

CORPORATE LAW AND  
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AND FINANCIAL MARKET REGULATION

# Creditor Protection in Private Companies

Anglo-German Perspectives  
for a European Legal Discourse

THOMAS BACHNER

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## CREDITOR PROTECTION IN PRIVATE COMPANIES

Limited liability companies form the backbone of our modern economy. However, there is a persistent risk of moral hazard on the part of directors and shareholders, particularly in closely held or private companies. Like all developed legal systems, both English and German law provide mechanisms designed to protect creditors from such risks. This book investigates some of these mechanisms, including the avoidance of pre-insolvency acts, capital maintenance and creditor-regarding duties of directors. By analysing the different conceptual and doctrinal perspectives inherent in the English and German systems, this book seeks to advance a discourse between audiences with different legal backgrounds. It will be an invaluable guide for those wishing to understand how the protective mechanisms operate and interact with each other, and how they do so in quite different ways in the two jurisdictions.

THOMAS BACHNER is Assistant Professor at WU (Vienna University of Economics and Business).



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## PREFACE

This book represents a thoroughly revised and updated version of my Ph.D. thesis approved by the Law Faculty at Cambridge University in 2006. The entire process that has led to this book has occupied the better part of a decade, and the end result is a far cry from the original plan. The book is an attempt – and it cannot be more than that – to write about German law and English law in a manner designed to make the exposition accessible to readers from each of the two jurisdictions by taking account of their respective conceptual and terminological background. My own status as an outsider, being neither German nor English, will hopefully have contributed to a fair balance between the two. Obviously, my legal education and academic roots in Austria, with its proximity to Germany especially in the field of company law, meant that the true voyage of discovery for me started only when I was given the fascinating opportunity to explore English law at Cambridge University.

I owe a sincere debt of gratitude to Eilís Ferran, who took on the charge of being my Ph.D. supervisor – and a charge it must have been with a supervisee constantly venturing off to do things he was not supposed to do – and who subsequently masterminded the publication of the book with Cambridge University Press. I also owe an intellectual debt to Simon Deakin and Brian Cheffins, each of whom taught me in his own manner and style that there is more to company law than I had hitherto thought. Thanks must go to Roderick Munday, Tony Weir and Pippa Rogerson for instilling in me an enthusiasm for the Common Law. Upon the introduction by Eva Micheler, Sarah Worthington and Paul Davies entrusted me with teaching their undergraduate classes at the London School of Economics on company law for two consecutive years (2001–2002 and 2002–2003). It turned into an immensely valuable experience for me, because it forced me to come to terms with English law in a very direct and almost brutal manner. Subsequent to the submission of the thesis, John Armour and Heribert Hirte, being the

examiners for the Ph.D., as well as one anonymous German referee made valuable suggestions for the improvement of the text. Over the years all these influences have come together and shaped this book into something I could not have imagined at the outset of the process. In the run-up to publication Vanessa Wilcox, Laurence Marsh and Donna Stockenhuber critically examined the whole text, while Christina Gasser, Olga Horwath, Veronika Korom, Helena Nejedlá and Felix Prechtl provided technical support. Naturally, I am solely responsible for all mistakes that remain.

In order to carry out my research at Cambridge I was on leave from the University of Economics and Business Administration in Vienna during the years 2000 to 2004. This would not have been possible, first, without the understanding of my academic mentor Peter Doralt, who greatly encouraged me to go abroad. It would also not have been possible without generous funding from a number of sources. The Austrian Science Fund (FWF), the Austrian Federal Ministry of Education and the Emil-Boral-Stiftung, Zurich provided living allowances at various stages. Smaller grants were made available by the University of Economics and Business Administration (from its OeNB-Förderpreis), the Cambridge European Trust, the Helmuth H. Merlin-Stiftung, the Graf Hardegg'sche Doktoren-Stiftung and the Walther Kastner-Stiftung. I am grateful to all of them.

Last, but not least, I wish to thank the team at Cambridge University Press for their valuable advice and for their patience in the face of numerous postponements of submission.

I have endeavoured to present the law as it was available to me on 6 April 2008. The book takes full account of the Companies Act 2006, notwithstanding that some of the new provisions may not yet be in force by the time of its publication. References in the text or in the footnotes guide readers to the respective provisions in the Companies Act 1985 and in earlier Companies Acts, where appropriate, thereby facilitating the work with secondary literature on the old and the new law. Moreover, the book already takes account of the German Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG), which entered into force on 1 November 2008. All references to websites were last checked as live on 6 November 2008.

*Thomas Bachner*  
Vienna, November 2008

## TABLE OF ABBREVIATIONS

Names in ‘...’ designate journals (which also function as case reports in Germany).

ABGB	Allgemeines bürgerliches Gesetzbuch – the Austrian Civil Code
AC	Appeal Cases (The Law Reports – House of Lords and Judicial Committee of the Privy Council)
ACLIC	Australian Company Law Cases
AcP	‘Archiv für die civilistische Praxis’
ACLR	Australian Company Law Reports
AG	Aktiengesellschaft – the German Joint Stock Company; ‘Die Aktiengesellschaft’
AktG	Aktiengesetz – the German Joint Stock Companies Act
All ER	[The] All England Law Reports
AnfG	Anfechtungsgesetz – the German Act on the Avoidance of Legal Acts of a Debtor outside Insolvency Proceedings
App.Cas.	Law Reports, Appeal Cases [Second Series, 1875–1890]
Art., art.	Article, article
BayObLG	Bayerisches Oberstes Landesgericht – the Bavarian Superior Court of Appeal [now abolished]
BB	‘Der Betriebsberater’
BCC	British Company Cases
BCLC	Butterworths Company Law Cases
BGB	Bürgerliches Gesetzbuch – the German Civil Code
BGBL	Bundesgesetzblatt – Federal Law Gazette
BGH	Bundesgerichtshof – the German Federal Court of Justice
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen – the official law reports of the German Federal Court of Justice in civil law matters
BPIR	Bankruptcy and Personal Insolvency Reports
CA	Companies Act; Court of Appeal

ch.	chapter(s)
Ch.	The Law Reports – Chancery Division
ChD	Chancery Division (of the High Court); Law Reports, Chancery Division [Second Series, 1875–1890]
CFILR	Company Financial and Insolvency Law Review
CJ	Chief Justice
CLJ	‘Cambridge Law Journal’
CMLR	Common Market Law Reports
CoLaw	‘[The] Company Lawyer’
DB	‘Der Betrieb’ (Germany)
DStR	‘Deutsches Steuerrecht’
DTI	Department of Trade and Industry
EBLR	‘European Business Law Review’
EBOR	‘European Business Organization Law Review’
ECFR	‘European Company and Financial Law Review’
ECR	European Court Reports
ed.	editor(s)
edn	edition
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch – the ‘Introductory Act’ to the German Civil Code (a statute containing transitional and supplementary provisions, including the rules on the conflict of laws)
EuZW	‘Europäische Zeitschrift für Wirtschaftsrecht’
EWCA Civ	England and Wales Court of Appeal (Civil Division)
EWHC	England and Wales High Court
EWiR	‘Entscheidungen zum Wirtschaftsrecht’
EWS	‘Europäisches Wirtschafts- und Steuerrecht’
f., ff.	and subsequent [page(s), paragraph(s) etc.]
fn.	footnote(s)
GmbH	Gesellschaft mit beschränkter Haftung – the German Limited Liability Company
GmbHG	Gesetz betreffend die Gesellschaften mit beschränkter Haftung – the German Limited Liability Companies Act
GmbHR	‘GmbH-Rundschau’
HGB	Handelsgesetzbuch – the German Commercial Code
HL	House of Lords
IA	Insolvency Act
ICCLJ	‘International and Comparative Corporate Law Journal’
ICCLR	‘International Company and Commercial Law Review’
ICLQ	‘International and Comparative Law Quarterly’

IIR	‘International Insolvency Review’
IL&P	‘Insolvency Law & Practice’
InsO	Insolvenzordnung – the German Insolvency Code
J	Justice
JBL	‘Journal of Business Law’
JCLS	‘[The] Journal of Corporate Law Studies’
JuS	‘Juristische Schulung’
JW	‘Juristische Wochenschrift’
JZ	‘Juristenzeitung’
KG	Kammergericht – a traditional designation for the OLG Berlin
KO	Konkursordnung – the Austrian Bankruptcy Act
KTS	‘Zeitschrift für Insolvenzrecht – Konkurs, Treuhand, Sanierung’
LC	Lord Chancellor
LJ, LJJ	Lady Justice/Lord Justice, Lord Justices
LG	Landgericht – a regional court of first instance in Germany
LMCLQ	‘Lloyd’s Maritime and Commercial Law Quarterly’
LR	Law Reports [First Series, 1865–1875]
LR Ch.App.	Law Reports, Chancery Appeal Cases
LR Eq.	Law Reports, Equity Cases
LR Ex.	Law Reports, Court of Exchequer
LR HL	Law Reports, English & Irish Appeals
MDR	‘Monatsschrift für Deutsches Recht’
MLR	‘Modern Law Review’
mn.	marginal number – Randzahl, Randziffer
MoMiG	Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen – Act to modernise the law governing private companies and to combat abuses (Germany)
n.	note; number – Nummer (in German statutes)
NJW	‘Neue Juristische Wochenschrift’
NJW-RR	‘Neue Juristische Wochenschrift – Rechtsprechungsreport’
NSWLR	New South Wales Law Reports
NZG	‘Neue Zeitschrift für Gesellschaftsrecht’
NZI	‘Neue Zeitschrift für das Recht der Insolvenz und Sanierung’
ÖBA	‘Österreichisches Bankarchiv’ (Austria)

OGH	Oberster Gerichtshof – the Austrian Supreme Court
OJ	Official Journal of the European Communities/of the European Union
OLG	Oberlandesgericht – a regional appellate court in Germany
OLGZ	Entscheidungen der Oberlandesgerichte in Zivilsachen
p.	page(s)
para.	paragraph(s)
PC	Privy Council
QB	The Law Reports – Queen’s Bench Division
QBD	Queen’s Bench Division (of the High Court)
r., rr.	rule, rules
RabelsZ	‘Rabels Zeitschrift für ausländisches und internationales Privatrecht’
RG	Reichsgericht – the German Imperial Court (until 1945; see now BGH)
RGBl.	Reichsgesetzblatt – Imperial Law Gazette (until 1945; see now BGBL.)
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen – the official law reports of the German Imperial Court in civil law matters
RIW	‘Recht der internationalen Wirtschaft’
s., ss.	section, sections
SI	Statutory Instrument
SLT	Scots Law Times
SZ	Entscheidungen des österreichischen Obersten Gerichtshofes in Zivilsachen – the official law reports of the Austrian Supreme Court in civil law matters
UKHL	United Kingdom House of Lords
vol.	volume
WLR	[The] Weekly Law Reports
WM	‘Wertpapier-Mitteilungen’
ZEuP	‘Zeitschrift für Europäisches Privatrecht’
ZGR	‘Zeitschrift für Unternehmens- und Gesellschaftsrecht’
ZHR	‘Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht’
ZIP	‘Zeitschrift für Wirtschaftsrecht’, formerly ‘Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis’
ZPO	Zivilprozessordnung – the German Civil Procedure Code



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### European Community

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- Convention on the law applicable to contractual obligations (80/934/EEC)  
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