Liability Within Corporate Groups (*Bremer Vulkan*) - Federal Court of Justice Attempts the Overhaul

By Peer Zumbansen
Suggested Citation: Peer Zumbansen, *Liability Within Corporate Groups (Bremer Vulkan) - Federal Court of Justice Attempts the Overhaul*, 3 German Law Journal (2002), *available at*
http://www.germanlawjournal.com/index.php?pageID=11&artID=124

Introduction

[1] On 17 September 2001, the Federal Court of Justice (Bundesgerichtshof) handed down a landmark decision regarding liability within corporate groups („Konzernhaftung") which is likely to give an entirely new direction to the law in this field. Most notably, the Court held that, in spite of the fact that the case concerned a by now classical example of a corporate „daughter" incurring serious financial losses due to management decisions taken by its corporate „mother", resulting in the erosion of the daughter's financial basis, the Court exclaimed the statutory as well as judge made law regarding corporate liability within corporate groups as *not applicable* in this case. Thus casting somewhat aside a great and complex bulk of company law in form of a rather ambiguous and quite eruptively evolving law of corporate liability within corporate groups (1), the Court held that tort law and criminal law would be applicable to the case in point. Paradoxically, it is the Court's apparent shifting away from corporate group liability that might allow for a clearer view on the applicable company law in an area that has, for a long time, been dominated by heated debates about the Court's ambitious interpretation of the relevant norms, their reach and concrete application.(2)

[2] The case's facts, put simply, are the following. The German Federal Agency for Special Tasks related to the German Reunification (Bundesanstalt für vereinigungsbedingte Sonderaufgaben – "BVS"), successor to the former *Treuhandanstalt* ("THA"), sued several members of the defendant corporate mother's board of directors (Vorstandsmitglieder) of Bremer Vulkan Verbund Aktiengesellschaft ("BVV") for damages of roughly 10 Million German Marks (DM) each. In 1994, *Bremer Vulkan*, a huge German ship building consortium, received substantial subsidies by the *Treuhandanstalt* under the condition that these funds be exclusively used in accordance with the applicable rules under European Union Law. Specifically, the funds were granted in order to aid one of the corporate daughters, MTW Schiffswerft GmbH ("MTW"), a German Limited Liability Company (*GmbH*), in Wismar, East Germany, which had recently been privatized and integrated into the Bremer Vulkan Corporate Group. Another aim of the subsidies was to aid the regional economic framework and employment situation in the East German *Land* of Mecklenburg Vorpommern. Bremer Vulkan, however, created a central Cash-Management System within the Corporate Group by which it hoped to multiply the funds it had received. When THA/BVA voiced concern about this use of public funds, managers of Bremer Vulkan explained the cash-management system to be a mere short-term instrument of corporate investment promising interest returns as well as lessening the interest pressure on the Corporate Group's members in connection with regular debt financing. In no case, the managers argued, did the case-management system put the funds for MTW in peril. Shortly after, when Bremer Vulkan faced serious financial distress, the THA funds were eventually swallowed up, which led to MTW's almost crashing, the occurrence of which was only averted by the extraction of MTW from the Bremer Vulkan corporate group, its indirect re-affiliation with THA/BVS and its recovery by new public funds.

[3] The Higher Regional Court in Bremen (*Oberlandesgericht*) rejected all damages claims against Bremer Vulkan, holding that it was neither liable based on the applicable rules of liability within corporate groups ("Konzernhaftung"), nor with regard to tort law in connection with criminal law rules pertaining to the abandoning of entrusted funds ("Untreue") pursuant to Section 266 of the German Criminal Code ("Strafgesetzbuch" – StGB), Fraud ("Betrug") pursuant to Section 263 StGB or misleading information by corporate managers regarding the corporation's financial situation ("Unrichtige Darstellung der Vermögensverhältnisse") pursuant to Section 400 of the Geman Stock Corporation Act (Aktiengesetz – AktG). The last question had arisen in connection with the Bremer Vulkan's General Shareholder Assembly on 29 June 1994 during which the then presiding member of the Board of Directors had cast aside all doubts concerning the rightly suspected distressed situation of the Company with promises of immediate recovery.

The Decision of the Bundesgerichtshof of 17 September 2001

[4] The Bundesgerichtshof did not follow the legal findings of the Bremen Higher Regional Court and sent the case back to the Bremen Court for further clarification of the circumstances eventually giving rise to claims in tort and criminal law. The Bundesgerichtshof founded its decision mainly on the following considerations:
The Court stressed the governing role played by the Bremer Vulkan corporate mother over the management decisions and the financial options of its daughter, MTW. With regard to this relationship, the Court affirmed a duty ("Pflicht") of the governing managers of Bremer Vulkan to safeguard the financial interests of the governed daughter in connection with financial management decisions taken by the mother. This duty arises especially when the

https://doi.org/10.1017/S207183220001470X Published online by Cambridge University Press

mother's managers leads the governed daughter to invest its funds into a collective liquitidity fund governed exclusively by the corporate mother. The relevant passage of the Court's decision reads:

"Veranlasst der Alleingesellschafter die von ihm abhängige GmbH, ihre liquiden Mittel in einen von ihm beherrschten konzernierten Liquiditätsverbund einzubringen, trifft ihn die Pflicht, bei Dispositionen über ihr Vermögen auf ihr Eigeninteresse an der Aufrechterhaltung ihrer Fähigkeit, ihren Verbindlichkeiten nachzukommen, angemessene Rücksicht zu nehmen und ihre Existenz nicht zu gefährden. Kommt er dieser Verpflichtung nicht nach, kann er sich eines Treubruchs i.S. des § 266 StGB schuldig machen." (3)

[5] The Court held that the managers in Bremer Vulkan's Board of directors had been in the position to take decisions for Bremer Vulkan that would have directly governing effect on the financial dispositions of MTW. Pursuant to Section 14 StGB, these managers were thus responsible under criminal law for the action taken by the Bremer Vulkan corporate group. The Higher Regional Court to whom the Bundesgerichtshof now relegated the case, will have to evaluate whether the managers acted deliberately in the meaning of Section 266 StGB. Central to this evaluation is the question if and - given the case – at which point in time, the Bremer Vulkan managers knew that the corporate group would not be in the position to pay back to MTW (and other East-German ship-building enterprises) the investments made by these into the collective cash-management fund.

[6] The Court's holding is particularly interesting with regard to the fact that the Bundesgerichtshof was apparently not willing to continue its path down the rocky road of corporate liability within corporate groups which, in the past, had been guided mainly by considerations focusing on the power architecture within the corporate group. In a series of much debated decisions, the Court, i.e. its second senate which is responsible for company law, had developed a system of corporate liability that, for its sophistication or for its jungle-like quality, had received both appraisal and harsh critique. (4) While the root of this intricate development of liability law might rightly already be found in the very beast of the corporate group itself, the continuous attempts in legal science to give it a proper name (and a coherent systematic structure) give clear proof of the ambiguous character inherent to what some see as a unitary entity and others as a multi-polar framework of more or less independent economic actors. (5) The perennial question has been how to adequately assess the particular nature of a cluster of companies that are not – for specific reasons – incorporated as a single firm and that, at the same time, are more than a mere short-term contractual alliance of fully independent economic actors. The Bundesgerichtshof has continuously chosen to seek analogies between the uncodified law of corporate groups involving limited liability firms (GmbH) and the statutory law pertaining to connected firms under the German Stock Corporation Act (AktG). This balancing of Stock corporation law on the one hand and the particular interests of limited liability firms on the other inevitably led to considerable legal despair, because what was attempted to hold clearly distinguishable revealed itself to be tied together by strong economic incentives. Under closest scrutiny by an attentive academia, the Court engaged itself in meticulous carvings of corporate group liability law – without, however, ever really producing a stage that fully satisfied everyone.

[7] In this respect, the Court's most recent decision of 17 September is most welcome, even if it might not fully ease the observers' troubled minds as to the concrete future prospects of corporate group liability law. The case serves, at the same time, as a clear, if not altogether thoroughly argued, message carrying the information – regardless of all ensuing specifics – of nothing less than a decisive disruption in the Court's reasoning with regard to the liability regime for corporate groups. This recent development of the law of corporate liability within corporate groups has been described by one of Germany's foremost observers and inspirers of company law doctrine as being reflective of a definite shift away from a concept of corporate group liability („Konzernhaftung") towards a differentiated system of management's liability, focusing on the financical interests of the corporate daughter and the related protective duties of the management. Focusing regularly on the *company* ("das Unternehmen") and the *corporate group* ("den Konzern") and the dependency relationship between these entities, corporate liability law tended to base the management's liability more on the corporate architecture than on the management's concrete doing, as seen from economic and business perspectives. Courts, thus, aimed at identifying dependency relationships among corporate entities within the group. (8) The Bundesgerichtshof went far in applying this line of reasoning in the much criticized *Video*-decision. In this holding, which the Court mitigated if not overturned in the subsequent ruling in its *TBB*-decision , the Court based its finding of the governing company's management's liability for the financial losses of the corporate daughter on the fact that the governing company was the daughter's only associate and that, in this position, the governing associate had exercised an allegedly unlimited degree of governance over the corporate daughter. In the case of the governed daughter being a "one-man" corporation, the single associate as corporate mother had taken on full risk liability for the daughter solely by the fact of creating this very corporate group. As this meant nothing else than the alleviation of the else applicable liability immunity of the GmbH-manager under German Limited Liability Law, pursuant to Section 13 para. 2 GmbHG, the general critique of the Court's holding in its *Video*-ruling was extremely harsh. It rightly pointed to the Court's de facto substitution of negligence and fault standards with regard to the manager's concrete doing by an inflexible strict liability scheme oriented exclusively at the corporate group's architecture and dependency structures.

https://doi.org/10.1017/S207183220001470X Published online by Cambridge University Press

[8] The Bundesgerichtshof's ruling of 17 September 2001 goes a long way in taking the opportunity of an else classical case of corporate liability within corporate groups to exclaim nothing less but the abandoning of many of the principles developed thus far under this heading. In the very beginning of its decision, the Court tells us that the rules pertaining to the protection of the dependent corporate daughter were *not* to be found – the Court, interestingly enough, did not say: "no longer" – in the Stock Corporation Law's sections related to liability within corporate groups (Sections 291 *et seq.* , 311 *et seq.* AktG) but, instead, that the protection of the dependent corporation against actions taken by its sole associate is limited to maintenance of its base capital and the safeguard of its existence – both of which imply a duty on the management's side to appropriately consider the daughter's own interests.

"Der Schutz einer abhängigen GmbH gegen Eingriffe ihres Alleingesellschafters folgt nicht dem Haftungssystem des Konzernrechts des Aktienrechts (§§ 291 ff., 311 ff. AktG), sondern ist auf die Erhaltung ihres Stammkapitals und die Gewährleistung ihres Bestandschutzes beschränkt, der eine angemessene Rücksichtnahme auf die Eigenbelange der GmbH erfordert. An einer solchen Rücksichtnahme fehlt es, wenn die GmbH infolge der Eingriffe ihres Alleingesellschafters ihren Verbindlichkeiten nicht mehr nachkommen kann." (13)

[9] The Court, in this holding, sends a clear message as to necessary elements of cause and effect with regard to the financial incapacitation of the corporate daughter due to actions taken by the mother's management. While this direction had already been indicated in the Court's *TBB*-ruling (14), the Bundesgerichtshof's new decision can rightly be seen as a loud and clear indication of the route towards an allegedly more accessible and assessable concept of corporate liability. This observation or, hope, is closely tied to the Court's apparent shifting away from a difficult-to-handle and far too rigid liability scheme which was, for a long time, focusing on the ominous identification of company actors ("Unternehmen") in their relationship within corporate groups. Following a devilishly compelling logic of dependencies exploited by *governing corporations* ("herrschende Unternehmen"), a truly nominalist identification of such dependencies severely widened the liability risks for economic actors and, thereby, caused great insecurity among corporate actors as to the risks incurred within most common architectures of corporate groups – a logic which reigned still in the much acclaimed *TBB*-decision.

Exchanging Unity for Unity

[10] "All a matter of degree", we are tempted to conclude in light of the aforementioned development of the Court's reasoning. In fact, the focus on the management's concrete doings and their assessment against a – likely to be open-ended – catalogue of managerial duties with regard to the company's existential basis seems to be a most welcome alternative to the architectural approach which tended to affirm almost strict liability at the high price of neglecting careful consideration of content and scope of the management's duties towards the company. This, again, does sound compelling, if only for its apparent simplicity. But, at the same time, we ought to pause for an instant in order to consider the array of difficulties resulting from this actor oriented approach. (16) What exactly are the pillars on which the scope of the relevant duties is to be assessed? The Court itself avoids an outspoken discussion of the otherwise lingering conflict between codified legal standards and managerial decision taking by apparently solely pointing to the standards laid down in the law. The manager's duty to preserve the company's base capital is laid down in Section 43 para. 3 and Sections 30 *et seq.* GmbHG. This turn to the written law, however, is not the best solution either, as it might only be functionable in extreme cases such as this one. (17) As already indicated, a quite persuasive argument points to the existential needs of the (dependent) company. What should be more important than that? Yet, just as the observation of the extreme poverty in many parts of the world and the ensuing simple proposals of combating the misery prove to run into the stubborn obstacles of facticity, there is but little reason to assume the opposite with regard to the questions we are concerned with in this context. What seems to underlie the simple and noble approach indicated by the Court's recent ruling is the exchange of one frame of references against another. Where, before, the evil tended to be seen in the exploitative exercise of managerial power within a corporate group, the evil now shall be identified in the exploiter. Both, corporate group and dependent company, are reduced to either actor or object of an exploitation, without further inquiry into the economic and organizational quality of the relationships at play. Instead of continuing to attack the architectural framework which has long been (and, so we would argue, still is) held to be the cause of such corruptive and destructive usages of management power, the remedy shall now be to target the management itself in light of yet-to-be-identified duties of care. Certainly, this has been done all along, but the underlying assumptions have been others. First was the suspicion of the exploitation of the dependency relationship in the interest of the corporate group, now the focus is on the financial needs of the corporate daughter, which seems almost detached from its being a part of a corporate group. The inability among judges and legal academia to reach consensus about the nature of the corporate group, *i.e.* about the manifold relationships and interrelationships at play within its borders, should have rendered us more skeptical *vis-à-vis* focus-shifts such as those recently suggested by the Court. At least, we should be aware of the remaining problem to adequately assess the quality of relationships between economic entities within these often flurry and fast evolving corporate clusters.

https://doi.org/10.1017/S207183220001470X Published online by Cambridge University Press

[11] It seems as if the basic – even if mostly hidden – assumption of a corporate group being an entity with certain and, for the dependent daughter, at times detrimental interests is now being replaced by another basic assumption with regard to the single company within this framework. The result is that the exclusionary focus on the corporate group, allegedly governed by identifiable dependency relationships which at times are exploited to the detriment of single entities within the group is replicated within the sole focus on these single entities. While the conundrum of the corporate group has been and continues to be the flexible and continuously evolving quality of relationships within the group and outside of it – see the case of franchise liability! – the "nature of the (single) firm within the corporate groups risks to escape our analytical approach if we contend ourselves to the corporate daughter as such.(18)

[12] This is not to say that the Bundesgerichtshof's ruling in *Bremer Vulkan* is not only not a step forward but, possibly, a step backward. Not quite. The Court's ruling clearly reflects the Court's awareness of the intricacy we have briefly alluded to above. In its attempt to carve out clear and manageable guidelines for the assessment of corporate liability the Court suggests to shift perspectives and it is this proposal which merits great acclaim. The "power architectural" approach taken by the Court in its preceding decisions jettisoned a jurisprudence of foreseeability and threatened limited liability practice. In a business world largely populated by interwoven economic actors, the before held liability scheme led to insecurities among economic actors (and their lawyers) with regard to risks incurred within corporate groups. Yet, a possible analytical capitulation before the conundrum "corporate group" by underlining the existential economic needs of the dependent corporate actors within a group might undo much of the learning experiences that are reflected in the Court's preceding case law. Even if it can well be argued that the hitherto focus on the governing company and the dependency relationships within the group produced too rigid a liability system, the case law did give proof of a continuous attempt to understand the particular quality of complex relationships within corporate groups. The Court's recent decision, thus, reflects another approach in this inquiry, this time shifting the focus away from the mainly architectural perspective towards an actor oriented view. The approach remains, however, a straight forward one, exchanging one polar view with another, without allowing for another, possibly more sensitive assessment of the relationships within corporate groups. If we consider the difficulties in clarifying the economic and legal quality of "a firm" in the light of highly complex modes of economic organization (19), and the contemporary corporate governance debate gives clear proof of this(20) , we ought to search for yet other perspectives on the interplay among different actors within corporate groups. Most importantly, this needed perspective must be informed by a fundamental insight into the self-regulatory dynamics of economic actors as societal actors towards which the law is forced, above all, to develop a *learning* attitude. As expressed probably more adequately in the English term "*corporate group*" than the German "*Konzern*", the relationships among clustered, bundled, combined etc. firms provide a rich and intricate example of interwoven, at times conflicting, at times converging interests, which themselves react nervously to systemic influences from within and without. The recent BGH decision reflects this situation and suggests a strengthening of the dependent company's management with regard to a if generally assessable catalogue of duties. These crystallize through their tying back to the existential interests of the company. This only looks very distantly like "business judgment rule", and the work still lies ahead.

For more Information: Decision of the Federal Court of Justice (Bundesgerichtshof – BGH) of 17 September 2001 – Reg. No. II ZR 178/99; published in: NEUE JURISTISCHE WOCHENSCHRIFT 2001, 3 December 2001, p. 3622. Also published in: ZEITSCHRIFT FÜR INSOLVENZPRAXIS (ZIP) 2001, p. 1874; BETRIEBS BERATER (BB) 2001, p. 2233; ZEITSCHRIFT FÜR WERTPAPIERMITTEILUNGEN (WM) 2001, 2062.

Karsten Schmidt, *Gesellschafterhaftung und „Konzernhaftung" bei der GmbH. Bemerkungen zum „Bremer Vulkan"-Urteil des BGH vom 17.9.2001*, in: NEUE JURISTISCHE WOCHENSCHRIFT 2001, 3 December 2001, p. 3577-3581.

Claus Luttermann, *Unternehmensfinanzierung, Geschäftsleiterpflicht und Haftkapital bei Kapitalgesellschaften. Rechtsfragen der Vermögensbetreuung und Liquiditätssicherung ("business judgement rule") im Konzern ("Bremer Vulkan") und ein umfassendes Finanzierungs- und Haftungskonzept*, in: BETRIEBS BERATER (BB) 2001, 2433-2437.

BETTINA FRIEDRICH, KONVERGENZEN IM GESELLSCHAFTSRECHT: RECHT-FERTIGUNG DURCH STATUS- UND BEFUNDSICHERUNG (2000).

Karsten Schmidt, *Die wundersame Karriere des Unternehmensbegriffs im Reich der Konzernhaftung*, in: DIE AKTIENGESELLSCHAFT 1994, pp. 189-195.

MARC AMSTUTZ, KONZERNORGANISATIONSRECHT (1993).

FRIEDRICH KÜBLER, GESELLSCHAFTSRECHT, 5th Edition (1998).

https://doi.org/10.1017/S207183220001470X Published online by Cambridge University Press

John W. Cioffi, *State of the Art: A Review Essay on Comparative Corporate Governance: The State of the Art and Emerging Research*, in: 48 AMERICAN JOURNAL OF COMPARATIVE LAW (Am. J. Comp. L.) 2000, pp. 501-534.

Reforming Corporate Governance in Germany: Inside a Law Making Process of a Very New Nature, Interview with the President of the Government Commission, Professor Theodor Baums, in: 2 GERMAN L. J. No. 12 (16 July 2001), available at http://www.germanlawjournal.com. [http://www.germanlawjournal.com/past_issues.php?id=43]

Gunther Teubner, Unitas Multiplex – Das Konzernrecht in der neuen Dezentralität der Unternehmensgruppen, in: ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT (ZGR) 1991, pp. 189-217.

Gunther Teubner, *Die 'Politik des Gesetzes' im Recht der Konzernhaftung. Plädoyer für einen sektoralen Konzerndurchgriff*, in: FESTSCHRIFT FÜR ERNST STEINDORFF ZUM 70. GEBURTSTAG (JÜRGEN BAUR/KLAUS HOPT/PETER MAILÄNDER EDS. 1990), pp. 261-279.

GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM. TRANSLATED BY ANNE BANKOWSKA AND RUTH ADLER, EDITED BY ZENON BANKOWSKI (1993) (German original: Recht als autopoietisches System, Frankfurt: Suhrkamp 1989).

KARL-HEINZ LADEUR, NEGATIVE FREIHEITSRECHTE UND GESELLSCHAFTLICHE SELBSTORGANISATION (2000).

Brigitte Knobbe-Keuk, *Zum Erdbeben Video*, in: DER BETRIEB 1992, p. 1461-1465.

Remo Häcki/Julian Lighton, *The Future of the Networked Company*, in: THE MCKINSEY QUARTERLY 3/2001. (1) For a far reaching and critical reconstruction of the case law, see, e.g., B. FRIEDRICH, KONVERGENZEN IM GESELLSCHAFTSRECHT 136-205 (2000); for a meticulous critique of the place of corporate liability law within contemporary private law doctrine, see also M. AMSTUTZ, KONZERNORGANISATIONSRECHT (1993).
(2) See, e.g., K. Schmidt, in: Neue Juristische Wochenschrift 2001, p. 3577, 3578-9.
(3) Bundesgerichtshof, Decision of 17 September 2001, in: Neue Juristische Wochenschrift 2001, p. 3622, 3623.
(4) See the decisions of the Bundesgerichtshof in ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN (BGHZ): 65 BGHZ 14 („ITT"), 95 BGHZ 330 („Autokran"), 107 BGHZ 7 („Tiefbau"), 115 BGHZ 187 („Video") and, finally, 122 BGHZ 123 („TBB"). See the thorough discussion in FRIEDRICH, supra note 1, at 167-205.
(5) See, for an entry to the discussion, G.TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM, chapter: Unitas multiplex.
(6) See, Schmidt, supra note 2 at 3578.
(7) Id.
(8) See Sections 291-338 AktG German Stock Corporation Act).
(9) See 115 BGHZ 187; legal academics have referred to the Court's holding as an „earthquake"; see Knobbe-Keuk, Zum Erdbeben Video, in: DER BETRIEB 1992, p. 1461-1465, 1461.
(10) 122 BGHZ 123.
(11) See 115 BGHZ 187, 194.
(12) See Friedrich, supra note 1, at 188.
(13) BGH, Decision of 17 September 2001, NEUE JURISTISCHE WOCHENSCHRIFT 2001, p. 3622.
(14) 122 BGHZ 123; see Schmidt, supra note 2, at 3577: „Balsam on the wounds of Limited Liability practice".
(15) See Schmidt, supra note 2, at 3578.
(16) See Luttermann, *Unternehmensfinanzierung, Geschäftsleiterpflicht und Haftkapital bei Kapitalgesellschaften, 2433, 2434-5, who points to the inevitable conflicts between the standards laid down by the law (e.g., in Section 91 para. 1 sent. 1 AktG and in Section 43 para. 3 GmbHG) and the actual constraints and options of managerial action.*
(17) Id., at 2436.
(18) See Teubner, Die 'Politik des Gesetzes' im Recht der Konzernhaftung, 261, 262.
(19) See, hereto, LADEUR, NEGATIVE FREIHEITSRECHTE UND GESELLSCHAFTLICHE SELBSTORGANISATION, 204-216; see also Häcki/Lighton, The Future of the Networked Company, in: The McKinsey Quarterly 3/2001.
(20) See, for a brillant overview, John W. Cioffi, State of the Art, in: AMERICAN JOURNAL OF COMPARATIVE LAW 2000, 501; see also „Reforming Corporate Governance in Germany: Inside a Law Making Process of a Very New Nature", Interview with the Head of the German Government Commission, Professor Theodor Baums, in: 2 GERMAN L. J. No. 12 (16 July 2001), available at http://www.germanlawjournal.com (http://www.germanlawjournal.com/past_issues.php?id=43)

https://doi.org/10.1017/S207183220001470X Published online by Cambridge University Press