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The Federal Court of Justice's concept for piercing the corporate veil due to destruction of a German Limited Liability Company

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The *German Limited Liability Company Act* (GmbHG) does not indicate any regulation for the abuse of the limitation of liability of a *German Limited Liability Company* (Gesellschaft mit beschränkter Haftung, GmbH). This unintended regulatory gap has been closed by the *German Federal Court of Justice* (Bundesgerichtshof, BGH) so far with the concept of piercing the corporate veil (i.e. disregarding the veil of incorporation, which separates the personality of a corporation from the personalities of its members) and thus extending the liability to the shareholders.

The BGH's latest doctrinal reason for piercing the corporate veil was, that the corporate entity shall be disregarded, if the company's economical existence had been deliberately destroyed by the shareholders. The liability privilege of Section 13 (2) GmbHG, according to which the GmbH has legal personality and possesses separate assets, which alone serve to cover its debts, should only come to bear, if the privilege is not misused by the shareholders. The Court ruled that the absence of misuse is an underlying prerequisite, which – if not fulfilled – makes the limitation not applicable (teleological reduction). Without the liability privilege of Section 13 (2) GmbHG a GmbH is comparable to a *German General Partnership* (Offene Handelsgesellschaft, OHG), for which Sections 105 and 128 *German Commercial Code* (Handelsgesetzbuch, HGB) apply, with the effect of the shareholders' unlimited liability.

In terms of facts this legal concept presupposed a perpetrator who, as a shareholder or partner-shareholder, intervenes in the company's assets and thus causes the insolvency of the company. Intervention could be any act or omission (e.g. by tolerating the interference of a co-shareholder), which removes a concrete asset position from the company, e.g. by entering into high risk transactions. Not only physical assets but also business opportunities or goodwill should be deemed as concrete asset positions.

Claims of the GmbH against a shareholder due to piercing the corporate veil because of an existence-destroying intervention should be subsidiary to claims on the basis of Sections 30 and 31 GmbHG.

The BGH has now abandoned the concept of piercing the corporate veil due to an existence-destroying intervention in the “Trihotel” judgement (16.07.2007 – II ZR 3/04, *Neue Juristische Wochenschrift* 2007, volume 60, issue 37, pages 2689-2694). The Court does no longer see any room for an analogy to the OHG, but instead recourses to the private law blanket norm of Section 826 *German Civil Code* (Bürgerliches Gesetzbuch, BGB), which applies, if a person intentionally inflicts damage on another person in a manner contrary to public policy. To fulfill the prerequisites of this Section in case of an intervention in the GmbH's assets which caused the insolvency of the company, the intervention has to be unethical and performed by a shareholder with the intent to inflict damage on the company.

Legal consequence is no longer an external liability of the shareholder towards the company’s creditors, but solely an internal liability towards the company. Therefore, if a creditor asserts the claim and not the company's insolvency administrator, he must first acquire a title against the company and then have the company's title against the perpetrating shareholder based on Section 826 BGB attached and transferred to him according to Sections 829 and 835 *German Code of Civil Procedure* (Zivilprozessordnung, ZPO).

Due to its legal nature as a damage compensation obligation, the liability scope of Section 826 BGB is less than the liability scope in the BGH's former concept of piercing the corporate veil. It only reaches as far as the company is unable to satisfy its obligations to the creditors because of the conduct of the shareholder.

Through Section 830 (2) BGB the circle of responsible persons is expanded to instigators and accessories.

If the shareholder's intervention has caused or aggravated a deficit balance, claims may be founded on Section 826 BGB as well as on Sections 30 and 31 GmbHG (concurring foundations of claims).

It is the opinion here, that the new doctrinal reason introduced by the “Trihotel” judgment not only applies to existence-destroying intervention, but also to other the other former groups of cases of piercing the corporate veil, namely due to misuse of the company form and due to assets mingling. However, a clarifying decision by the BGH may be helpful.