



Universität Hamburg

Seminar für Handels-, Schifffahrts-  
und Wirtschaftsrecht

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*The two-tier system in Germany and Italy*  
**Rechtsvergleichendes Seminar zum Gesellschaftsrecht**

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**23.5. – 24.5.2007 Mailand / Italien**

**Sommersemester 2007**

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*6. The responsibility of the supervisory board and the manager*

*a) The responsibility of the supervisory board*

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von

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## **A. Introduction**

This essay is about the responsibility of the members of the supervisory board, the preconditions and the restriction limitation of liability.

It deals with the possibilities how to get back the loss which results from mistakes made by the supervisory board and its members.

It is an elementary interest of the company that the supervisory board is obliged to monitor and inspect the director's board. Their obligationable rights have to be completed in an acceptably manner their due diligence and the duty to monitor the board of directors.

The spirit and purpose of the personal liability of the members of the supervisory board are the following: The officers' liability ( §§ 93, 116 AktG ) is part of the Corporate Governance and fulfils the functions of adjustment for the loss and prosecution and also to the supervisory boards performance in general as a preemptive effect. To escape a possible liability, the members are called upon a correct action towards the company.<sup>1</sup>

The supervisory boards' private law liability splits into internal and external liability.

## **B. Historical background**

The German Stock Corporations Act (AktG) passed through various stages of development.

The development of the responsibility of the supervisory board did not play a significant role in the German court decisions. Although already in the 1970s a series of judicial decisions by the highest

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<sup>1</sup> Paal, DStR 2005, 382, 383.

courts dealt with this theme, e.g. the “Herstatt” case. Additionally, there were spectacular crisis’s of several companies like Schneider, Suedmilch, Bremer Vulkan, Kloeckner-Humboldt-Deutz, Refugium and others.<sup>2</sup> As a result of this development, the question of a responsibility of the leading organisations of companies turned into the spotlight of the public view. The supervisory board as institution was marooned a lot of criticism and it became clear that a fundamental reform had to be a stringent conclusion from this.

Until the 1980s, liability by managers and board members had not been in the focus because of misconduct which entailed damages for their companies.<sup>3</sup> The fundamental change concerning this view occurred in the late 90s after a lot of startling collapses of big corporations, e.g. ARAG.

The ARAG/Garmenbeck - adjudication<sup>4</sup> by the Federal Court of Justice (BGH) resulted in the comprehensiveness of the supervisory board’s responsibilities. For all intents and purposes, the judicature brought forward the diversifications in the liability law in this area.

Results of these reforms were that a new type of insurance developed, the Directors’ and Officers’ policy (D&O policy). Because of globalization and its consequences, like international interlinking of business enterprises the liability risk for members of the supervisory board raised up unknown levels up to the present.<sup>5</sup>

Because of the bad economical situation and the improved terms of the shareholders, the supervisory board’s situation in the case of a fundamental mistake has worsened a lot. From this time on, the shareholders’ willingness to claim damages from / to assert on their claim for damages/ the members of the controlling institution of the company has revised.<sup>6</sup>

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<sup>2</sup> Wojtek/Buchholz, AG, 4.3.1 p. 1.

<sup>3</sup> Thuemmel, pers. Haftung, p. 19.

<sup>4</sup> BGHZ 135, 244 et seq..

<sup>5</sup> Thuemmel, pers. Haftung, p. 19.

<sup>6</sup> Wojtek/Buchholz, AG, 4.3.1 p. 1.

Besides, in times of financial crises, the disposition the persons concerned increases to be on the lookout for additional defaulter.<sup>7</sup>

### **C. Presupposition for a liability**

The supervisory board's task is to supervise the management board's actions. If they breach their duties, there will be a liability of the supervisory board's members.

Core function of the supervisory board is the supervision of the executive board. Because of a time in which there are economic crisis's, every possible additional debtor is searched by the creditor(s).<sup>8</sup> And if a member does not fulfil its duties, the member is or can be liable to indemnify.

Each member of the supervisory board has to insist on a functional work of this institution.

During their administration, every member has to preserve the care of a prudent and assiduous surveillant and members who harm their duty / -ies have to pay for this misbehaviour, according to § 116 in connection with § 93 I, II AktG. Also gripped by this norms are not only supervisory boards in corporations, but also those of associations limited by shares and limited liability companies. Point 3.8 of the German Corporate Governance Codex (DCGC) does not constitute a self-contained accountability. But it is also due that the German courts will follow the recommendations given by the DCGC in isolated cases.<sup>9</sup>

Every member of the supervisory board is liable for damages if his decision is caused by the influence of an outsider to act in a way which causes a loss to the company. Both have to pay for this. This does not work in a co-determined limited liability corporation, but this does

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<sup>7</sup> Thuemmel, pers. Haftung, p. 20.

<sup>8</sup> Thuemmel, pers. Haftung, p. 20.

<sup>9</sup> Thuemmel, pers. Haftung, p. 20.

not change the fact that each member of the supervisory board has to act in a way which fits in the company's interests. The regulation of the liability obtain for every single member, whatever he is an employee representatives or even a member which appointment had been incorrect. Furthermore, the validity incorporates board decisions.

The only possible liability is the one of a single member of the supervisory board, but the board as a hole does never vouch.

The foundation of claim in these cases are §§ 116, 93 of the German Stock Corporations Act (Aktengesetz, AktG).

With the KonTraG began a phase of change in the liability and the security for the members of the board.<sup>10</sup> The Federal Court of Justice gave a judgement which guided to this situation in which the supervisory boards are today.

#### **D. Liability to the company (interior liability)**

There are a lot of risks for members of an institution of a company in case of a misconduct, not only by the private law but also by the criminal law. In the case of a violation (or neglect) of a failure to comply with one's duties, this can lead to unpleasant consequences, especially if the failure had been wilful or if their acting had been illegal.

Liability means that every single member of the supervisory board has to avouch for the loss caused by the acting or refrain of the supervisory board with their hole private property.

Central rules of law in the case of a liability by supervisory board members are §§ 116 s. 1, 93 AktG. These norms bind them to

implement their position with the diligence of a prudent and conscientious outside director.<sup>11</sup> A culpable violation of this duty leads to a liability for the caused damages.<sup>12</sup> Furthermore, a few other rules of law deal with liability by supervisory board members: §§ 117 I, II 1 AktG; §§ 310 I, 318 II AktG; §§ 399, 400, 404, 405 AktG, §§ 331, 334 HGB.<sup>13</sup>

The reference in § 52 I GmbHG guides to the norms of the AktG and for that reason, the non-executive directors of the supervisory board of a limited liability company are in the same way liable for damages as the supervisory board of a corporation.<sup>14</sup> By a generally accepted analogy<sup>15</sup>, advisory boards are treated equally like optional supervisory boards of limited liability companies.<sup>16</sup>

Their major obligation is the control of the board of directors. By the compliance of this, all members have to act in a loyal, practicable, commercial and proper way.<sup>17</sup> Allegiance means, that executive and non-executive board directors are bound to abidance by the law, especially the German Stock Corporations Act, the bylaws and the decisions by the adjudication of the annual general meeting. A practicable administration implies, that there is an appropriate administration with company organisation structure and office routine organisation.<sup>18</sup>

The German Federal Court of Justice demands / requests as preconditions for a claim that there has to be made a testing in two steps of the unlawfulness of the directors' resolutions.

In a first step, a test has to be made, if the preconditions for acclaim of damages is given in a real and lawful (in fact and in law) manner.

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<sup>10</sup> Thuemmel, DB 1999, 885, 885.

<sup>11</sup> Lutter/Krieger, Rechte und Pflichten, Rn. 822.

<sup>12</sup> Lutter/Krieger, Rechte und Pflichten, Rn. 822.

<sup>13</sup> Lutter/Krieger, Rechte und Pflichten, Rn. 823.

<sup>14</sup> Thuemmel, pers. Haftung, p. 98, Rn. 193.

<sup>15</sup> BGH BB 1980, 546, 549; BGH NJW 1983, 1675, 1676; Raiser/Vail, Kapitalgesellschaftsrecht, § 34 Rn. 1.

<sup>16</sup> Thuemmel, pers. Haftung, p. 98, Rn. 193.

<sup>17</sup> Wojtek/Buchholz, AG, 4.3.2 p. 1.

<sup>18</sup> Wojtek/Buchholz, AG, 4.3.2 p. 1.

Furthermore, the risks and the chances of success of a claim and the possibility of an irrecoverable debt have to be ascertained. In the case of a positive result, the second step implies to check if the company's interests forbid(s) to enforce the damages.<sup>19</sup> It is necessary that there is a predominant probability that the court having jurisdiction actuates the existence of the presuppositions for a claim for damages.<sup>20</sup> If the supervisory board does not bring suit in the case of a positive result of this inspection, they are in danger to be liable for this. The BGH awards to the supervisory board an area of discretion by making their decision and their scope for judgment evaluation is not wide, there is hardly any. This discretionary decision is given to the supervisory board as it is in the same implementation to the board of directors and this has to be respected in this consideration.<sup>21</sup>

## **I. Admeasurement of their duties**

Consequences of this progress are, that from now on, the supervisory boards' duties are wide-ranging enlarged. Recently, besides the historical monitoring function, it also has – in the name of the corporation – to lodge a claim for compensation against the management in case of a suitable / corresponding misconduct. In cases like these, there is no discretion given to the supervisory board, so it has to act, otherwise it will be subjected to an own liability risk.<sup>22</sup>

The KonTraG was the reaction of the legislator. It changed several provisions of the AktG and the GmbHG in order to “correct” failures in the controlling system of companies.

Regulated by law are a few obligations for the supervisory board. These will be depicted in the following.

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<sup>19</sup> OLG Düsseldorf, NJW – RR 1995, 1371, 1376.

<sup>20</sup> Goetz, NJW 1997, 3275, 3276.

<sup>21</sup> Hirte, Kapitalgesellschaftsrecht, § 3 Rn. 3.206.

<sup>22</sup> Thummel, pers. Haftung, p. 21.

## 1. Monitoring of the directors board

Core function and core obligation of the supervisory board is to monitor and to control the directors boards' work, for example the decisions and so on, § 111 I AktG. This duty includes the control of all kinds of the business management: economic profitability, expediency, legality and conformity with regulations.<sup>23</sup> Not included is the business management which is exclusively assigned to the board of directors.<sup>24</sup>

Object of the surveillance is the management, especially the management guidance in consideration to the measures taken.<sup>25</sup>

The directors board has to fulfil its job in a lawful way. This implicates not only the rules of the German Stock Corporations Act, but also the articles of their association and of course also the compliance with other important statutes which touch the interests of a company, e.g. competition law (UWG, GWB), environmental law, tax law, antitrust law and others.<sup>26</sup>

The supervisory board can also have the duty to make a report in a situation, in which the internal instruments cannot achieve a constitutional status and furthermore when every citizen would have a disclosure duty or if this would be the only way to deter harm from the company.<sup>27</sup>

Considering the amount of the surveillance, it is enough to prove the regularly given reports from the board of directors and in the normal case, the supervisory board can have confidence in the accuracy and completeness of the current situation.<sup>28</sup> But in the case of objection towards the contents of the bulletin, e.g. by hazardous business dealings.<sup>29</sup> For instance, if a company has just started up, a more

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<sup>23</sup> BGHZ 114, 127, 129; KölnerKomm AktG-Mertens, § 111 Rn. 11.

<sup>24</sup> AktG-Hopt/Roth, § 111 Rn. 365; KoelnerKomm AktG-Mertens, § 111 Rn. 11; Lutter/Krieger, Rechte und Pflichten, p. 23, Rn. 62.

<sup>25</sup> Lutter/Krieger, Rechte und Pflichten, p. 23/24, Rn. 63.

<sup>26</sup> Lutter/Krieger, Rechte und Pflichten, p. 27/28, Rn. 72.

<sup>27</sup> Lutter/Krieger, Rechte und Pflichten, p. 28, Rn. 72. Semler, Arbeitshandbuch E 107.

<sup>28</sup> Lutter/Krieger, Rechte und Pflichten, Rn. 828.

<sup>29</sup> Lutter/Krieger, Rechte und Pflichten, Rn. 828.

critical view on the reports is necessary and expected.<sup>30</sup> In difficult (especially difficult economical) times for the company, it is also required to hold meetings a lot more often to use the right of information in times when hazardous dealings shall be transacted.<sup>31</sup> Another duty in the monitoring theme is to prove the company to be in enough funds and that the board of directors take appropriate actions in sufficient circumference.<sup>32</sup> § 114 IV AktG offers another possibility to the supervisory board to exert influence on: A few decisions which touch a particular manner of business dealings have to be acquiesce by the supervisory board, otherwise there cannot be a deal and this proviso affirm has to be limited on a special type of deals.<sup>33</sup>

The duty to monitor the board of directors is not only limited on the past, much important is also to invigilate the future in the sense of strategic planning and general questions and decisions about the corporate policy in the near future.<sup>34</sup>

As a conclusion from that, one could say that the supervisory board has a lot of duties and therefore a huge responsibility.

## **2. Proxy of the company**

By ascertainment of a contravention, the members of the supervisory board have to interfere amendatory.<sup>35</sup> Propriety means that the administration has to have an adequate organization of the company and the combine by considering business management experience.<sup>36</sup>

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<sup>30</sup> OLG Düsseldorf, WM 1984, 1080, 1084.

<sup>31</sup> AktG-Hopt/Roth, § 111 Rn. 317; Lutter/Krieger, Rechte und Pflichten, Rn. 828.

<sup>32</sup> Semler, Leitung und Überwachung, Rn. 184 ff..

<sup>33</sup> Kiethe, Haftung von Aufsichtsräten, 2122, 2125.

<sup>34</sup> Wojtek/Buchholz, AG, 4.3.3.1 p 5.

<sup>35</sup> Lutter/Krieger, Rechte und Pflichten, Rn. 73.

<sup>36</sup> Hoffmann/Preu, Aufsichtsrat, Rn. 518.4; Lutter/Krieger, Rechte und Pflichten, Rn. 74.

### 3. Special duties in a combine

For a supervisory board in a tributary company, there are special duties to maintain:

They have to work for custody of the shareholders and in the case of a misbehaviour by the supervisory board, claims of damages can be filed by the tributary company or even third parties.<sup>37</sup>

By neglecting their duty to monitor, out of § 318 II AktG, the consequences as described above may eventuate.<sup>38</sup> §§ 310, 318 AktG comprehend special duties for a supervisory board in a combine, but their major duty is the one which is written down in § 318 II AktG.

### 4. Duty of loyalty

The supervisory boards' duties compared to the managing board are not that distinctive, because it is only an additional sideline job.<sup>39</sup> Most important and inherent of their duty is to be loyal towards the corporation and not acting contrary to the interests of the company and its commercial operations.<sup>40</sup> The members have to force and support the company's interests and dealings but also have to interfere in situations in which there seems to be an endangerment for the company.<sup>41</sup> A clash of interests does not exculpate a member, rather it has to attend to interest of the company and only these interests.<sup>42</sup> Such a clash can happen if the member is also member of another supervisory or directors' board of a corporation which is a business rival or a associate partner of the first one.<sup>43</sup>

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<sup>37</sup> Thuemmel, per. Haftung, p. 110, Rn. 221.

<sup>38</sup> Thuemmel, per. Haftung, p. 110, Rn. 221.

<sup>39</sup> AktG-Hueffer, § 116, Rn. 4; Ulmer, NJW 1980, 1603, 1606.

<sup>40</sup> Lutter/Krieger, Rechte und Pflichten, Rn. 842.

<sup>41</sup> Lutter/Krieger, Rechte und Pflichten, Rn. 843.

<sup>42</sup> Hirte, Kapitalgesellschaftsrecht, § 3 Rn. 3.204; Lutter/Krieger, Rechte und Pflichten, Rn. 844.

<sup>43</sup> Wojtek/Buchholz, AG, 4.3.3.1. p. 8.

§ 116 s. 2 AktG obligated them also to be always secretive about their work for the supervisory board acquire information and the counsels.<sup>44</sup>

It is also to classify as a breach of duty if a member uses its insider-information to procure vantages for him- or herself or an affiliated<sup>45</sup> and the same applies for a member of a supervisory board who is also a member in the board of another corporation and which attune for a business dealing that exceed the possibilities of this company but benefits the other one.<sup>46</sup>

Furthermore, an infringement against the duty of discreetness and loyalty can – in some cases under special circumstances provoke a criminal procedure. An example for this is a denigration in public by giving intensively false information to the public.<sup>47</sup> A violation of § 404 AktG can be the consequence.

## **5. Miscellaneous duties**

There are other liability rules / standards which cause a liability by the supervisory board in case of a compliance of the presuppositions, these are the following:

Liability of founders (§§ 48 et seq. AktG) and breaches of the duty to the maintenance of capital (§ 93 III in conjunction with § 116 AktG). Beside the agreement catalogue (§ 111 IV AktG), the supervisory board has widened, see §§ 89 I, 114, 115 AktG.

Furthermore, the supervisory board has to assign a final scrutinizer, see § 290 HGB (German Commercial Code) and if they contravine against this, a liability can be the result, as it is now after the KonTraG had been realised, regulated in §§ 111 II 3 AktG, 318 I 4 HGB. Cause for this measure is that there should not originate dependences between the supervisory board and the board of

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<sup>44</sup> Wojtek/Buchholz, AG, 4.3.3.1. p. 6.

<sup>45</sup> BGH WM 1985, 1443, 1443; BGH NJW 1980, 1629, 1630.

<sup>46</sup> Wojtek/Buchholz, AG, 4.3.3.1. p. 7.

<sup>47</sup> Wojtek/Buchholz, AG, 4.3.3.1. p. 7.

directors.<sup>48</sup> So a supervisory board of an affiliate can be liable because of §§ 310, 318 II AktG.<sup>49</sup> Other possibilities to suit a claim are §§ 21 et seq. WpHG, 15 a WpHG in conjunction with § 823 II BGB, §§ 37b, 37c WpHG, § 161 AktG and § 44 BörsG.

## **II. Internal liability**

### **1. Overview**

Core area of the supervisory board's responsibility is the internal liability.

Every single member has to be responsible for its faults which caused a loss for the enterprise.

A supervisory or advisory board of a company has totally different duties to administrators and the board of directors, it is only an institution which works almost exclusively in the interior.<sup>50</sup>

The internal liability requires a neglect of duty by the members which has to be perpetrated culpably and this has to cause a damage for the company.<sup>51</sup>

This contains every single disturbance of the company's assets.<sup>52</sup> Every kind of fault is sufficient for the liability.

### **2. Default**

The liability of non-executive members presupposes a blame by the member to be liable for the damages.<sup>53</sup> Every member who does not act with the diligence of a prudent and conscientious outside director acts contrary to duty and at the same time culpably.<sup>54</sup> A lack of abilities does not excuse the member from liability because everyone,

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<sup>48</sup> Hirte, Kapitalgesellschaftsrecht, § 3 Rn. 3.196.

<sup>49</sup> Mutter, untern. Entscheidungen p. 169.

<sup>50</sup> Thuemmel, pers. Haftung, p. 98.

<sup>51</sup> Wojtek/Buchholz, AG, 4.3.2.1 p. 1.

<sup>52</sup> Wojtek/Buchholz, AG, 4.3.2.1 p. 1.

<sup>53</sup> AktG-Hueffer, § 93 Rn. 3a.

<sup>54</sup> Lutter/Krieger, Rechte und Pflichten, Rn. 846.

who gets a call has to refuse it if he or she is not able to be up to the standard.<sup>55</sup>

**a. Criterion for diligence**

During their administration, every member has to exercise the care of a prudent and conscientious outside director.<sup>56</sup> As a escrow of foreign interests, they are obliged to descry their position only in the interest of the company.<sup>57</sup> The measure of diligence in this situation is to determine, but whether it is only subjective or only objective, rather is it objective considering a minimum of elaborateness<sup>58</sup>, but every single member only has to verify that he or she acted because of his or her education and skills and that this had been enough in this situation from his or hers subjective point of view.<sup>59</sup>

**b. Damage for the company**

It applies for the diagnosis if there is a loss for the company the rules of the German Civil Code (BGB) and the general principles hereunto.<sup>60</sup> A harm is the result of a comparison between the current state and nominal condition.<sup>61</sup> A harm can also be originated if the company could not realise a benefit based on of the fault, § 252 BGB.

**c. Causality**

The neglect of duty has to be causative for the loss that arose for the company. This is the conclusion of the theory of adequate causation. But in the case of a collective decision, it is necessary to make a judgmental overall view. In controversy is, if a single member of the supervisory board has to take over responsibility and be liable for a result of a resolve.

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<sup>55</sup> Hoffmann/Preu, Aufsichtsrat, Rn. 519.2.

<sup>56</sup> sea above, footnote 13.

<sup>57</sup> LG Dortmund, AG 2002, 97, 99; Hoffmann/Prau, Aufsichtsrat, Rn. 511.

<sup>58</sup> Kiethe, Haftung von Aufsichtsräten, 2122, 2125.

<sup>59</sup> KoelnerKomm AktG-Mertens, § 93 Rn. 98.

<sup>60</sup> Wojtek/Buchholz, AG, 4.3.3.1 p 17.

<sup>61</sup> Palandt-Heinrichs, Vorb v § 249 Rn. 8.

The members argue that they were outvoted but that does not prevent them from being prosecuted.<sup>62</sup> But the Federal Court of Justice decided that a member of a supervisory board is only not punishable in the case if he or she had done everything he or she could to impede the resolution,<sup>63</sup> this can lead to the retirement from their office and these fundamental rule applies also to the civil law cases and therefore it is not that easy for a member of a supervisory board to exculpate oneself.

#### **d. Problems with the burden of proof and analysis**

As a basic principle, the plaintiff has to testimony his or her pleadings but for the liability of the board of directors and the supervisory board, the legislator has reserved this guiding principle so that the members of this offices have to evidence that they worked and decided with the diligence of a prudent and conscientious outside director when this is still in dispute, see §§ n116, 93 II AktG. As a consequence, the undutifulness and the default is supposed by the legislator to the debit of the board members.<sup>64</sup> The official reports of the meetings can be a very important valuable proof in this situation.

### **III. Prescription**

Claims for damages of the internal and external liability expire in five years, §§ 116 VI, 117 VI, 93 AktG, in the case of §§ 823 I, II, 826, they lapse in three years.

### **IV. Possibilities for (a) corporate veils**

Participation of the general meeting, see § 93 I AktG, prescribes that a duty of replacement towards the corporation cannot occur, if the

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<sup>62</sup> Wojtek/Buchholz, AG, 4.3.3.1 p 18.

<sup>63</sup> BGHSt 37, 106, 131/132.

<sup>64</sup> BGH NJW 1986, 54.

results which ends up in a loss for the company resulted from an adjudication of the general meeting.<sup>65</sup>

## **E. Exterior liability of the supervisory board**

The exterior liability contains norms from various laws: §§ 116, 93 AktG.

### **I. Liability of the supervisory board towards the shareholders**

A liability towards the shareholders of the company can base on § 117 I 2, II AktG and also on §§ 310 I, 323 I, 309 IV, 318 II AktG concerning the liability in terms of a combine.

#### **1. § 117 I 2, II AktG**

A direct claim of shareholders towards members of the supervisory board can only arise from § 117 I 2, II AktG, but just under the condition that a third party has abetted a supervisory board's member to act to the detriment of the company and that the members' manner has caused a loss to the company.<sup>66</sup>

But the shareholder can only lodge his claim against long odds if they are not able to substantiate a loss that is unattached by the value of the stock.<sup>67</sup> The Federal Court of Justice clarified that a deficit of the worth of the stock itself is not capable for a refund.<sup>68</sup>

In the case of a decision by the general assembly which is in compliance with the law, a deliverance from the accountability of the members of the supervisory board is actually feasible.<sup>69</sup> A demand barred in five years, see § 117 VI AktG.

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<sup>65</sup> Lutter/Krieger, Rechte und Pflichten, Rn. 851.

<sup>66</sup> BGH NJW 1985, 1777, 1778.

<sup>67</sup> Wojtek/Buchholz, AG, 4.3.4.1 p.1.

<sup>68</sup> Wojtek/Buchholz, AG, 4.3.4.1 p.1.

<sup>69</sup> Wojtek/Buchholz, AG, 4.3.4.1 p. 2.

## **2. §§ 823 I, 823 II in conjunction with a protective law, § 826 BGB**

A claim can also be buttressed on § 823 I BGB because of the violation of membership rights. These are an absolute right in terms of the norm and therefore it is possible for stockholders to base a claim against the company on them.<sup>70</sup>

However, this is only promising, if the conditions are fulfilled and these comprehend that the supervisory board tolerated and endorsed an encroachment upon the membership rights of a shareholder.<sup>71</sup>

An entitlement which is founded on § 826 BGB needs additionally the infringement of a protective law. Most frequently considered are §§ 263, 246 StGB, 399 ff. and 404 AktG.<sup>72</sup> § 263 of the German criminal code (StGB) captures fraud, § 246 StGB the peculation and the elements of an offence considering the stock corporation law. §§ 399 ff. AktG offers protection against misstatements and § 404 AktG prosecutes the betrayal of secrets which gains in more importance concerning the dissemination of inside information.<sup>73</sup>

The breach of an official duty does not always lead to a claim for indemnify but there are situations in which a member of the supervisory board is under certain conditions liable to an individually shareholder.<sup>74</sup>

## **II. Responsibility of the supervisory board towards third parties and creditors**

A liability towards third parties, thus furnisher or clients e.g. is typically only possible on tortious rules, an obligee can only take against a member of the supervisory board, if he distrains an entitlement which the company has against the member, but this is

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<sup>70</sup> BGHZ 83, 122, 133.

<sup>71</sup> Wojtek/Buchholz, AG, 4.3.4.3 p.1.

<sup>72</sup> Wojtek/Buchholz, AG, 4.3.4.3 p.1.

<sup>73</sup> Wojtek/Buchholz, AG, 4.3.4.3 p. 1.

circumstantial and the member has the same objections as towards the company.<sup>75</sup>

## **1. § 823 II in conjunction with § 92 II AktG, §§ 826, 830**

### **BGB**

A liability of supervisory boards' members towards third parties is only imaginable in exceptional cases, for example if they neglect their duty to file for insolvency<sup>76</sup>, see § 92 II AktG in connection with § 823 II BGB.

## **2. Liability of the supervisory board for tax debts and national insurance contributions**

Tax dues can be purchase tax and also income tax. Company's legal agents are only liable after §§ 34, 69 AO (German Fiscal Code) but members of the supervisory board are basically not liable.<sup>77</sup> A claim based on §§ 34, 69 AO, § 823 II in connection with § 266 a StGB (Deny and defalcation of remuneration / compensation / wage) does not exist in a normal case. But liability because of incitement or abetment / aid if the member supports wilfully the person who has the duty to act and this results in a damage and if the board of directors had a duty to act which had been violated.<sup>78</sup>

In contrary to the burden of proof and analysis considering the internal liability, in this case the obligee has to prove his or her submission.<sup>79</sup>

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<sup>74</sup> Wojtek/Buchholz, AG, 4.3.4.3 p. 1.

<sup>75</sup> Wojtek/Buchholz, AG, 4.3.4.3 p. 1.

<sup>76</sup> Wojtek/Buchholz, AG, 4.3.5.1 p. 1.

<sup>77</sup> Wojtek/Buchholz, AG, 4.3.5.2 p. 3.

<sup>78</sup> BGHZ 75, 96, 107.

<sup>79</sup> Wojtek/Buchholz, AG, 4.3.5.2 p. 4.

## **F. Enforcement of the claims because of liability**

The claims against the members of the supervisory board have to be asserted by the board of directors as the leading organ of the company, § 78 AktG. § 147 II 1 AktG also offers the possibility to alienate this right to a proxy.

## **G.D & O – Policy**

Because of the development that members of the supervisory board are in very few more cases liable than before the reform of the AktG through the KonTraG and also because of the judicature by the Federal Court of Justice, a new insurance evolved, specialising in insurance of managers and members of supervisory boards.

The origin of the D & O – Policies lays in the USA, but in reality, the first insurance for this theme was created by Lloyd's of London.<sup>80</sup>

In Germany, the insurance for managers was originally unessential, this was judicially not required because shareholders do not have far-reaching rights to sue.<sup>81</sup> For them it is only possible to enforce a claim of interior liability, if they can affiliate 10 % of the nominal capital (§ 147 AktG) or if they combine the majority of a limited liability company.<sup>82</sup> The instrument to assert a claim have not changed in general but the mindset regarding a commencement of action has because of the changes in the market, the economical crisis, the breakdowns of a starling number of companies and the judicature of the highest courts.<sup>83</sup>

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<sup>80</sup> Kreuzer-Schlechtriem, Haftung der Leitungsorgane, p. 76.

<sup>81</sup> Thuemmel, pers. Haftung, p. 161, Rn. 338.

<sup>82</sup> Thuemmel, pers. Haftung, p. 161, Rn. 338.

<sup>83</sup> Thuemmel, pers. Haftung, p. 161, Rn. 339/340.

## **H. Summary**

As a summary, one has to say that the endangerment to be addressee of a claim as member of a supervisory board and the chances, that the claim is justified and there has to be paid for a neglect of duties, has increased. Because of the shifting of the burden of proof to the supervisory boards' members, there situation has worsened extensively because it is very complicated to attest that the harm did not arise because of one's actual fault.

As a result of this changes, everyone in such a connotatively and responsible position has to take his or her business seriously and to exercise the maximum care to avoid the least possibility to be drawn on.

On this account, they all have the duty to amplify their knowledge to a competent and adequate standard to cope with their tasks. But this does not mean that extensive knowledge is required and precondition for a nomination.