it ensure, that the amount of the share capital is sufficient with regard to assumed risks (undercapitalization[10]).[11]

According to § 7 I AktG the minimum amount of the share capital of a public limited company comes to 50,000 Euro. Among other things the provision of the share capital is secured by the

9 Baumbach, Adolf and Hueck, Alfred (ed), *GmbH-Gesetz*, (18th edn Verlag C. H. Beck, München 2006), § 30 GmbHG, Rn. 1.

10 See under B.III.2).

11 Baumbach, Adolf and Hueck, Alfred (ed), *GmbH-Gesetz*, (18th edn Verlag C. H. Beck, München 2006), § 30 GmbHG, Rn. 3.

prohibition of an issue below par, § 9 I AktG. Hence it is not permitted to issue shares to an amount lower than their nominal amount or lower than the proportional amount of the share capital represented by the respective unit share. Furthermore, the company formation by incorporators and subscribers is prohibited, i.e. the promoters have to commit to taking over all shares before a public limited company can come into existence, §§ 2, 29 AktG. As far as benefits are granted to individual shareholders or third persons and as far as they shall receive compensation for promotion costs an explicit provision in the articles of association is necessary, § 26 I, II AktG. The same applies to capital contributions in the form of contributions in kind as well as to the acquisition of a shareholders' personal property by the company, § 27 I AktG. Especially with regard to the question, whether the value of contributions in kind corresponds to the amount of the capital contribution taken over, an examination of the establishment by external verifiers has to take place, §§ 32 II, §§ 33 II Nr. 4, 34 AktG. § 36 II 1 AktG requires that certain parts of the capital contributions have already been made before applying for registration of a public limited company. A quarter of the contributions in cash have to be raised, contributions in kind have to be raised completely, § 36a AktG. Before a public limited company will be registered, the local court at the registered office of the company to-be examines whether the company was established in accordance with the regulations.[12] This includes an examination whether the value of contributions in kind corresponds to the amount of the capital contribution taken over, § 38 II 2 AktG.

The maintenance of the share capital is ensured by § 57 I, II AktG. According to this provision every return of capital contributions already made or the payment of interest for capital contributions made by the shareholders is prohibited. Furthermore there is a risk that capital contributions are returned by the payment of the purchase price to the shareholder in the context of a purchase of own shares by the company. Therefore §§ 71 to 71 e AktG stipulate that a purchase of own shares is only admissible in exceptional cases. Moreover § 57 III AktG prohibits the distribution of a dividend higher than the corresponding share of the distributable profit.

According to § 5 I GmbHG the share capital of a private limited company has to come to at least 25,000 Euro. The provision of the share capital is secured by the obligation that the promoters of a private limited company have to take over capital contributions that altogether correspond to the entire amount of the share capital, § 3 I Nr. 4, § 5 GmbHG. In addition § 5 IV GmbHG stipulates

12 Hüffer, Uwe, *Aktiengesetz*, (7th edn Verlag C. H. Beck, München 2006), § 38 AktG, Rn. 15.

that contributions in kind as well as the amount of the capital contribution to which the respective contribution in kind refers to have to be listed in the articles of association. If a contribution in kind is overvalued, i.e. its value does not correspond to the amount of the capital contribution that has to be made, the shareholder has to pay the difference to the company in cash, § 9 GmbHG. The application for registration of a private limited company can only take place if the capital contributions have been made to a particular extent, § 7 II, III GmbHG. At the time of the application contributions in kind have to be fully placed at the companies' disposal, while with regard to cash contributions only at least a quarter of each capital contribution has to be deposited. However the amount of cash contributions has to attain at least half of the statutory minimum amount of the share capital. In case of sole trader private limited companies the shareholder in addition has to stand bail for the unpaid part of the cash contributions. Shareholders can neither be released from the obligation to make their capital contributions nor can they set off with claims against the company in this regard, § 29 II GmbHG. As far as a shareholder does not make its capital contribution, the other shareholders are jointly liable for it, § 24 GmbHG. With regard to capital maintenance § 30 GmbHG says that no payment of the company to the shareholders shall take place if and as far as company assets do not exceed the amount of the share capital.

b) Legal consequences of violations of capital maintenance regulations

It is doubtful what legal consequences arise if shareholders receive payments from their company, that violate § 57 AktG or § 30 GmbHG . There is a difference between the legal situation of public limited companies and private limited companies in the scale of forbidden payments to shareholders. § 30 GmbHG prohibits payments to shareholders that derogate the company's assets necessary to maintain the share capital. Therefore a prerequisite of this provision is a negative equity, i.e. a situation where the company assets do not reach to the amount of the share capital.[13]
§ 30 GmbHG does not constitute restrictions regarding the part of the company assets that exceeds the amount of the share capital. The shareholders are rather entitled to dispose of it.[14] Creditors of the company can basically not rely on the shareholders leaving this part of the company assets in the company.[15]

13 Baumbach, Adolf and Hueck, Alfred (ed), *GmbH-Gesetz*, (18th edn Verlag C. H. Beck, München 2006), § 30 GmbHG, Rn. 12.
14 Henze, Hartwig, 'Gesichtspunkte des Kapitalerhaltungsgebotes und seiner Ergänzung im Kapitalgesellschaftsrecht in der Rechtsprechung des BGH', (2003) NZG 649, 652.
15 Henze, Hartwig, 'Gesichtspunkte des Kapitalerhaltungsgebotes und seiner Ergänzung im Kapitalgesellschaftsrecht in der Rechtsprechung des BGH', (2003) NZG 649, 652.

The prohibition of payments to shareholders by § 57 AktG in contrast is more extensive. Not payments that interfere with capital maintenance are forbidden but every drawing in excess of the distribution of the distributable profit is prohibited.[16] Provided that a payment violates § 57 AktG the public limited company has a claim for reimbursement against the respective shareholder pursuant to § 62 I 1 AktG. As far as a creditor of the company can not obtain satisfaction of his claim against the company he is entitled to assert the claim of the company against its shareholder, § 62 II 1 AktG. This does not constitute a direct claim of the companies' creditor against the shareholder of the company but rather a claim of the company.[17] The creditor is only entitled to bring a representative action. He asserts a claim of the company against the shareholder on behalf of his own. Therefore it is not about a direct liability of the shareholders in a narrower sense. It has to be taken into consideration that the entitlement of the companies' creditors to a representative action ends with the commencement of insolvency proceedings, § 62 II 2 AktG. Afterwards only the receiver has the right to assert claims of the company.

Shareholders of private limited companies that receive repayments of capital contributions in violation of § 30 I GmbHG have to reimburse them to the company pursuant to § 31 I GmbHG. The further development of the company assets has no influence on this claim once it has come into existence.[18] Therefore the claim persists in cases where the company assets grow on the amount of share capital again after the violation of § 30 I GmbHG. In contrast to the legal situation of public limited companies § 31 III GmbHG provides for a contingent liability of the other shareholders. They are liable for those payments that the company cannot retrieve from the recipient. While § 62 II 1 AktG entitles creditors of public limited companies to bring an representative action against the shareholder regarding the repayment claim of the company against the shareholder there is no provision explicitly dealing with this issue with regard to private limited companies. Therefore it is unclear, whether creditors of a private limited are entitled to assert the company's claim for reimbursement against its shareholder. Due to the lack of an respective provision the Federal Court of Justice has the view that neither creditors of the company are entitled to assert claims of the company based on § 31 I GmbHG against its shareholder nor do they have an own direct claim against the respective shareholder.[19] In contrast some scholars are of the opinion that the

16 Hüffer, Uwe, *Aktiengesetz,* (7th edn Verlag C. H. Beck, München 2006), § 57 AktG, Rn. 2.

17 Kropff, Bruno and Semler, Johannes (ed), *Münchener Kommentar zum Aktiengesetz, Band 2, §§ 53a-75,* (2nd edn Verlag C. H. Beck/Verlag Vahlen, München 2003), § 62 AktG, Rn. 78ff; Hüffer, Uwe, *Aktiengesetz,* (7th edn Verlag C. H. Beck, München 2006), § 62 AktG, Rn. 13.

18 Henze, Hartwig, 'Gesichtspunkte des Kapitalerhaltungsgebotes und seiner Ergänzung im Kapitalgesellschaftsrecht in der Rechtsprechung des BGH', (2003) NZG 649, 652.

19 BGH NJW 1990, 1725, 1730; Baumbach, Adolf and Hueck, Alfred (ed), *GmbH-Gesetz,* (18th edn Verlag C. H.

entitlement of creditors of a company to a representative action in § 62 II 1 AktG should be applied analogously to repayments by private limited companies.[20] But this opinion is not convincing since the prerequisites for the assumption of an analogy – the existence of an unintended regulatory loophole and the comparability of interests – are not fulfilled. In the context of numerous amendments of the private limited companies act the legislator has had the opportunity to insert a provision comparable with § 62 II 1 AktG into the former. Therefore there is no intention of the legislator apparent to treat public limited companies and private limited companies equally in this context despite the explicit legal situation. Thus creditors of a private limited company are not entitled to assert repayment claims under § 31 GmbHG against the respective shareholder.

c) Conclusion

As discussed above, the German laws on companies contain a multiplicity of norms that ensure the provision and maintenance of a company's share capital. The legal consequences of violations of capital maintenance provisions are exclusively claims of the company against the respective shareholder. Neither in the case of private limited companies nor in the case of public limited companies do creditors of the company have a direct claim against a shareholder based on an unlawful payment of the company to its shareholder. At first glance this result might appear as a discrimination of creditors of a company under German Law compared with creditors of those jurisdictions that provide for a direct liability of shareholders towards creditors of the company in cases of capital withdrawal. But this view is untrue as a comparison with the company law of the United States of America, i.e. the company law of its federal states, will show. In the company law of the United States there is no statutory provision that determines a considerable minimum amount of share capital of companies.[21] Provisions on the protection of creditors against a withdrawal of the company assets only provide for a limited protection.[22] Therefore the system of direct liability there compensates amongst others for the absence of an protection of the companies' assets that are available for the satisfaction of creditors' claims by capital maintenance provisions.[23] Facing the

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Beck, München 2006), § 31 GmbHG, Rn. 6.

20 Roth, Günter H. and Altmeppen, Holger, *Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG),* (5th edn Verlag C. H. Beck, München 2005), § 31 GmbHG, Rn. 9; § 43 GmbHG, Rn. 62ff.

21 Merkt, Hanno and Göthel, Stephan R., *US-amerikanisches Gesellschaftsrecht,* (2nd edn Verlag Recht und Wirtschaft, Frankfurt am Main 2006), Rn. 135.

22 Merkt, Hanno and Göthel, Stephan R., *US-amerikanisches Gesellschaftsrecht,* (2nd edn Verlag Recht und Wirtschaft, Frankfurt am Main 2006), Rn. 462.

23 Von Arnim, Christoph, 'U.S. Corporation und Aktiengesellschaft im Rechtsvergleich - Haftungsdurchgriff im deutschen Kapitalgesellschaftsrecht und Piercing the Corporate Veil im Recht der U.S.-amerikanischen Corporation', (2000) NZG 1001, 1006.

German statutory provisions on capital provision and capital maintenance which violation leads to claims of the company against the respective shareholder there is no need for direct claims of a creditor of the company against this shareholder.

2) Undercapitalization

There are sharp divisions over the question on how to deal with cases in which a company is not able to satisfy all the claims of its creditors because the equity capital bears no relation to the companies' business activity. Some scholars have the view that an insufficient capitalization of a company as such justifies a direct liability of its shareholders towards the companies' creditors. The prerequisites for this liability would be that the equity capital of the company is insufficient in such a way that it is apparent to an insider that a failure of the company is considerably more likely than according to the normal risk of the business.[24] Although this opinion is problematic insofar as there are no clear criterions for the question which amount of equity capital is sufficient in the individual case.[25]

The Federal Court of Justice ("Bundesgerichtshof", "BGH") rejected a direct liability of the shareholders based on an undercapitalization as such.[26] The main reason given for this refusal is that the relevant laws do not provide for capital requirements with regard to the companies' line and scale of business.[27] The rules on capital provision only provide for particular minimum capital requirements that indiscriminately apply to the registration of all private limited companies and public limited companies respectively. According to § 7 I AktG the minimum amount of the share capital of every public limited company comes to 50,000 Euro and § 5 I GmbHG provides that the share capital of every private limited company has to come to at least 25,000 Euro. The provisions on capital maintenance do also not deal with the question of undercapitalization. As discussed above[28], the capital maintenance provisions prohibit payments of the company to the shareholder if and as far as the company assets do not exceed the amount of the share capital (§ 30 GmbHG) or rather every drawing in excess of the distribution of the distributable profit (§ 57 I AktG). But they cannot prevent that operational losses diminish the capital basis of the company.

24 Roth, Günter H. and Altmeppen, Holger, *Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG),* (5th edn Verlag C. H. Beck, München 2005), § 13 GmbHG, Rn. 116.
25 Baumbach, Adolf and Hueck, Alfred (ed), *GmbH-Gesetz,* (18th edn Verlag C. H. Beck, München 2006), § 13 GmbHG, Rn. 16.
26 Roth, Günter H. and Altmeppen, Holger, *Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG),* (5th edn Verlag C. H. Beck, München 2005), § 13 GmbHG, Rn. 117.
27 BGH NJW 1977, 1449, 1450.
28 See B.III.1)a).

Although the Federal Court of Justice considers a violation of § 826 BGB which is a tort provision regarding an intentional damnification contra bonos mores in cases where a company is undercapitalized. This provision refers to situations where a person is harmed in a was that violates good morals. Different from a direct liability for claims against the company a liability according to § 826 BGB is based on the conduct of persons, i.e. in this context the shareholders of the company. Therefore it is not about a direct liability in a narrower sense. The differences between these grounds for a liability are not only of dogmatic nature. A violation of § 826 BGB in the context of undercapitalization rather has more constituent elements than an undercapitalization as such.

According to § 826 BGB someone who intentionally inflicts a damage on another person in a way contra bonos mores is liable for the respective damage. Correspondingly § 826 BGB has four elements of which the two last elements have the greatest importance: the occurrence of a damage (1), a causal link between the conduct of the alleged tortfeasor and the damage (2), the causal conduct has to be contra bonos mores (3) and the intent of the wrongdoer (4).[29] One important difference between a liability pursuant to § 826 BGB and a direct liability of shareholders is the prerequisite of an intent in case of the former. But this prerequisite is interpreted restrictively by the courts. It is therefore sufficient if the shareholder is aware of the fact that a damage of a creditor of the company is very likely because of the companies insufficient equity capital.[30] Hence it is not required that the shareholder aims to damage a shareholder.

With regard to the undercapitalization of a company the Federal Court of Justice held in the following case[31] that the shareholders were liable according to § 826 BGB because they had established a company to harm contracting parties. The facts of this case were as follows. Shareholder A was the owner of a property. Together with shareholder B – his wife – he established a private company. This company commissioned several tradesmen to erect a building on the property. After the works were finished A sold the build-up plot and received the purchase price. Since the company had been impecunious since its establishment the tradesmen were not able to receive full payment for their work from the company. The Federal Court of Justice assumed that the conduct of A was contra bonos mores because he established the company for the sole purpose

29 Rebmann, Kurt, Säcker, Franz Jürgen and Rixecker, Roland (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 5,* (4th edn Verlag C. H. Beck, München 2004), § 826 BGB, Rn. 5.

30 Rebmann, Kurt, Säcker, Franz Jürgen and Rixecker, Roland (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 5,* (4th edn Verlag C. H. Beck, München 2004), § 826 BGB, Rn. 99.

31 BGH NJW-RR 1988, 1181.

of harming the tradesmen.[32] By concluding the contracts for work and services on behalf of the company instead of concluding them on behalf of his own he prevented the contracting parties from obtaining access to the assets created by their work. It was not the company but rather him who received the sales revenue.

3) The development from a liability within groups of companies towards a liability for causing the company's insolvency

a) Provisions on the protection of subordinated companies

To acquire an understanding of the concept of liability for causing the company's insolvency, currently adopted by the Federal Court of Justice, the liability within groups of companies and especially the former concept of liability in so-called "qualified de facto groups" has to be introduced. According to § 18 (1) AktG, a group consists of several legally independent companies under a united leadership. In the Companies Act there are statutory provisions on the legal relations between companies within a group. The legal relations within groups on a contractual basis (§§ 300ff. AktG) are regulated as well as those in groups on a mere factual basis (§§ 311ff. AktG).

The background against which this provisions was enacted is the danger facing by the subordinated company and its creditors that the interests of the subsidiary company are disregarded by the controlling company. Within a group on a contractual basis the controlling company has the leadership over subordinated companies. The situation without a contractual basis is similar since a company which is the majority shareholder or sole shareholder of another company can control the latter by exerting the influence based on its shareholder position. Therefore the Companies Act contains several protective provisions.

With regard to contractual groups certain restrictions on the use of assets of a company do not apply. Payments due to the control agreements and profit transfer agreements are not subject to the restrictions of the §§ 57 (prohibition against the return of capital contributions), 58 (limitations on the appropriation of the annual surplus), 60 (regulations on the distribution of profits) AktG. But to ensure the maintenance of the subordinated company's capital[33], § 302 (1) AktG provides that the controlling company has to balance an annual deficit of the subordinated company.

32 BGH NJW-RR 1988, 1181, 1182.
33 Hüffer, Uwe, *Aktiengesetz*, (7th edn Verlag C. H. Beck, München 2006), § 302 AktG, Rn. 3.

According to § 311 (1) AktG the controlling company within a factual group is not allowed to use its influence to induce the subordinated company to undertake disadvantageous legal transactions without providing a compensation. If no compensation is paid, the subordinated company has a claim for damages against the controlling company pursuant to § 317 (1) AktG.

b) Liability within qualified de facto groups

The compensation in each individual case, as provided by § 311 (1) AktG for factual groups of public limited companies can become problematic. Namely it is not possible in a lot of cases to determine whether a legal transaction of a subordinated company that was induced by the controlling company is disadvantageous for the subordinated company, so that it cannot be distinguished between lawful and unlawful interventions by the controlling company.[34] Furthermore it is often not possible to quantify the disadvantages to the subordinated company, i.e. the loss of assets as result of the legal transaction. In these cases the involved companies were called qualified de facto groups, what refers to the "qualified" kind of control by the controlling company.

To deal with this difficult distinction between lawful and unlawful interventions by controlling companies the Federal Court of Justice established the so-called liability within qualified de facto groups. This meant that he applied § 302 AktG that actually applies to contractual groups of public limited companies analogous to cases of qualified de facto groups of private limited companies. According to this provision a controlling company is obliged to compensate a loss of its subordinated company. The preconditions of liability in a qualified de facto group were controversial. In particular it was unclear, whether the mere exertion of leadership over the subordinated company was sufficient[35] or whether the leadership within a group had to be exerted without adequately taking the interests of the subordinated company into consideration.[36] Even though a provision of the company law relating to groups was applied in this group of cases, the cases decided by the Federal Court of Justice had nothing to do with the relation between different companies within a group in the real sense. It was even decided, that a controlling shareholder, who at the same time was the sole director of the company, engaged in business activities in addition to

34 Baumbach, Adolf and Hueck, Alfred (ed), *GmbH-Gesetz*, (18th edn Verlag C. H. Beck, München 2006), Schlussanhang, Rn. 134.

35 Henze, Hartwig, 'Gesichtspunkte des Kapitalerhaltungsgebotes und seiner Ergänzung im Kapitalgesellschaftsrecht in der Rechtsprechung des BGH', (2003) NZG 649, 654.

36 BGH NJW 1993, 1200.

and apart from those of the company, was liable for the negative results of a legal transaction of the company on its assets .[37] The reasons given for these decisions where, that such a shareholder had a position comparable with a controlling company within a group of companies and that there was a conflict of interests.[38] Under certain conditions not only the subordinated company but also its creditors were entitled to assert the equalization claim.[39] Therefore this was a case of direct liability. Although the cases decided by the Federal Court of Justice were related to the situation of groups of private limited companies there was agreement to a large extent, that the principles of liability in qualified de facto groups could also be applied to groups of public limited companies.[40]

The decisions by the Federal Court of Justice were harshly criticised by many scholars. In particular there was the criticism that the court did not provide clear constituent elements of this liability.[41] Furthermore some scholars disagreed with the results of the judgements[42], because in an extreme case the liability of a shareholder was based on the fact, that he held shares in two different companies over a period of just one week.[43] This was considered implausible also because the liability could be avoided to some extent by becoming an indirect shareholder instead of a direct shareholder.[44]

c) Interventions in the company different from capital withdrawal -
"liability for causing the company's insolvency"

With its judgement in the case "**Bremer Vulkan**"[45] the Federal Court of Justice finally gave up the concept of liability in a "qualified de facto group" and introduced the "liability for causing the company's insolvency" of shareholders of private limited companies. Within the framework of an obiter dictum he held that the protection of dependent private limited companies against interferences by its controlling shareholders is no longer based on the company law relating to

37 BGH NJW 1991, 3142.
38 BGH NJW 1991, 3142, 3143.
39 Kropff, Bruno and Semler, Johannes (ed), *Münchener Kommentar zum Aktiengesetz, Band 8, §§ 278-328,* (2nd edn Verlag C. H. Beck/Verlag Vahlen, München 2000), Anhang zu § 317, Rn. 118ff..
40 Kropff, Bruno and Semler, Johannes (ed), *Münchener Kommentar zum Aktiengesetz, Band 8, §§ 278-328,* (2nd edn Verlag C. H. Beck/Verlag Vahlen, München 2000), Anhang zu § 317, Rn. 20ff.
41 Schmidt, Karsten, 'Gesellschafterhaftung und "Konzernhaftung"bei der GmbH – Bemerkungen zum "Bremer Vulkan"-Urteil des BGH vom 17.09.2001', (2001) NJW 3577ff.
42 Schmidt, Karsten, 'Gesellschafterhaftung und "Konzernhaftung"bei der GmbH – Bemerkungen zum "Bremer Vulkan"-Urteil des BGH vom 17.09.2001', (2001) NJW 3577, 3579.
43 BGH NJW 1997, 943f..
44 Schmidt, Karsten, 'Gesellschafterhaftung und "Konzernhaftung"bei der GmbH – Bemerkungen zum "Bremer Vulkan"-Urteil des BGH vom 17.09.2001', (2001) NJW 3577, 3579.
45 BGH NJW 2001, 3622.

groups within the Companies Act (§§ 291ff., 311ff. AktG).[46] The protection is rather limited to the maintenance of the share capital and the company's right to continuance that require due consideration of the private limited company's own interests.[47] This due consideration would be lacking, if the company becomes unable to meet its obligations because of the controlling shareholder's interferences.[48] An intervention causing the company's insolvency only results in the liability of the sole shareholder for the obligations of the company, if the ability of the company to satisfy its creditors cannot be restored by the repayment of withdrawn capital contributions pursuant to § 31 GmbHG.[49] This concept differs from the former court rulings insofar as it isn't about a liability connected with the structure of groups but is a liability for the abuse of management power. It also does not depend on a controlling position of the shareholder or a classification of the shareholder as an enterprise.[50]

The newly-created principles on the liability for causing the company's insolvency became relevant for the first time in the decision of the so-called "**KBV-case**" by the Federal Court of Justice.[51] The facts of this case were as follows.[52]

A and B were shareholders of K-GmbH with 40 per cent and 60 per cent shareholding respectively. B was director of the company. The plaintiff and K-GmbH concluded a contract for work and services. According to that K-GmbH owed to the plaintiff DM 82,000. After this claim had come into existence, A and B decided to stop the business and to take over the employees by another company, L-GmbH. In the following K-GmbH, represented by B, and L-GmbH, represented by A, concluded a contract. Therein all claims of L-GmbH and its inventory were transferred to K-GmbH. In return L-GmbH assumed a part of the obligations of K-GmbH. The claim of the plaintiff against K-GmbH didn't belong to the obligations assumed by L-GmbH. The value of the transferred inventory amounted to 215,000 DM, the value of the claims amounted to 990,000 DM. The assumed obligations had a value of 823,000 DM. This resulted in a difference of 382,000 DM. That amount was withdrawn from K-GmbH. The reason for this were obligations of K-GmbH towards A on the basis of a tenancy. Execution attempts by the plaintiff into the assets of K-GmbH were unsuccessful.

46 BGH NJW 2001, 3622.
47 BGH NJW 2001, 3622.
48 BGH NJW 2001, 3622.
49 BGH NJW 2001, 3622, 3623.
50 Baumbach, Adolf and Hueck, Alfred (ed), *GmbH-Gesetz*, (18th edn Verlag C. H. Beck, München 2006), Schlussanhang, Rn. 123.
51 BGH NJW 2002, 3024.
52 BGH NJW 2002, 3024.

The application for the commencement of insolvency proceedings over the assets of K-GmbH was rejected due to the lack of assets. In the following the plaintiff sued A and B for the payment of the claims against K-GmbH based on the contract for work and services.

The Federal Court of Justice was of the opinion that beside the prerequisites of a claim based on an intentional damnification contra bonos mores (§ 826 BGB) the prerequisites of a direct liability of the shareholders A and B due to the causing of the company's insolvency were fulfilled. The principle of limited liability is based on the precondition that the assets of the company, which are required to meet its obligations, have to remain in the company for the purpose of the creditors' satisfaction. Insofar the shareholders are deprived of the authority to dispose of the company's assets. The company has no right to its continuance towards the shareholders, they can basically at any time terminate the existence of the company by way of an optional liquidation or insolvency proceedings.[53] But the termination has to take place in an ordered procedure, in which the assets of the company are first of all used for the satisfaction of its creditors.[54] The separation of the shareholders' assets and the assets of the company comprises that the shareholders only have access to the surplus not required for the fulfilment of the company's obligations.[55] The commitment of the company's assets to the preferential satisfaction of creditors during the entire existence of the company is an indispensable precondition for privilege of limited liability as provided for in § 13 (2) GmbHG.[56] It constitutes an abuse of the legal form of a private limited company, if the shareholders deprive the company to a considerable extent of its assets, without due consideration of the company's ability to meet its obligations.[57] This results in the loss of the liability privilege, as far as the loss suffered because of the interference cannot be compensated under §§ 30, 31 GmbHG.

The Federal Court of Justice set out the concept of liability for causing the company's insolvency more precisely within the context of the so-called "**car-dealership case**".[58] In this judgement the BGH dealt with the question on the liability of a person who holds no shares of the private limited company itself but in another company that is for its part a shareholder of the private limited company. Furthermore, he had to decide on what kind of conduct constituted an insolvency causing

53 BGH NJW 2002, 3024, 3025.
54 BGH NJW 2002, 3024, 3025.
55 BGH NJW 2002, 3024, 3025.
56 BGH NJW 2002, 3024.
57 BGH NJW 2002, 3024.
58 BGH NZG 2005, 177.

interference. The facts of the case were as follows[59]:

The defendant was a shareholder of the car dealership E-GmbH with 50 per cent shareholding and the sole director of the company. The remaining shares were held by his wife and his daughter. E-GmbH as well as Z-GmbH were both authorised dealers for cars manufactured by the B-AG. Both companies were in charge of the same contract area. In the following E-GmbH acquired all shares of Z-GmbH, the defendant was also appointed as sole shareholder of Z-GmbH. In this capacity he terminated the dealership contract between Z-GmbH and B-AG two years before the end of its term. Therefore Z-GmbH wasn't anymore in the position to sell new cars and to acquire original spare parts. The stock of cars and the employees of Z-GmbH were taken over by E-GmbH. In the following the winding up of Z-GmbH was initiated, the application for the commencement of insolvency proceedings was rejected due to a lack of assets. The plaintiff is a creditor of Z-GmbH. After unsuccessful execution attempts it sued the defendant, basing on his claim against Z-GmbH.

The Federal Court of Justice held that indirect shareholders, i.e. persons who hold shares of a company which is the shareholder of the respective company, shall be treated as direct shareholders if they are able to exercise control over the company.[60] Accordingly, the ability to assert actual influence, rather than the formal legal construction, is decisive.[61] The defendants' 50 per cent shareholding in E-GmbH together with his position as sole director let the Federal Court of Justice act on the assumption that he exercised control over Z-GmbH.[62] The defendant' fellow shareholders, his wife and daughter, were not actually involved in the business. Although the defendant held only 50 per cent of the shares and therefore didn't have the majority of votes in the shareholders' meeting he was sole director and was able to run the business any way he wanted. The other shareholders also had no majority in the shareholders' meeting and were therefore not able to direct the director.

With regard to the question as to whether the conduct of the defendant was amounted to an unlawful interference that justified a disregard of the limitation of liability pursuant to § 13 (2) GmbHG, the Federal Court of Justice stated, that a shareholder is not obliged to continue the

59 BGH NZG 2005, 177.
60 BGH NZG 2005, 177.
61 BGH NZG 2005, 177, 178.
62 BGH NZG 2005, 177, 178.

business activities of the company.[63] But the termination of business activities has to occur in accordance with the laws, i.e. an orderly exploitation of the company's assets has to take place and the proceeds have to be used to satisfy the creditors.[64] A liability for causing the company's insolvency only becomes an issue if the shareholder withdraws company assets by transferring the assets to himself or another company of which he is shareholder without paying the company a consideration in line with the market conditions.[65] In view of the question whether the defendant transferred assets of Z-GmbH to E-GmbH without adequate payment, the establishment of facts by the court of appeal were not sufficient.[66] Therefore the Federal Court of Justice was not in the position to decide the case himself and remanded it.

In a further case[67] the Federal Court of Justice had to deal with the question whether a particular behaviour such as mismanagement could amount an unlawful interference with the assets of the company. The facts of the case were as follows[68]:

The plaintiff acted for years as a commercial agent of the G-GmbH. The defendant was director and indirect majority shareholder of G-GmbH. He held 94 per cent of the shares in T-BV, which was the sole shareholder of T-GmbH, which in turn held 53.44 per cent of the shares in G-GmbH. The defendant allowed the claims of G-GmbH against its foreign subsidiaries to grow to DM 3.8 million in the year 1992. Not until 1993 the defendant moved on to supply the subsidiaries only on advance payment. In 1994 G-GmbH, represented by the defendant, sold its entire stock of finished products at a purchase price of about DM 3.6 million and raw materials at a purchase price of abut DM 1.6 million to H-GmbH with two years time allowed for payment. The finished products as well as the raw materials had been assigned to a bank as security in advance. H-GmbH didn't pay the purchase price and became insolvent. With regard to G-GmbH insolvency proceedings were closed due to a lack of assets. The plaintiff sued the defendant for the commission owed to him by G-GmbH for his work as commercial agent on the basis of direct liability.

As already decided in the “car-dealership case”, a liability of the defendant is possible even though

63 BGH NZG 2005, 177, 178.
64 BGH NZG 2005, 177, 178.
65 BGH NZG 2005, 177, 178.
66 BGH NZG 2005, 177, 178f.
67 BGH NZG 2005, 214.
68 BGH NZG 2005, 214.

he was no direct shareholder of G-GmbH.[69] By his majority shares in T-BV and its status as indirect majority shareholder of G-GmbH the defendant had controlling influence on G-GmbH and exerted this influence in fact. Therefore the question arises, whether the conduct of the defendant amount an unlawful interference.

In the year 1992 he allowed due claims of G-GmbH against its subsidiaries to grow, thus he granted them credit. This generous granting of credit and his late change to advance payment of supplies might have constituted mismanagement. The Federal Court of Justice held that the concept of liability for causing the company's insolvency does not refer to mismanagement of a company but rather requires the deliberate deprivation of assets on which the company relies on to meet its obligations for non-company purposes.[70] The Court saw no evidence for such a deprivation of assets, since the defendant in fact – although belatedly - went over to supply the subsidiaries only on advance payment.[71] The sale of finished products and raw materials that had been pledged as security beforehand also wasn't an unlawful interference, that could constitute the direct liability of the defendant.[72] It was indeed about misappropriation against the bank, rather than an interference with the company assets of G-GmbH to the disadvantage of its creditors, that led to his respective conviction.

d) Prerequisites und legal consequences of the liability for causing the company's insolvency

(1) Introduction

As discussed above, according to the rulings of the Federal Court of Justice, the liability for causing the company's insolvency requires, that a shareholder deprives the company of its assets without adequate consideration for the maintenance of the company's ability to meet its obligations and that this has caused the insolvency of the company. However, the claim cannot be established if the company is fully compensated. Accordingly, the liability for causing the company's insolvency can only be established if the following prerequisites are met:

(2) Liability causing behaviour

69 BGH NZG 2005, 214, 214f.
70 BGH NZG 2005, 214, 215.
71 BGH NZG 2005, 214, 215.
72 BGH NZG 2005, 214, 215.

The liability for causing the company's insolvency requires a certain intervention with the assets of the company. An act amounts to this kind of intervention if it prejudices the company's ability to meet is obligations without adequate consideration.[73] To put it simply, a shareholder is not allowed to deprive assets of the company if there is a deficit or a threat thereof.[74] Mere mismanagement without a deliberate deprivation of assets for non-company purposes or the assumption of business risks are not sufficient.[75] That the respective shareholder has benefited from the intervention does not matter, what is required is the participation in causing the company's insolvency by consenting to the transfer of assets is sufficient.[76]

Different cases of insolvency causing interventions are acknowledged. Beside the withdrawal of capital, insolvency causing interventions include diversion of other vital assets such as business opportunities, patents, licenses, mean of production as well as the termination of vital tenancy agreements.[77] Furthermore, the assumption of risks comes into consideration. In the context of groups of companies this includes the accession to liability pools or central cash pools, in cases where the liquidity of the company is not ensured at any time, as well as the securitization in favour of a shareholder or other companies.

Since the Federal Court of Justice has not made a decision on this matter yet, it is contended whether the liability for causing the company's insolvency requires the fault of the shareholder concerning the causation of the company's insolvency. Some scholars argue, that the subjective element of fault of the shareholder is not required, since the direct liability is based already on an objective behaviour that constitutes an abuse of this form of company.[78] Other scholars argue in favour of the requirement of fault. According to them, the liability for causing the company's insolvency is a liability based on the fault of a grossly negligent violation of the obligation not harm the assets of the company that are dedication satisfaction of the creditors.[79] In practice these

73 BGH NJW 2002, 3024.
74 Baumbach, Adolf and Hueck, Alfred (ed), *GmbH-Gesetz*, (18th edn Verlag C. H. Beck, München 2006), Schlussanhang, Rn. 119.
75 BGH NZG 2005, 214, 215.
76 BGH NZG 2002, 520.
77 Baumbach, Adolf and Hueck, Alfred (ed), *GmbH-Gesetz*, (18th edn Verlag C. H. Beck, München 2006), § 13 GmbHG, Rn. 20; Henze, NZG 2003, 649, 658.
78 Baumbach, Adolf and Hueck, Alfred (ed), *GmbH-Gesetz*, (18th edn Verlag C. H. Beck, München 2006), § 13 GmbHG, Rn. 19.
79 Roth, Günter H. and Altmeppen, Holger, *Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG)*, (5th edn Verlag C. H. Beck, München 2005), § 13 GmbHG, Rn. 95; Schmidt, Karsten, 'Gesellschafterhaftung und "Konzernhaftung"bei der GmbH – Bemerkungen zum "Bremer Vulkan"-Urteil des BGH vom 17.09.2001', (2001) NJW 3577, 3579; Westermann, Hans-Peter, 'Haftungsrisiken eines "beherrschenden" GmbH-Gesellschafters', (2002) NZG 1129, 1137.

different approaches should not have any consequences, since the ruthless causation of the company's insolvency by one or more of its shareholders without their fault is unthinkable.[80]

(3) Debtors of direct liability

The liability for causing the company's insolvency requires a certain intervention with the assets of the company. A mere minority shareholder without any influence within the company is not able to make such an intervention. Possible debtors of direct liability are rather sole shareholders as well as several cooperating shareholders.[81] Shareholders in that respect are also indirect shareholders who are in a position to exercise control over the private limited company through another company controlled by them.[82] Furthermore some scholars have the opinion, that affiliated companies and so-called "indirect de facto shareholders"[83] can also be debtors of direct liability.[84] The latter are persons, who are able to exercise the right to issue instructions or have other influence capabilities to the disadvantage of the company by circumventing the real shareholder. There are, however, no decisions of the Federal Court of Justice on this point. But from my point of view it speaks well against this position that direct liability is an exception from the principle of limited liability (§ 13 (2) GmbHG) – but this provision neither refers to affiliated companies nor to de facto shareholders.[85]

(4) The result of the intervention

There are different comments on the question on the kind of results the intervention has to produce. On the one hand some scholars argue that the mere worsening of the company's business situation is sufficient.[86] Predominantly though it is deemed necessary that the intervention of the shareholder has caused the insolvency of the company or at least has deepened an already existing insolvency.[87]

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80 Roth, Günter H. and Altmeppen, Holger, *Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG),* (5th edn Verlag C. H. Beck, München 2005), § 13 GmbHG, Rn. 95.

81 Baumbach, Adolf and Hueck, Alfred (ed), *GmbH-Gesetz,* (18th edn Verlag C. H. Beck, München 2006),§ 13 GmbHG, Rn. 19.

82 BGH NZG 2005, 177, 178.

83 OLG Rostock, NZG 2004, 385ff.

84 Roth, Günter H. and Altmeppen, Holger, *Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG),* (5th edn Verlag C. H. Beck, München 2005), § 13 GmbHG, Rn. 96.

85 Roth, Günter H. and Altmeppen, Holger, *Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG),* (5th edn Verlag C. H. Beck, München 2005), § 13 GmbHG, Rn. 97.

86 OLG Rostock, NZG 2004, 385; Henze, Hartwig, 'Gesichtspunkte des Kapitalerhaltungsgebotes und seiner Ergänzung im Kapitalgesellschaftsrecht in der Rechtsprechung des BGH', (2003) NZG 649, 656.

87 Roth, Günter H. and Altmeppen, Holger, *Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG),* (5th edn Verlag C. H. Beck, München 2005), § 13 GmbHG, Rn. 94; Baumbach, Adolf and Hueck, Alfred (ed),

The Federal Court of Justice has not expressed an opinion on this question so far. The fact that the direct liability is linked to a situation, where the creditor cannot attain satisfaction from the assets of the company due to its lack of liquidity speaks in favour of the predominant opinion.[88] If the intervention does not cause or at least deepens the insolvency, there is no need for the protection of the creditors by awarding to them a claim against the company's shareholder.[89] Either they can still attain satisfaction of their claims from the company or there is no causal link between the interference and their loss.

(5) Restrictive requirements

According to Federal Court of Justice, interventions of shareholders into the assets of the company shall not lack adequate consideration to the company's ability to meet its obligations "to an extent that makes a difference.[90] The wording leads to the conclusion that there are interventions that lack adequate consideration but that are not significant enough to meet the requirements the satisfaction of which will lead to a liability for causing the company's insolvency. There is no further explanation by the Federal Court of Justice, but some scholars assume, that he used this wording to provide leeway for dealing with exceptional cases in the future.[91]

(6) Subsidiarity towards claims pursuant to §§ 30, 31 GmbHG

The Federal Court of Justice held that there exists no liability for causing the company's insolvency if and as far as the loss suffered because of the deprivation of company assets by the shareholder can be regained according to §§ 30, 31 GmbHG.[92] Due to a lack of judicial comments it is unclear, how this requirement has to be interpreted.. As far as §§ 30, 31 GmbHG cannot be applied, because the deprivation of assets does not find an expression in the balance sheet or no insolvency has been caused by the intervention, there is no conflict between capital maintenance and direct liability. But problems arise if a liability under §§ 30, 31 GmbHG and direct liability for causing the company's insolvency coincide because the constituent of both the former as well as the latter are fulfilled. This is the case, when interventions affect the share capital and at the same time cause losses, that find no expression in the balance sheet (the value of means of production decline due to the

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GmbH-Gesetz, (18th edn Verlag C. H. Beck, München 2006), § 23 GmbHG, Rn. 19.

88 Bruns, Patrick, 'Zur Reichweite der Haftung wegen existenzvernichtenden Eingriffs' (2004) NZG 409, 410.

89 Shillig, Michael, 'The Development of a new Concept of Creditor Protection for German GmbHs', (2006) 27 (11) Comp. Law., 348, 349.

90 BGH NJW 2002, 3024.

91 Dauner-Lieb, Barbara, 'Die Existenzvernichtungshaftung – Schluss der Debatte?', (2006) DStR 2034, 2038f.

92 BGH NJW 2002, 3024; BGH NZG 2005, 177.

withdrawal of patents or concessions).[93] Another example are cases, where §§ 30, 31 GmbHG can be applied but do not sufficiently compensate the loss of the company (deprivation of assets that causes the insolvency of the company regardless of the existing claim under §§ 30, 31 GmbHG). The postulated subsidiarity of the liability for causing the company's insolvency could be interpreted as referring only to those amounts of losses that exceed the amounts covered by §§ 30, 31 GmbHG. But this interpretation would cause inconsistencies between the scopes of the two different claims, since different persons are entitled to make a claim under the provisions. A company is entitled to make a claim under §§ 30, 31 GmbHG whereas a creditor of the company has the right to make a claim on the basis of the causation of the company's insolvency.[94] Therefore it is more convincing, to restrict the subsidiarity of the direct liability towards claims under §§ 30, 31 GmbHG to cases where there is either no threat of insolvency or the threat has already been eliminated by a compensation.[95] In the remaining cases the liability according to §§ 30, 31 GmbHG does not conflict with the liability for causing the company's insolvency.

(7) Limitation of the extent of liability

According to the Federal Court of Justice, full liability for causing the company's insolvency will not be imposed if the respective shareholder can prove, through comparison with the hypothetical loss, that the actual loss that would have occurred under a lawful conduct of the shareholder, is only a limited loss.[96] The obligation of compensation is then reduced to this amount. The reason for this limitation is, that an unlimited liability of the shareholder for all claims against the company seems to be inappropriate, if there existed a deficit or if the company was even over-indebted before the intervention of the shareholder.[97] In this case the claim of the creditor was not entirely valuable before. Therefore an unlimited liability of the shareholder for meddling with the company asstes would provide the creditor with a claim higher than the one that exists without the intervention of the shareholder.[98] In these cases an equitable decision shall be made, whether the liability has to be limited to a fraction of the claim of the creditor.[99]

93 Baumbach, Adolf and Hueck, Alfred (ed), *GmbH-Gesetz*, (18th edn Verlag C. H. Beck, München 2006), § 13 GmbHG, Rn. 18.
94 Dauner-Lieb, Barbara, 'Die Existenzvernichtungshaftung – Schluss der Debatte?', (2006) DStR 2034, 2039.
95 Baumbach, Adolf and Hueck, Alfred (ed), *GmbH-Gesetz*, (18th edn Verlag C. H. Beck, München 2006), § 13 GmbHG, Rn. 18.
96 BGH NZG 2005, 177, 178; BGH NZG 2005, 214, 215.
97 Henze, Hartwig, 'Gesichtspunkte des Kapitalerhaltungsgebotes und seiner Ergänzung im Kapitalgesellschaftsrecht in der Rechtsprechung des BGH', (2003) NZG 649, 657.
98 Dauner-Lieb, Barbara, 'Die Existenzvernichtungshaftung – Schluss der Debatte?', (2006) DStR 2034, 2041.
99 Henze, Hartwig, 'Gesichtspunkte des Kapitalerhaltungsgebotes und seiner Ergänzung im Kapitalgesellschaftsrecht in der Rechtsprechung des BGH', (2003) NZG 649, 657.

(8) Legal consequences and assertion of claims

The causation of a company's insolvency results in the direct liability of the company's shareholders towards the creditors. This claim does not aim at a compensation of damages but rather at the satisfaction of the creditors' claim. However while insolvency proceedings take place the creditors cannot directly assert this claim, cp. § 93 InsO (“insolvency rules”). During this time the assertion of this claim is rather reserved to the receiver, since such a claim concerns all insolvency creditors.[100]

As a result of this limitation and the requirement, that the intervention of the shareholder has to cause the company's insolvency, a direct claim of the creditors of the company exists only in cases where no insolvency proceedings take place at that moment although the insolvency of the company has been caused. This is the case when the application for the commencement of insolvency proceedings has been rejected due to a lack of assets or where insolvency proceedings have already been completed.

Whether the creditor of the company is obliged to claim unsuccessfully against the company before being entitled to assert the claim directly against the shareholder has not been decided yet.[101] Some scholars deem an prior unsuccessful execution attempt against the company necessary for holding the company's shareholder liable.[102] As reason for this they refer to the statement of the Federal Court of Justice that a creditor of a company can only sue a shareholder of this company based on the liability for causing the company's insolvency if the company cannot satisfy him.[103] But in my opinion this conclusion is not inevitable. The statement of the Federal Court of Justice could also be understood as mere reference to the insolvency of the company, which is an acknowledged prerequisite of the claim.

The burden of proof basically rests with the party that asserts a claim. Accordingly a creditor of a company who sues the company's shareholders has to prove the justification of his claim. With

100 BGH DStR 2005, 1743, 1747; Roth, Günter H. and Altmeppen, Holger, *Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG)*, (5th edn Verlag C. H. Beck, München 2005), § 13 GmbHG, Rn. 105.

101 Shillig, Michael, 'The Development of a new Concept of Creditor Protection for German GmbHs', (2006) 27 (11) Comp. Law., 348, 350.

102 Henze, Hartwig, 'Gesichtspunkte des Kapitalerhaltungsgebotes und seiner Ergänzung im Kapitalgesellschaftsrecht in der Rechtsprechung des BGH', (2003) NZG 649, 657.

103 BGH NJW 2002, 3024 headnote 2.

regard to the fact, that creditors of a company have an insight into the management of the company only to a very limited extent, the Federal Court of Justice granted alleviations of the burden of proof to the creditors in his decisions on "qualified de facto groups".[104] These alleviations can also be applied to the new concept of liability for causing the company's insolvency.[105] It is therefore sufficient if the plaintiff alleges facts that allow for the conclusion that the shareholder with its management of the company grossly encroached upon the interests of the company. If he succeeds and the shareholder contests the causal link between his conduct of grossly encroaching upon the company's interest and the insolvency of the company, the burden of proof shifts to the shareholder.

4) Commingling of assets

a) Private limited companies

According to rulings of the Federal Court of Justice shareholders of a private limited company can be held liable by creditors of the company if they do not sufficiently separate between the assets of the company and their personal assets.[106] Creditors of the company can assert this claim directly against the shareholders as far as no insolvency proceedings take place. This direct liability can be understood best in comparison with the capital maintenance regulations in §§ 30, 31 GmbHG. These regulations shall ensure the availability of a certain amount of assets (the equity capital) for the satisfaction of creditors' claims. Repayments of capital contributions to shareholders, which touch the equity capital, have to be reimbursed to the company pursuant to § 31 I GmbHG. This obligation to reimburse repayments does not protect creditors of the company in cases where the companies' and the shareholders' assets are commingled and it therefore is not possible to control, whether shareholders withdraw certain amounts of capital contributions.[107]

The liability of shareholders based on commingling of assets has two prerequisites: (1) the assets of the company and those of shareholders have to be undistinguishable and (2) the respective shareholder has to be responsible for this commingling of assets.[108] The first prerequisite is fulfilled, if non-transparant accounting or other cover-up tactics prevent the control, whether the

104 BGH NJW 1993, 1200, 1203.

105 Roth, Günter H. and Altmeppen, Holger, *Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG)*, (5th edn Verlag C. H. Beck, München 2005), § 13 GmbHG, Rn. 101f.

106 BGH NJW 1986, 188, 189; BGH NJW 1994, 1801, 1801f.

107 Roth, Günter H. and Altmeppen, Holger, *Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG)*, (5th edn Verlag C. H. Beck, München 2005), § 13 GmbHG, Rn. 113.

108 BGH NJW 1994, 1801, 1802.

provisions on capital maintenance have been observed.109 This can for example be the case, if there is no accounting at all[110] or if shareholders use the account of the private limited company for their private account management.[111] But in contrast to the legal situation in countries like Britain[112] the mere lack of a double-entry bookkeeping is no sufficient evidence for a commingling of assets.[113]

The second prerequisite for the liability of a shareholder for obligations of the company is that he is responsible for the commingling of assets. According to the Federal Court of Justice this requires that the shareholder has a ruling influence on the company.[114] Hence mainly majority shareholders are liable. But under certain circumstances minority shareholders can also be responsible. This is the case, if the minority shareholder holds the majority of shares from an economic perspective since other shareholders hold their shares as fiduciaries for him or since he can always rely on the support of other shareholders in the shareholders' meeting.[115] The same applies, if a minority shareholder cooperates with a majority shareholder regarding the commingling of assets.[116]

In one of his judgements the Federal Court of Justice gave his opinion on the prerequisites for the personal liability of shareholders of a private limited company based on the commingling of assets.[117] The facts of the case were as follows:

The defendant and her husband were shareholders of a private limited company, conducting asset management, with 20 per cent and 80 per cent shareholding respectively. Furthermore the defendant was the sole director of the company. However, in fact she was never engaged in the business of the company. The business was rather run by her husband who was an authorized signatory of the company. The only reason for the appointment of the defendant was that her husband should be enabled to appear as a witness in lawsuits in which the company was involved. If the husband had held the position of a director of the company the German Civil Procedure Rules would not have

109 BGH NJW 1986, 188, 189; BGH NJW 1994, 1801, 1801f.
110 Baumbach, Adolf and Hueck, Alfred (ed), *GmbH-Gesetz*, (18th edn Verlag C. H. Beck, München 2006), § 13 GmbHG, Rn. 14; BGH NJW 1994, 1801.
111 OLG Celle, GmbHR 2001, 1042.
112 Hirte, Heribert, 'Die Entwicklung des Unternehmens- und Gesellschaftsrechts in Deutschland in den Jahren 2005 bis 2006', (2007) NJW 817, 820.
113 BGH NJW 2006, 1344.
114 BGH NJW 1994, 1801, 1802.
115 BGH NJW 1994, 1801, 1802.
116 Roth, Günter H. and Altmeppen, Holger, *Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG)*, (5th edn Verlag C. H. Beck, München 2005),§ 13 GbHG, Rn. 114.
117 BGH NJW 1994, 1801.

allowed him to appear as a witness in those lawsuits. The plaintiff engaged the company to administrate her assets and payed about DM 450,000 to the company. After the asset management contract had been terminated, the plaintiff retrieved only about DM 130,000. After commencement of insolvency proceedings against the company, the plaintiff sued the defendant to retrieve the outstanding amount from the terminated contractual relationship with the company.

Based on the fact, that no accounting according to the rules took place in the company at all, the Federal Court of Justice assumed, that the company's assets and those of the shareholders were commingled.[118] Nevertheless he held that the defendant was not personally liable, since she was not responsible for the commingling of assets.[119] The defendant was not able to exert any ruling influence on the company on the basis of her position as a shareholder. She was only a minority shareholder with a share of 20 per cent and was not supposed to be involved in the management of the company at all. Furthermore the Federal Court of Justice was of the opinion that being the sole director of the company did not provide the defendant with the necessary influence to be held responsible too.[120] He argued that directors are basically entitled to the management of the respective company but they do not have a ruling influence since they have to obey instructions given by the majority of the shareholders.[121] This cases makes clear, that a direct liability based on commingling of assets requires the responsibility of the shareholder for the commingling as well.

b) Public limited companies

There are different opinions on the question, whether shareholders of a public limited company can also be held liable by creditors of the company on the basis of commingling of assets. The Federal Court of Justice did not have the chance to rule on this question so far. In the context of a possible direct liability based on commingling of assets there are two major differences between a private limited company and a public limited company. Unlike shareholders of private limited companies, shareholders of public limited companies have no right to issue instructions to the company's directors.[122] Therefore it is less probable that they have a ruling influence on the company. Furthermore the Companies Act provides for more far-reaching claims against the shareholders of a

118 BGH NJW 1994, 1801, 1802.
119 BGH NJW 1994, 1801, 1802.
120 BGH NJW 1994, 1801, 1802.
121 On the duty to comply with orders see Roth, Günter H. and Altmeppen, Holger, *Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG)*, (5th edn Verlag C. H. Beck, München 2005), § 37 GmbHG, Rn. 3ff.
122 Kropff, Bruno and Semler, Johannes (ed), *Münchener Kommentar zum Aktiengesetz, Band 1, §§ 1-53*, (2nd edn Verlag C. H. Beck/Verlag Vahlen, München 2000), § 1 AktG, Rn. 66.

public limited company. With regard to private limited companies § 30 I GmbHG prohibits payments to shareholders that derogate the company's assets, necessary to maintain the share capital. § 57 AktG, the corresponding provision on public limited companies is more extensive insofar as it prohibits all drawings in excess of the distribution of the distributable profit and not only those payments that interfere with capital maintenance. In case of a violation of § 57 AktG the respective shareholder can be held liable for reimbursement pursuant to § 62 I. AktG. Under specific circumstances creditors of the company are entitled to assert this claim of the company against the shareholder. Since creditors of the company can bring this representative action there is no need for a direct liability based on commingling of assets with regard to public limited companies.[123]

This opinion is furthermore verified by a noticeable lack of court decisions on this matter. It shows that in practice there is no need for a direct liability of public limited companies' shareholders based on commingling of assets since either no legal disputes with corresponding facts arose or those legal disputes could be solved otherwise.

5) Conclusion

As stated above, a direct liability of shareholders for obligations of their company is discussed in four major groups of cases: capital withdrawal, undercapitalization, liability for causing the company's insolvency and commingling of assets. However a direct liability of shareholders towards creditors of the company is ultimately not acknowledged in all of these cases.

Cases of capital withdrawal are not solved by disregarding the separate legal personality of companies but by the provisions on capital provision and capital maintenance. As far as public limited companies are concerned, every drawing in excess of the distribution of the distributable profit is prohibited by § 57 I AktG. If a shareholder violates this provision the company has a claim for reimbursement against this shareholders. If and to the extend that a creditor of the company cannot obtain satisfaction of his claim against the company he is entitled to assert the claim of the company against its shareholder. This constitutes no direct liability but rather a representative

123 Hüffer, Uwe, *Aktiengesetz*, (7th edn Verlag C. H. Beck, München 2006), § 1 AktG, Rn. 20; but see Kropff, Bruno and Semler, Johannes (ed), *Münchener Kommentar zum Aktiengesetz, Band 1, §§ 1-53*, (2nd edn Verlag C. H. Beck/Verlag Vahlen, München 2000), § 1 AktG, Rn. 65ff.

action of the creditor against the shareholder. In case of private limited companies § 30 GmbHG prohibits payments of the company to the shareholder if and as far as the company assets do not exceed the amount of the share capital. The company has a claim for repayment against the respective shareholder if he violates this capital maintenance provision. Creditors of the company have no direct claim against the shareholder nor are they entitled to assert the company's claim for repayment against the shareholder.

Undercapitalization is a situation in which the equity capital of the company bears no relation to its business activity. If a creditor of a company cannot be satisfied due to this undercapitalization he has no direct claim against the shareholders of this company based on the undercapitalization as such. However, he might have a claim against individual shareholders on the basis of the tort provision § 826 BGB which refers to violations contra bonos mores.

The liability for causing the company's insolvency is a new cause of action established by the Federal Court of Justice almost six years ago. It is about a direct liability of shareholders for the abuse of management power. Shareholders can be held directly liable by creditors of the company if they deprive the company of its assets and thus cause the insolvency of the company. Since this cause of action has been established only recently there are still unclear points regarding the constituent elements of this claim. These include for example the relation of the liability for causing the company's insolvency to claims based on capital maintenance (§§ 30, 31 GmbHG). Therefore further legal comments by the Federal Court of Justice are required.

Regarding commingling of assets there is a difference between the legal situation of the two different kinds of companies. In case of private limited companies shareholders are directly liable towards creditors of the company if they do no sufficiently separate between the company assets and their personal assets. The reason for this is that the compliance with capital maintenance provisions is not possible if these different assets are commingled. With regard to public limited companies it is controversial whether creditors of the company have a direct claim against the shareholders. Certain differences between private limited companies and public limited companies speak against acknowledging a direct liability of shareholders in the case of public limited companies. A ruling influence of shareholders of a public limited company is less likely since they do no have the right to issue instructions to directors. Furthermore creditors of public limited companies are sufficiently protected against a commingling of assets by more extensive capital maintenance provisions.

C. The legal Situation in the People's Republic of China

I. The legal situation before the enactment of the Company Law 2006

1) Introduction

As will be demonstrated in the following, the legal basis for a direct liability of shareholders for obligations of the company got changed decisively by the enactment of the Company Law 2006. Nevertheless this part of the article starts with an extensive discussion of the legal situation before the enactment of the Company Law 2006. The reason for this is that it requires an understanding of the former legal situation to acquire an understanding of the current legal situation. Especially with regard to the interpretation of current statutory provisions the analysis of former court decisions is helpful.

2) Statutory provisions

The first Company Law of the PRC became effective in 1994. With regard to private limited companies (also called “limited liability companies”) and public limited companies (also called “joint stock limited companies”) Art. 3 Company Law 1994 provided for the separate legal personality and the limitation of shareholders' liability. The article said: “A "limited liability company" or "joint stock limited company" is an enterprise legal person. In the case of a limited liability company, shareholders shall assume liability towards the company to the extent of their respective capital contributions, and the company shall be liable for its debts to the extent of all its assets.” But there was no provision explicitly answering the question, whether shareholders can be held accountable for obligations of the company. The Articles 206 through 228 Company Law 1994 contained certain limits to limited liability. But they did not provide for a cause of action for creditors of the company, they only provided for criminal and administrative penalties.[124] The General Principles of Civil Law (“GPCL”) do also not answer the question, whether there are situations in which creditors of a company can hold the shareholders directly liable. Art. 49 GPCL only provides that in certain situations the legal representative of a company can be held liable and can be subject to administrative and criminal liability.

124 Albert, Cavid M., 'Addressing Abuse of the Corporate Entity in the People's Republic of China: New Thoughts on China's Need for a Defined Veil Piercing Doctrine', (2002) 23 U. Pa. J. Int'l Econ. L. 873, 879f.

3) The reply of the Supreme People's Court

The most important document dealing with direct liability of shareholders was a reply of the Supreme Peoples' Court ("SPC") to a question of the Higher Peoples' Court of Guangdong[125], issued in 1994. To understand the importance of this document it is necessary to point out the role played by the SPC. According to Art. 33 Organic Law of the Peoples' Courts "the Supreme People's Court shall give interpretation on issues concerning specific applications of laws and decrees in judicial proceedings". This is different from the legal situation under German Law and most other countries. Because of the doctrine of separation of powers the German supreme federal courts are not entitled to give abstract interpretations on legal questions, they are rather restricted to decide the cases presented to them. Furthermore the judgements of German courts in principle only have binding effect on the parties to the respective lawsuit. But interpretations of the Supreme Peoples' Court in contrast are binding to lower courts. Therefore the judicial interpretations by the SPC amount to a certain extent to judicial legislation.[126] Accordingly the mentioned Reply of the Supreme People's Court could basically serve as basis for holding shareholders directly liable. It contained the following passage:

"Where the enterprise incorporated by another enterprise has obtained its Enterprise Legal Person Business Licence but the amount of contributed capital is different from the amount of registered capital, where the amount of contributed capital satisfies the requirement under rule 15 (7) of the Detailed Rules for the Implementation of Regulations of the People's Republic of China on the Administration of Registration of Enterprises with Legal Person Status or the amount required under other regulations, if the enterprise in question meets other conditions on the acquisition of enterprise legal personality, the enterprise's legal personality should be recognized and the enterprise should bear its civil liability with its assets. However, where the enterprise is unable to meet ist liability with its assets after it has been dissolved or has ceased to operate, the founding enterprise ought to meet the liability of the first-mentioned enterprise, the liability of which should be limited to the difference between the amount of the contributed capital and the amount of the registered capital."

125 "On the Assumption of Civil Liability After an Enterprise Established by Another Enterprise has been Closed Down or Gone Out of Business." Reply to the High Court of Guangdong by the Supreme Court on Liability of Promoting Enterprises for Their Terminated Enterprises on March 30, 1994 (hereinafter Reply of the Supreme Peoples' Court).

126 See Lin Feng, *Constitutional Law in China*, (Sweet & Maxwell Asia, Hong Kong 2000), Rn. 9.31.

According to this wording, the Reply of the Supreme Peoples' Court deals only with a special case of direct liability. It refers to a situation in which one company has established another company and provides for direct liability of the parent company, limited to the difference between the subsidiary company's amount of contributed capital and the amount of its registered capital. A claim based on the Reply of the Supreme Peoples' Court has the following four prerequisites: (1) an enterprise incorporated by another enterprise, (2) the amount of the contributed capital is less than the amount of the registered capital but satisfies the amount required under certain regulations, (3) the subsidiary enterprise is dissolved or has ceased to operate, (4) the subsidiary enterprise is unable to meet its liability. Therefore the Reply of the Supreme Peoples' Court does not support a direct liability of a shareholder for obligations of the company in cases in which the aforementioned prerequisites are not fulfilled. In spite of the lack of statutory provisions and judicial interpretations that regulate direct liability of shareholders in a comprehensive way, there are in fact some judgements of courts which award claims based on the direct liability of shareholders. Five of these cases will be discussed in the following.

4) Court decisions

a) Case 1:

Amoy Xiahua Display Device System Ca Ltd

vs. Yantai Dongchen Science and Technology Co Ltd[127]

Wang and Ma proposed to promote the defendant company and transferred their capital contributions into the account of the proposed company. After an accounting firm had produced a capital verification report Wang and Ma withdrew RMB 200,000 from the capital account in the name of salary payment and duty trip expenses.

In the following the plaintiff and the defendant entered into a distributorship contract, appointing the defendant to be the distributor of the products manufactured by the plaintiff company in certain areas. The plaintiff delivered some goods to the defendant pursuant to the contract but the defendant did not make full payment. After the Yantai Industry and Commerce Administrative Bureau had

127 Guojia Faguan Xueyuan & Zhongguo Renmen Daxue Faxueyuan (National Judicial Officers College & The Peoples' University of China Law School)(ed), Zhongguo Zhenpan Anli Yaolan (2004 Nian Shangshi Shenpan Anli Juan) (A Collectian of Major Chinese Cases (Commercial law cases)), Peoples' Court Press, Peoples' University of China Press, Beijing, 2005, 311; the entire description of this case is based on a translation provided by Dr. Charles Zhen Qu, Assistant Professor at City University of Hong Kong, which is on file with the author.

revoked the business licence of the defendant the plaintiff sued the defendant for the sum owed.

The Court held that Wang and Ma should compensate the plaintiff RMB 300,000 with company assets of the defendant and RMB 200,000 (the amount withdrawn by them from the companies' capital account) with their personal assets. With regard to the second sum it was of the opinion that the withdrawal in the name of salary payment and duty trip expenses amounted to capital withdrawal, which contravened the relevant provisions. Wang and Ma should therefore face the legal consequence of capital withdrawal.

The background to this case is that the provision of capital contributions is checked only once in the context of the companies' registration. Art. 34 Company Law 1994 and Art. 36 Company Law 2006 provide that shareholders shall not withdraw their capital contributions once their company is registered. But in fact the withdrawal of capital contributions is possible. Insofar there is no difference to the situation under German Law. Whether shareholders obey the provisions on capital maintenance is not checked constantly. But in the case of private limited companies German Law allows creditors of a company to assert the claim of the company for reimbursement against the shareholder who violated the prohibition of capital withdrawal.[128] Under German Law creditors of the company are therefore at least able to ensure that the necessary legal measures for the reimbursement of the company are taken. There is no comparable provision in the Chinese Company Law. Furthermore neither Art. 34 Company Law 1994 nor Art. 36 Company Law 2006 provides for the legal consequence that creditors of the company have a direct claim against the shareholders based on the capital withdrawal. Therefore the wording of the Company Law does not support the judgement of the court.

b) Case 2:

Urban and Rural Construction Co Ltd vs Yang & Others[129]

Yang, Qu and Gao incorporated the Jinbaoma company in 1995. The total registered capital was RMB 500,000. Before incorporation of the company Yang had concluded an agreement with the plaintiff that the latter would erect a building for the company to be incorporated.

128 See B.III.1)b).

129 Beijing Higher Peoples' Court (ed), Adjudication and interpretation of complicated company law cases (Law Press China, Beijing 2006) 231; the the entire description of this case is based on a case summary provided by Dr. Charles Zhen Qu, Assistant Professor at City University of Hong Kong, which is on file with the author.

In 1996 Jinbaoma had its assets revalued for the purpose of increasing the amount of its registered capital The assets of the company were valued at about RMB 11,600,000, the major part of this (RMB 7,300,000) was based on the value of the real estate project in construction. The registered capital of Jibaoma was subsequently changed accordingly.

After incorporation the project was completed in 1997. Jinbaoma sold the respective property for RMB 4,000,000 to another company which paid the whole purchase price to Jinbaoma. The plaintiff reached an agreement with Jinbaoma on the contract price of almost RMB 3,500,000, payable until the end of October 1998. However, Jinbaoma has only paid RMB 300,000.

Since Jinbaoma did not lodge its annual return in 1998 the Bureau of Industry and Commerce Administration (BICA) revoked its business licence. The plaintiff sued the three shareholders of Jinbaoma for the balance of the contract price and litigation costs.

The trial court emphasised that the three shareholders of Jinbaoma transferred the property in question to a third party before Jinbaoma paid the contract price to the plaintiff. They also caused the deregistration of Jinbaoma without liquidating the company by failing to lodge the annual return. The court held that what the shareholders had done deprived Jinbaoma of its ability to discharge its debts and amounted to evading debt in bad faith. They should therefore be liable for Jinbaoma's debt.

This case indicates a major problem under Chinese Company Law regarding the deregistration of a company. If a company fails to lodge its annual return the authority in charge deregisters the company but it is not ensured that a liquidation of the company takes place. Therefore there is no means to control, whether the company has to satisfy claims of its creditors with the remaining company assets. This enables shareholders of a company to deprive creditors of the company of the satisfaction with company assets. Under German Law in contrast the deregistration of companies requires a liquidation (§§ 65ff GmbHG, § 264 I AktG). In this context obligations of the company have to be satisfied (§ 70 GmbHG, § 268 I AktG). If this is not possible due to a lack of company assets insolvency proceedings have to be carried out (§ 64 GmbHG, 92 II AktG). Insolvency proceedings shall ensure the equal satisfaction of creditors of the company (§ 1 InsO).

In this case the court argued that the conduct of the shareholders amounted to evading debt in bad

faith. Evading debt in bad faith is a group of cases in which the piercing of the corporate veil doctrine is applied and a direct liability of the shareholders is acknowledged under Common Law. It is problematic to apply a Common Law doctrine under Civil Law. Under German Law the principle of legality prohibits to do so. This principle of legality can be derived from Art. 20 III Grundgesetz ("GG", "Constitution") which provides that the judicature is bound to law and justice. This provision is interpreted in that courts are not allowed to decide without a legal basis but depend on a statutory provision to intervene. There is no comparable provision under Chinese Law. But the PRC understands itself as a Civil Law country. Therefore it is not admissible to apply Common Law principles. The direct liability of shareholder rather requires a statutory legal basis.

c) Case 3:

Guang Han City Wan Da Credit Cooperative vs Tuo Xin Co Ltd and Others[130]

The fist defendant was Tuo Xin Co Ltd ("TX"), the other defendants were Chen Dao Xun and Liu Xiao Qina who were promoters and shareholders of TX. They were spouses and did not enter into any agreement to separate their personal property before or after marriage.

The plaintiff signed a loan agreement with TX which provided that he would provide TX with a circulating fund of RMB 4,000,000. It was also agreed that the plaintiff was entitled to inquire into the operation of business of TX. If the latter would not use the fund for the agreed purpose stated in the contract, the plaintiff should be entitled to stop the disbursement of the loan or to recover the principle and interest before maturity from TX. After the execution of the loan agreement the plaintiff transferred RMB 4,000,000 into the account of TX in accordance with the agreement.

When the plaintiff exercised the inquiry right into the business of TX afterwards it was discovered

130 Jian, D, The legal personality of husband and wife Companies: affirm or deny? an examination on popular judicial thinking (2003) 1 /Company Law Report/ (in Chinese) 279, 281; the entire description of this case is based on a translation provided by Dr. Charles Zhen Qu, Assistant Professor at City University of Hong Kong, which is on file with the author.

that it did not apply the money for the prescribed purpose. The plaintiff subsequently sought to recover the principle and interest before maturity from TX which made no repayment. The plaintiff then brought a suit seeking the repayment of the principle and the interest of the loan from the defendants.

The defendants TX and Chen Dao Xun did not mount a defence. The defendant Liu Xiao Qin pleaded that the facts presented by the plaintiff were true but it was TX that should be responsible for the debt. She argued that although she was one of the shareholders of the company the registration of TX in the Industry and Commercial Bureau were processed by Chen Dao Xun. She added that she did not contribute any capital to the company and that she was merely a nominal shareholder and should not be held responsible for paying back the loan.

The Peoples' Court of Guang Han City held that the loan agreement was valid. The plaintiff had performed its obligation of disbursement while the TX did not apply the loan for the prescribed purpose. Its conduct amounted to a breach of the loan agreement, the plaintiff was therefore entitled to demand a discharge of the loan before its date of maturity and TX should repay the principle of RMB 4,000,000 together with its assets.

The court also held that Chen Dao Xin and Liu Xiao Qin should assume liability for the debt of TX. Since they were spouses their properties were indivisible according to the rules of spousal property. The court argued that therefore establishing TX amounted to setting up a limited liability company by a single subject which contravened the provisions on the establishment of a limited liability company under the Company Law 1994. TX was in fact used as the agent of the two shareholders for conducting civil acts. Permitting TX to enjoy the benefit of limited liability would contravene the civil law principle of fairness and would be harmful for the protection of the parties' legal rights.

The reason for the direct liability of the shareholders, given by the court in this case, is the violation of the prohibition of one person companies. Although the Articles 58ff Company Law 2006 allow for one person private limited companies,[131] companies required at least two shareholders according to Art. 20 and Art. 75 Company Law 1994.[132] But it is not convincing that the court

131 But according to Art. 79 Company Law 2006 a public limited company still requires at least two shareholders.
132 Gu Minkang, *Understanding Chinese Company Law*, (Hong Kong University Press, Hong Kong 2006), 80, 331, 337.

classified the company, established by the spouses in this case, as a one person company. A company is a one person company only if all its shares are held by a single person. The Chinese Law provides for a martial community of property. But that does not alter the fact that there is only a community of property. The separation between the legal personalities of the two persons is not affected.

With regard to the prohibition of one person companies under the Company Law 1994 the further question arises, what legal consequences an attempt to establish an unlawful one person company basically has. Like the court in this case one scholar suggests to endorse the Common Law doctrine of lifting the corporate veil to prevent sole shareholders from abusing the company and obtaining limited liability.[133] But there are two arguments against this view. As discussed above[134], the application of Common Law principles like the doctrine of piercing the corporate veil would require a legal basis but there was none for that under Chinese Law. Furthermore the obvious consequence of an attempt to establish a company that does not fulfill the legal requirements is that the authority in charge rejects the application for the registration of the company. Therefore there was also no need to apply the piercing the corporate veil doctrine.

d) Case 4:

Xu Zhou Phoenix Hotel Limited vs Zheng and Tao[135]

Zheng and Tao were spouses and shareholders of the former Xu Zhou City San Shui Aquatic Product Corporation Ltd ("SSAP"), Zheng was also the legal representative of this company. SSAP obtained a loan of RMB 400,000 from the plaintiff. After the date of maturity SSAP paid a part of the interest but the principle and the remaining part of the interest were left unpaid.

Subsequently SSAP applied to the Bureau of Industrial and Commercial Administration (BICA) for deregistration, based on the fact that its assets had been depleted so that it could no longer carry on business. It also stated in the application form that the creditors' rights and the debts of the company had been cleared. Should there be any remaining debt, Zheng and Tao would be personally liable. In the following the BICA approved the deregistration of SSAP but no liquidation of the company

133 Gu Minkang, *Understanding Chinese Company Law*, (Hong Kong University Press, Hong Kong 2006), 80.
134 See C.I.4)b).
135 Jian, D, The legal personality of husband and wife Companies: affirm or deny? an examination on popular judicial thinking (2003) 1 /Company Law Report/ (in Chinese) 279, 297; the entire description of this case is based on a translation provided by Dr. Charles Zhen Qu, Assistant Professor at City University of Hong Kong, which is on file with the author.

took place.

The plaintiff brought proceedings against SSAP for the repayment of principle and interest. In the course of court proceedings the court replaced Zheng and Tao as defendants since SSAP had been deregistered. The two defendants raised no objection to the obligation of SSAP regarding the loan. But they claimed that as shareholders they should not be responsible for any dept owed by the former company. In the first instance and appellate court proceedings both defendants refused to provide book accounts and asset statuses on the basis that the books were lost.

The court of first instance held that Zheng and Tao had to repay to the plaintiff the principle and the interest of the loan out of the assets of SSAP. It argued that according to the provisions on limited liability companies in the Company Law the liability of shareholders is limited to the amount of capital they agreed to contribute and after dissolution the shareholders should liquidate their company. Although SSAP had been deregistered the company had never been liquidated. Therefore the shareholders would be still liable for repaying the debt owed to the plaintiff with the remaining assets of the dissolved company.

The plaintiff appealed the judgement, claiming that the court of first instance erred in holding Zheng and Tao responsible for clearing of the debts of SSAP with the assets of that company. The defendants should rather be held liable for the repayment of the debts with their personal assets. The plaintiff argued that after the decision of SSAP to dissolve, it had to be liquidated. And if upon liquidation it was found out that the assets of the company could not meet all of its debts, it should apply for a declaration of bankruptcy to the peoples' court. Since the two shareholders, Zheng and Tao did not claim bankruptcy it could be inferred that the company still had enough assets to repay its debt.

Zheng in response argued that it is a principle of company law that the liability of shareholders is limited and that shareholders should not be held responsible unless it is proved that they failed to make capital contributions, withdrew capital contributions or misappropriated company property. He claimed that there was no fault on the part of the two defendants, the loss of the plaintiff would be rather caused by the fact that SSAP had no assets left before deregistration. Therefore the shareholders should not be held liable. Zheng also argued that the promise to pay any remaining debt of SSAP, made by him and Tao in the application for deregistration, was made under the pressure of the Bureau of Industry and Commerce Administration (BICA). Since that promise was

against the principle of free will it should be deemed invalid.

The Intermediate Court of Xu Zhou City revoked the judgement of the court of first instance. It held that Zheng and Tao should compensate the plaintiff for the amount of principle and interest of the loan disbursed to SSAP by the plaintiff. He argued that it could be inferred that Zheng and Tao received assets of SSAP since the company had not been liquidated. Since this conduct infringed the creditors' interests Zheng and Tao would be liable to compensate the plaintiff with the assets that they received from SSAP. From the fact that the defendants refused to provide the book of accounts the court inferred that the amount of the assets received by the shareholders would be greater than or equivalent to that of the debt. Zheng and Tao should therefore be personally liable to compensate the plaintiff for the principle and the interest of the loan disbursed to SSAG.

Like in case 2 the background of this case is that the deregistration of a company does not require a compulsory liquidation of the company. In this case the court based the direct liability of the shareholders on the fact that they received the company assets without liquidating the company . It argued that this conduct infringed the creditors' interest. But the court gave no legal basis for holding the shareholders directly liable.

e) Case 5:

China Eastern Airlines Company Limited Xiamen Sales Department vs Renshan Ticketing Agency Company Limited and Xu Yimin[136]

Since 1994 different companies entered into air tickets sales agency contracts with the plaintiff, the Xiamen Sales Department of China Eastern Airlines Company Limited (“XSD”). These companies sold air tickets of the plaintiff. They had in common that the defendant Xu Yimin was their legal representative and in one case the majority shareholder of the company.

The defendant Xiamen Renshan Ticketing Agency Company Limited (“RTA”) was established in May 1996 by Renshan Commerce Development Company Limited (“RCDCL”) with 60 per cent shareholding and Wang Jianmin with 40 per cent shareholding. At that time Xu Yimin was majority shareholder of RCDCL with 80 per cent shareholding, he also was chairman, legal representative

136 Fujiang Amoy intermediate Peoples' Court, 17 December 2001, (2001) Xia Jing Zhong Z No. 228; the entire description of this case is simplified and based on a translation provided by Dr. Charles Zhen Qu, Assistant Professor at City University of Hong Kong, which is on file with the author.

and general manager of this company. Furthermore Xu Yimin was the legal representative of RTA. A Xiamen accountants firm transferred the audited capital of RTA, which amounted to RMB 1,000,000, to the bank account of the company. Subsequently RTA transferred almost RMB 1,000,000 to the plaintiffs bank account, The cheque bore the finance chop of RTA and the personal chop of Xu Yimin. The purpose of the payment was recorded as payment for air tickets.

In February 1997 the plaintiff and the defendant RTA concluded a domestic airline passenger transportation sales agency contract. The contract stipulated that the plaintiff appointed RTA as his agent in Xiamen, responsible for the sales within his domestic airline passenger transportation business. All dealings between the parties were in accordance with the contract until August 1999 when RTA defaulted with the payment of air tickets for about RMB 170,000. RTA did not pay this amount in the following. In May 1999 Xu Yimin succeeded RCDCL as the majority shareholder in RTA.

The court of first instance was of the opinion that the domestic airline passenger transportation sales agency contract between the plaintiff and the defendant RTA was enforceable. The plaintiff had fulfilled his obligation while RTA has not payed for the tickets. Therefore the court held that RTA had to bear the liability for its breach of contract. Furthermore the court of first instance held that the defendant Xu Yimin should bear joint and several liability for the payment of the tickets based on the application of the piercing the corporate veil doctrine.

The court had the view that Xu Yimin withdrew the registered capital of RTA. It argued as follows: The transfer of almost RMB 1,000,000 at the end of May 1996 was not for RTA's own business purpose but for settling the debt owed by Xu Yimin personally to the plaintiff. Although Xu Yimin was not RTA's shareholder when this payment was made, he was both the controlling shareholder and the legal representative of RCDCL as well as the legal representative of RTA. Xu Yimin took advantage of his special position and appropriated RTA's funds to settle his personal debts. Although this act was different from normal acts of capital withdrawal it should in essence still be considered as such. This capital withdrawal caused the inability of RTA to make the payment of air tickets to the plaintiff. Xu Yimin did not prove that he had subsequently restored RTA's registered capital to its full amount by other means.

According to the court, the defendant Xu Yimin abused his power as a shareholder and should therefore be held liable on the basis of the doctrine of piercing the corporate veil. He had used

company assets to settle his personal debts and with this violated the fundamental principle of the separation between company assets and assets of shareholders. Because of this violation the company had in fact lost its independence and its character as a separate entity. Allowing a shareholder to evade his legal or contractual liability by using the excuse that a company is a separate legal entity and a shareholders' liability is limited would clearly infringe the interests of a creditor or the general public. This would be inconsistent not only with the legal concepts of justice and credibility but also with the founding intention of the system of enterprise legal person.

Furthermore, the court argued that there were three elements required for disregarding the separate legal personality of a company which were fulfilled in this case. (1) The abusers of the company's legal personality can be those shareholders who have actual control over the company. This was the case since Xu Yimin was majority shareholder and legal representative of the majority shareholer of RTA (2) Most of the registered capital of RTA was used to settle the personal debts of Xu Yimin so that the company became unable to pay its debts and had to cease operation (behavioural element). (3) The act of the defendant Xu Yimin caused RTA to be severely deficient in capital and ultimately prevented the realisation of the plaintiff's legal rights as a creditor. This fulfilled the consequence element.

The court of appeal upheld the judgement with regard to the liability of RTA to make the outstanding payment to the plaintiff. With respect to the defendant Xu Yimin the court of appeal repealed the judgement of the court of first instance because the plaintiff and Xu Yimin had reached a voluntary settlement during the trial of second instance. Therefore the court decision does not contain remarks on the application of the piecing the corporate veil doctrine by the court of first instance.

In this case the court of first instance based the direct liability of a shareholder on the fact that the shareholder withdrew capital of the company. This is remarkable insofar as the shareholder himself held no shares of the company at the time when the respective payment was made by the company. But the shareholder was the legal representative of the company as well as the controlling shareholder and the legal representative of the company's majority shareholder. Therefore it is convincing to appraise the possibility of the indirect shareholder to exert influence on the company as more important than the question whether someone is a direct or an indirect shareholder.

Furthermore, the court argued that the withdrawal violated the principle of separation between

company assets and assets of shareholders and that the company lost thereby its character as separate entity. But this argument is unfounded. As discussed with regard to German Law[137], a violation of the separation between company assets and those of shareholders occurs solely in cases where it is not possible to distinguish beween the two total assets. But in this case it was clear that the amount of almost RMB 1,000,000 belonged to the company assets before the payment and to the assets of another legal entity afterwards. Whether the latter legal entity was the plaintiff or Xu Yimin does not matter in this context.

The court gave no legal basis for the application of the piercing the corporate veil doctrine and the mentioned three constituent elements. The same applies to the legal concepts of justice and credibility, given as basis for the direct liability of the shareholder. As a matter of statutory interpretation it is basically possible to argue that the intention of the legislature regarding the system of enterprise legal person speaks in favour of a direct liability in this case. But there is no supporting evidence for such an intention in the judgement.

f) Conclusion

The cases discussed above can be divided in two main groups. In the cases 1 and 5 the direct liability of shareholders is based on capital withdrawal. In the cases 2 and 4 the courts disregarded the separate legal personality of the companies because the companies were deregistered but the shareholders did not liquidate them. Case 3 is special insofar as the court referred to the prohibition of one person companies under the Company Law 1994 as basis for the direct liability of a shareholder. The discussed cases have in common that they support the direct liability of shareholders although there was no legal statutory basis for this under Chinese Law. The latter is especially true with regard to the application of the Common Law doctrine of piercing the corporate veil.

II. The legal situation under the Company Law 2006

137 See B.III.4)a).

1) Statutory Provisions

a) Art. 20 Company Law 2006

The newly amened Company Law provides for a direct liability of shareholders for obligations of the company in two articles, Art. 20 and Art. 64 Company Law 2006. The latter provides: “Where any of the shareholders of a company evades the payment of its debts by abusing the independent status of legal person or the shareholder's limited liability, if it seriously injures the interests of any creditor, it shall bear several and joint liabilities for the debt of the company.” According to the wording there are three prerequisites for a direct liability: (1) the abuse of the independent legal personality of a company or the shareholder's limited liability by a shareholder, (2) an evasion from the payment of its debts and (3) the causation of serious injuries to the interests of any creditor. Since the provision does not refer to certain individual cases but the undefined “abuse of the separate legal personality” it is a comprehensive clause. Therefore is not possible to give an abstract definition of what kind of conduct is an “abuse” in that sense. It is rather necessary to interpret the provision with regard to certain groups of cases. It remains to be seen how the first court decisions after the enactment of the Company Law 2006 will interpret the “abuse of the separate legal personality”. Furthermore the wording of Art. 20 Company Law 2006 raises amongst others the following questions. Some translations of the provision contain the requirement of a “serious injury” to the interests of a creditor as result of the shareholders' conduct.[138] According to other translations only an “injury” to the interest of creditor is required.[139] Therefore it is unclear whether any injury to the interests of a creditor of the company is sufficient or only injuries that get to a certain extent. Another question is how the requirement that the shareholder acts to evade the payment of debts has to be understood. This could mean that the evasion from any debts is covered. But the wording also allows for the restrictive interpretation that the debt must already exist when the shareholder abuses the separate legal personality. The two possible interpretations lead to different results for example in a case where the shareholder withdraws his capital contribution which later causes the inability of the company to meet an obligation if the obligation was entered into after the capital withdrawal.

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138 See Chinadaily.com.cn, Company Law of the People's Republic of China (revised 2005), <http://www.chinadaily.com.cn/bizchina/2006-04/17/content_569258_2.htm> accessed 1 May 2007; Lawinfochina.com, Company Law of the People's Republic of China, < http://0-www.lawinfochina.com.lib.cityu.edu.hk/display.asp?db=1&id=4685&keyword=> accessed 1 May 2007.

139 See Isinolaw.com, Company Law of the People's Republic of China, <http://0-www.isinolaw.com.lib.cityu.edu.hk/isinolaw/english/detail.jsp?searchword=STATUTES_EN_TITLE%3Dcompany+law+and+catalog%3D0+and+isenglish%3D1&channelid=76608&record=3&iscatalog=0&statutes_id=2007602&skind=110> accessed 1 May 2007.

b) Art. 64 Company Law 2006

The other provision dealing with direct liability of shareholders is Art. 64 Company Law 2006. It provides: “If the shareholder of a one person limited liability company cannot prove that the property of the company is independent of the shareholder's own property, the shareholder shall bear the joint and several liability for the company's debts.” This article refers to the commingling of assets, i.e. a situation where it is not possible to distinguish between the assets of the company and the personal assets of the shareholders. It is remarkable that Art. 64 Company Law 2006 has a limited scope of application. It only governs the liability of shareholders for the commingling of assets in case of one person private limited companies. Under German Law in contrast the direct liability for a commingling of assets also covers companies with more than one shareholder. In case of one person companies it is admittedly more likely that company assets and personal assets cannot be distinguished. But as shown above[140], there are cases in which creditors of a company with more than one shareholder suffer damages because of a commingling of assets. Therefore the narrow scope of application of Art. 64 Company Law 2006 is regrettable. But the legal situation in China matches the legal situation in Germany regarding commingling of assets in public limited companies. This is neither covered by Art. 64 Company Law 2006 nor does the prevailing opinion in Germany acknowledge a direct liability of shareholders for the commingling of assets in the case of public limited companies.[141] Another difference between the legal situation in China and in Germany is the allocation of the burden of proof. According to Art. 64 Company Law 2006 the shareholder has to prove that the assets of the company are separate from his personal assets. This is an exception from the principle that the burden of proof basically rests with the party that asserts a claim since the creditor of the company asserts a claim in this case. Under German Law in contrast this principle is applicable so that the burden of proof rests with creditor who asserts a claim against a shareholder based on the commingling of assets. It can be argued in favour of the allocation of the burden of proof pursuant to Art. 64 Company Law 2006 that shareholders are basically more familiar with the company's course of business. Therefore it is much easier for them to prove that there is a sufficient separation between company assets and their personal assets than for creditors of the company to prove the opposite.

140 See B.III.4)a).
141 See B.III.4)b).

2) Consequences

Apparently no court judgements on the question of the direct liability of shareholders under the newly enacted Company Law 2006 have been published in English sources. Therefore it remains to be seen, how the courts will interpret Art. 20 and Art. 64 Company Law 2006. In the meantime there is no legal security regarding this issue in the PRC. But against the setting of the former court decisions discussed above, the new provisions allow at least for a rough interpretation. Due to the character of Art. 20 Company Law 2006 as a comprehensive clause, based on the undefined term “abuse of the separate legal personality”, this provision can be interpreted insofar that it covers the cases of capital withdrawal and deregistration without liquidation, in which the courts awarded the direct liability of shareholders before the enactment of the Company Law 2006. Contrary to the situation under German Law there is no explicit provision in the Company Law 2006 that governs the legal consequences of violations against capital maintenance provisions. The wording of Art. 20 Company Law 2006 allows for an interpretation of capital withdrawal as an “abuse of the separate legal personality”, so that the mentioned judicial loophole could be filled respectively . Therefore it is likely that the courts will stick to their holdings in former judgements and hold shareholders directly liable for a capital withdrawal further on. The only difference is that the application of the piercing the corporate veil doctrine, which was lacking a statutory legal basis, would be replaced by an application of Art. 20 Company Law 2006. Since companies can still be deregistered without a liquidation taking place it is still a possible solution to hold shareholders directly liable for damages that occur to creditors of the company. Therefore an application of Art. 20 Company Law 2006 is also likely in these cases . Apart from cases of capital withdrawal and deregistration without liquidation it is at the moment only possible to speculate, whether Chinese courts will also acknowledge the liability of shareholders for obligations of the company in further groups of cases. This question namely remains to be answered by the courts with regard to groups of cases in which direct liability is discussed in Germany, such as undercapitalization and the liability for causing the company's insolvency.