Changing Paradigms: The Liability of Corporate Groups in Germany

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Changing Paradigms: The Liability of Corporate Groups in Germany

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The German law on affiliated companies and groups of companies ("Konzernrecht"), as embodied in the German Stock Corporation Act of 1965, as amended ("Aktiengesetz"), has often been credited for its innovative approach to the dichotomy of liability strategies relevant to corporate groups—viz., the traditional concept of entity liability based on the fundamental doctrine of the legal separateness of the corporate entity and, accordingly, resulting in a limitation of investor liability as the rule, and discrete and rare occurrences of what is almost poetically designated the

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3 See Marcus Lutter, Limited Liability Companies and Private Companies, in 13 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 2, § 203, at 102 (1998) ("In such situations, liability is
“piercing of the corporate veil” ("Durchgriffshaftung") as narrow and reluctantly crafted exceptions, and the more modern, revolutionary concept of group or enterprise liability ("Konzernhaftung") in the law of corporate groups which—in its most radical form—will allow (and even mandate) a court to penetrate all horizontal and vertical “corporate separateness barriers” within a collective, polycorporate business enterprise as the rule and without exception.4

Indeed, one of the most prolific international scholars on the liability of corporate groups, Professor José Engrácia Antunes, has repeatedly described such innovative German approach to the legal phenomenon of intragroup liability as a “third intermediate and differentiated regulatory strategy.”5 Comparatively, he labels such intermediate strategy—intermediate, since it is structurally situated somewhere between the traditional, well-established nineteenth century notions of entity law6 and the rather contemporary, yet often still embryonic formulations of enterprise

imposed on individual members on the principle that justice is better served by ‘disregarding the company as a separate legal entity’ or, more poetically, by ‘lifting or piercing the corporate veil’.”) (emphasis added); see also T.W. Cashel, Groups of Companies—Some US Aspects, in GROUPS OF COMPANIES 20, 26 (Clive M. Schmitthoff & Frank Wooldridge eds., 1991) (“Piercing, or lifting, the corporate veil is a colourful figure of speech.”).

4 For a general discussion of such dichotomy, see Antunes, supra note 2, at ch. 3; Phillip I. Blumberg, Kurt A. Strasser, Nicholas L. Georgakopoulos, & Eric J. Gouvin, Blumberg on Corporate Groups §§ 6.01, 6.05 (2d ed. 2005) [hereinafter Blumberg on Corporate Groups]; José Engrácia Antunes, The Liability of Polycorporate Enterprises, 13 CONN. J. INT'L L. 197, 215–21 (1999).

5 Antunes, supra note 4, at 221; see also Antunes, supra note 2, at 313; cf. Alting, supra note 2, at 250 (stating that the German Konzernrecht has even enacted the principle of enterprise law).

liability—the "dualist approach."  

Part I of this Article will briefly summarize the dualistic fabric of the group liability schemes promulgated under the German Stock Corporation Act of 1965. However, being far from even remotely regulating much of today's operational and legal reality within corporate groups in Germany, Part II will juxtapose the statutory dualist approach discussed in Part I with a parallel "case law" development in the German law of corporate groups which, until recently, had all but dwarfed the significance of the statutory framework provided under the German Stock Corporation Act. Such parallel development, the emergence of the so-called "qualified de facto corporate group doctrine" during the 1980s in the jurisprudence of the German Federal Supreme Court ("Bundesgerichtshof"—abbreviated "BGH"), unexpectedly experienced in 2001 and 2002 what will be diagnosed by this Article as a tectonic, multi-layered paradigm shift ("Paradigmenwechsel") in the German law of intragroup liability. Such vital change of group law paradigms is evidenced by the Federal Supreme Court's complete abandonment of the qualified de facto corporate group doctrine—a process which Part III of this Article will explore in more detail. Finally, Part IV will analyze and evaluate the various layers and characteristics of the diagnosed paradigm shift as well as its consequences for the liability concepts applicable to corporate groups under German law and discussed herein. In conclusion, this Article will argue that, because of the aggregate effect of the identified paradigm shift, a truly substantive dualist (or hybrid) approach addressing the parent-subsidiary liability conundrum under German law (which approach Professor Antunes was still able to attest as late as 1999) today, de lege lata, no longer exists in such jurisdiction.

7 Antunes, supra note 4, at 221; see also Antunes, supra note 2, at 313 (describing the German legal system's differentiated "dualist approach"); Herbert Wiedemann, The German Experience with the Law of Affiliated Enterprises, in GROUPS OF COMPANIES IN EUROPEAN LAWS 21, 33 (Klaus J. Hopt ed., 1982) (describing the differentiation between contractual and factual concerns in the German regulatory system of corporate groups, as discussed in Part I, infra, as a "dualistic system").

8 For an explanation of the quotation marks around German, i.e., civil law jurisdiction "case law" throughout this Article, see infra note 75 and accompanying text.

9 Cf. Heinz-Dieter Assmann, Microcorporatist Structures in German Law on Groups of Companies, in REGULATING CORPORATE GROUPS IN EUROPE 317, 319 (David Sugarman & Gunther Teubner eds., 1990) ("It is undeniable that, in German law specifically, considerable improvements on the part of both case law and jurisprudence have been made in the legal machinery and in methods for understanding and treatment of group enterprise, but it does seem best in this outline to keep to the approach that characterizes (German) law in force: the paradigm, if you will, of group enterprise law.") (emphasis added) (citation omitted); Raiser, supra note 6, at 114 ("Enterprise law emphasizes the size of an enterprise instead of the legal form of the company. Its paradigm is the large firm, especially the corporation. Its attention is directed especially to enterprise relationships and to the need to develop appropriate legal structures for them.") (emphasis added).

10 See Antunes, supra note 4, at 221.
I. THE DUALISTIC FABRIC—THE STATUTORY FRAMEWORK

Unlike the corporations codes of each of the fifty state jurisdictions constituting the United States which, in unison, remain silent on the topic of general parent-subsidiary liability,11 German corporate law has articulated explicit standards for the liability of parent company-shareholders (as opposed to individual investor-shareholders) in the statutory corporate group framework. Forty years ago, the German Federal Government promulgated a new version of the Stock Corporation Act and, in an unprecedented step at the time,12 included provisions in such act which devised two specific categories of corporate groups and then applied different liability schemes to each of them.13

A. The Contractual Concern

The first such statutory group category is that of the “contractual corporate group” or “contractual concern” ("Vertragskonzern").14 True to its name, the contractual group is based on a voluntary, contractual arrangement, the “control agreement” ("Beherrschungsvertrag")15 between the controlling parent company and the controlled subsidiary corporation.16 Pursuant to the control agreement, the parent acquires, and is permitted to exercise, far-reaching management powers over the subsidiary and its op-

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11 See Lutter, supra note 3, § 203, at 102.
12 See Assmann, supra note 9, at 339–40 (stating that the “Third Section of the Stock Corporation Law (AktG)” is a “product of the Stock-Corporation-Law Reform of 1965”); Wei, supra note 2, at 398 (“Germany was the first country to have a separate legal regime, here in the form of the Aktionengesetz, as a way of regulating groups of companies.”); Eddy Wymeersch, Do We Need a Law on Groups of Companies, in CAPITAL MARKETS AND COMPANY LAW 573, 587 (Klaus J. Hopt & Eddy Wymeersch eds., 2003) (“Germany is the only European state that has introduced formal regulation on the law of company groups.”). Today, Brazil (1976) and Portugal (1986) have also adopted regulatory frameworks for corporate groups. See Antunes, supra note 2, at 313, 324–27; Blumberg, supra note 2, at 643 (“In the German Stock Corporation Act of 1965 applicable to public stock corporations (Aktiengesellschaft, or A.G.), the German Federal Republic has enacted the most comprehensive statutory scheme for corporate groups (Konzern) in the world.”) (citations omitted).
13 For an account of the history of the corporate group sections of the German Stock Corporation Act, see Antunes, supra note 2, at 342–47.
16 See AktG § 291(1), translated in Schneider & Heidenhain, supra note 1, at 265.
erations. It is even permissible under the statute that the parent company's directions and corporate influence are detrimental to the subsidiary as long as such directions meet two requirements. First, they have to be consistent with the interests of the global business enterprise, i.e., the corporate group as a whole. And second, they may not jeopardize the separate legal existence of the subsidiary corporation. Thus, in other words, in a contractual concern the parent company may have complete control over the subsidiary and its business operations, provided that the exercise of such control is in the best interest of the corporate group and does not render the subsidiary insolvent.

Given that the contractual group is premised on a contractual arrangement, the Stock Corporation Act does not utilize any "corporate law emblems" of intragroup liability in order to address the legal consequences of the extensive, yet permissible corporate control over the subsidiary corporation. Rather than obliterating the parent company's limited liability as the shareholder of the controlled subsidiary, the German stock corporation law applies a contractual response—a hybrid form of "statutory-contractual" quid pro quo—which obliterates the parent company's limited liability as the contractual counter-party of its controlled subsidiary. By operation of law, the parent company entering into the control agreement with its subsidiary and thereby forming the contractual group assumes a statutory obligation—created by virtue of the mere existence of the control agreement—to compensate the subsidiary for all annual deficits incurred by such controlled entity during the contract period (i.e., the time period during which the control agreement is in effect). It should be noted that such global compensation liability of the parent company is incurred irrespective of any factual relationship, or even the slightest causal link, between the subsidiary's losses and the actual control exercised by the parent company.

17 See AktG § 308(1), translated in SCHNEIDER & HEIDENHAIN, supra note 1, at 284; see also Antunes, supra note 4, at 222.
18 AktG § 308(1), translated in SCHNEIDER & HEIDENHAIN, supra note 1, at 284; see Hofstetter, supra note 2, at 581; Singhof, supra note 15, at 165; Wiedemann, supra note 7, at 26; Frank Wooldridge, Aspects of the Regulation of Groups of Companies in European Laws, in EUROPEAN COMPANY LAWS—A COMPARATIVE APPROACH 103, 119 (Robert R. Drury & Peter G. Xuereb eds., 1991).
19 Hofstetter, supra note 2, at 581; Schiessl, supra note 15, at 497.
20 However, the contractual form is prescribed by law and the controlling entity can force the conclusion of the control agreement at any time.
21 More precisely, the parent company itself obliterates, i.e., waives, its limited liability as the shareholder of the controlled subsidiary corporation by concluding the control agreement with such entity.
22 See AktG § 302(1), translated in SCHNEIDER & HEIDENHAIN, supra note 1, at 275–76; see also Hofstetter, supra note 2, at 581; Singhof, supra note 15, at 165; Stohlmeier, supra note 14, at 136; Wiedemann, supra note 7, at 36.
From an accounting perspective, the balance sheet of a contractual group subsidiary can never show any losses. Any fiscal loss of the subsidiary will automatically be offset with a compensation claim by the subsidiary against the parent corporation as an account receivable in like amount. At the same time, the parent company is obligated to immediately create and, if necessary, increase sufficient reserve amounts in order to cover the fiscal loss incurred by the subsidiary. At the end of the fiscal year, such reserve amounts become payable to the subsidiary. Should the parent corporation refuse to pay, the creditors of the subsidiary are able to enforce the subsidiary’s compensation claim against the parent company under applicable German bankruptcy provisions.

B. The Factual Concern

The second category of corporate groups created by the Stock Corporation Act of 1965 is the factual concern or de facto concern (“faktischer Konzern”). Also true to its name, the factual concern or group is characterized by the absence of a control agreement (or any other contractual arrangement between parent and subsidiary addressing the group issue). Instead, the de facto group is a “pure-bred” statutory creation that comes into existence as a matter of law once two factual requirements have been met. First, majority ownership of a particular corporation by another company is established—which, under the Stock Corporation Act, creates a presumption of the lack of independence of the majority-owned corporation. Second, a uniform, centralized management structure (“einheitliche Leitung”) is applied to the majority-shareholder company and the majority-owned corporation, i.e., both companies are operated as a single, centralized enterprise (“Konzern”) as far as corporate management and control are concerned.

23 See Ulrich Immenga, Company Systems and Affiliation, in 13 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 7, § 75, at 83 (1985); Miller, supra note 2, at 102.
24 See AktG § 300 No. 3, translated in SCHNEIDER & HEIDENHAIN, supra note 1, at 275; see also Assmann, supra note 9, at 342; Lee & Blumenthal, supra note 2, at 228; Miller, supra note 2, at 102–03.
25 See AktG § 302(1), translated in SCHNEIDER & HEIDENHAIN, supra note 1, at 275–76; Klaus J. Hopt, Legal Elements and Policy Decisions in Regulating Groups of Companies, in GROUPS OF COMPANIES 81, 94 (Clive M. Schmitthoff & Frank Wooldridge eds., 1991); Immenga, supra note 23, at 83.
26 See Alting, supra note 2, at 237; Hofstetter, supra note 2, at 581; Wooldridge, supra note 18, at 121.
27 See Stohlmeier, supra note 14, at 137.
28 See AktG §§ 16(1), 17(2), translated in SCHNEIDER & HEIDENHAIN, supra note 1, at 35–37; see also Hofstetter, supra note 2, at 581; Miller, supra note 2, at 101; Stohlmeier, supra note 14, at 137; Wiedemann, supra note 7, at 32.
29 AktG § 18(1), translated in SCHNEIDER & HEIDENHAIN, supra note 1, at 37; see also Assmann, supra note 9, at 341 (discussing the “unitary management” that results when a dominating company and (one or more) dependant companies become a group); Hopt, supra note 25, at 95 (“[I]t remains true that under German law a Konzern only exists if there is not just control, but one or more controlled enterprise is subject to the uniform management of the controlling enterprise.”) (emphasis added);
THE LIABILITY OF CORPORATE GROUPS IN GERMANY

The consequences of the de facto concern, thus established, on the parent company's liability for the debts of its dependent subsidiary follow an entirely different statutory scheme from the one applicable to contractual groups. Here, the Stock Corporation Act provides that in any case of a particular interference by the parent company in the subsidiary's management—which interference is disadvantageous to the independent business interests of the subsidiary—the parent company shall compensate the subsidiary for any and all damages sustained as a result of such singular interference.\(^3\) Obviously, liability in de facto groups is thus a case-by-case, interference-by-interference analysis of intragroup liability.

As a result, the scope of liability in de facto concerns is very limited, both as a matter of "legal formalism" and a matter of "legal realism." Regarding the former, the form of the liability structure in German factual groups can be compared to veil piercing cases in the United States. Instead of incurring a full-scale liability for all subsidiary debts (as is applied to the German contractual concern regardless of any actual detriment caused by the parent's control), intracompany liability in factual concerns focuses on isolated cases of detrimental parental interferences where, in addition to the disregard for the subsidiary's "separate existence" as expressed in the uniform, centralized management structure establishing the de facto group, there is some form of additional "wrongful conduct" by the parent company harming the subsidiary. Furthermore, intracompany liability also requires a causation nexus between the detrimental measure taken by the parent company and the damages or losses sustained by the subsidiary. It therefore further limits recovery by the subsidiary to only those losses which have been directly caused by a particularized, harmful interference with the corporate autonomy of such entity.\(^3\)

As far as the "legal realism" limitation of the scope of de facto group liability in Germany is concerned, it is evident from the restrictive statutory

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\(^3\) Wiedemann, supra note 7, at 25 (noting that the Konzern "presupposes" sole management by the dominant company); Wooldridge, supra note 18, at 108 (discussing what may constitute a controlling interest on the part of the dominant company); Frank Wooldridge, The Situation of Dependent GmbH in a de facto Group in German Law, 1996 J. BUS. L. 627, 629 n.7 (noting the role that uniform management plays in defining a group of companies, as well as the circumstances in which uniform management is "treated as existing"); Wymeersch, supra note 12, at 587 n.49 (noting that under the German Stock Corporation Act, "'uniform management' or 'einheitlicher [sic] Leitung' is the essential criterion").

\(^3\) AktG §§ 311(1), 317(1), translated in SCHNEIDER & HEIDENHAHN, supra note 1, at 287, 293-94; see also Miller, supra note 2, at 104; Singhof, supra note 15, at 166.

\(^3\) See Antunes, supra note 4, at 223 ("[T]he parent has only to compensate concretely established patrimonial prejudice caused to the subsidiary."). Comparatively, it could therefore be claimed that the three-prong liability structure for factual groups under the German Stock Corporation Act (i.e., uniform management, detrimental interference, causation nexus) is identical to the three-factor liability pattern (i.e., separate existence, wrongful conduct, causation) which is often utilized in veil piercing cases in the United States. For a discussion of the traditional U.S. three-stage veil piercing pattern, see BLUMBERG ON CORPORATE GROUPS, supra note 4, §§ 10.03[B], 11.01; Hofstetter, supra note 2, at 592; Kurt A. Strasser, Piercing the Veil in Corporate Groups, 37 CONN. L. REV. 637, 640-41 (2005).
scheme for factual group liability as described above that the controlled subsidiary would be required to establish—for each individual, particular interference by the parent company—that such interference was detrimental and, in addition, the extent to which actual damages resulted therefrom (i.e., as opposed to other particular parental interferences or even to autonomous, "self-constituted" causes).\(^{32}\) Though, at the time of such relevant, particular interference by the parent company, the same subsidiary would be fully embedded in the de facto group and subjected to its uniform, centralized management (i.e., the controlling feature under the Stock Corporation Act constituting the de facto group). In other words: In corporate reality, the factual concern will often be characterized by highly interconnected companies with a multitude of parental interferences—probably even on a day-to-day basis. Procedurally, it will therefore often be impossible for a highly controlled subsidiary to point to one particular parental interference as the sole (or, at least, controlling) cause of a particular, stand-alone damage that it has suffered (and will be able to quantify with the precision necessary for recovery).\(^{33}\) Thus, shedding some "light of realism" on the corporate group provisions in the German Stock Corporation Act, it should come as no surprise that apparently only one successful suit against a parent company based on de facto concern compensation liability has been reported in the last forty years.\(^{34}\)

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\(^{32}\) See Schiessl, supra note 15, at 501.

\(^{33}\) See Alting, supra note 2, at 238 ("Because of the difficulty stating a cause of action, which requires proof of the transaction's disadvantage to the subsidiary including specific damages incurred, commentators view the legal means in a de facto Konzern as ineffectual.") (emphasis added); id at 240-41 (summarizing the various legal and factual obstacles for the realization of a compensation claim in the de facto group); Buxbaum, supra note 6, § 78, at 40; Hopt, supra note 25, at 103 ("[T]he practical difficulties of establishing the responsibility and of substantiating the damage are considerable. . . . Even if the damage can be established it is still necessary to show that it is caused by the parent. If the members of the management board of the subsidiary make a credible statement that they have acted without having been ordered or induced to act by the parent, this is often the end of the matter.""); Miller, supra note 2, at 105 ("[T]he controlled entity must prove that the controlling enterprise caused it to be put at a disadvantage in a specific transaction. Damages must be proved. Under the German legal system this decision is based on proof of the absence of a disadvantage in the transaction. The absence of disadvantage must be established. Due to the legal system this burden of proof may be difficult to sustain, particularly in light of the lack of pretrial discovery allowable and the absence of corporate rules permitting shareholders to obtain comprehensive information."); Schiessl, supra note 15, at 501 ("At a certain level of domination and integration of the two companies it becomes nearly impossible to isolate a single transaction and to assess the damages.""); Singhof, supra note 15, at 167 ("At a certain level of domination and integration, it becomes virtually impossible to isolate the detrimental transactions (instructions) and their nexus to losses, to assess the damages, or to identify violations of the duty of loyalty.").

Almost as a "domino effect" of such procedural difficulties in enforcing parent company liability in factual corporate groups, the number of contractual concerns in Germany is relatively small.35 When taking into account a legal reality characterized by only a very remote liability exposure as a de facto concern parent, why would such majority-shareholder company ever deliberately enter into a control agreement, become a contractual group parent and incur liability for all of the subsidiary's losses—even in the possible complete absence of any detrimental interference or actual loss causation?36

Court with respect to Sections 311 et seq. AktG in the 34 years since the enactment of such statute.") (original in German). Regarding the jurisprudential status prior to such decision, see Hofstetter, supra note 2, at 582 ("The provisions about the de facto concern in the German Stock Corporation Act have remained almost a dead letter. Successful actions for damages under these provisions are apparently unknown. The reason lies in high enforcement costs and risks. Proof of detrimental interference on a transaction-by-transaction basis is very difficult to establish, where the businesses of parent and subsidiary corporations have been highly interconnected.") (citations omitted); Schiessl, supra note 15, at 501 n.114 ("Successful claims under AktG § 317 are unknown."); Wiedemann, supra note 7, at 37 ("According to secs. 317, 318 AktG, the dominant enterprise is liable to the dependent company, as well as to the creditors and shareholders of the latter, for damages if compensation is not made for the transactions or measures it has occasioned. The plaintiff must prove that all these prerequisites are present. The claim becomes void if the management board of the dependent company declares that the combine[d] management had not occasioned the transaction in question. Successful claims under secs. 317-318 AktG are for this reason unknown.").

Similarly applying a "reality-check" on the corporate group provisions in the German Stock Corporation Act, Professor Antunes even diagnoses a "dangerous gap between law and reality," i.e., between the "real organizational-governance structure" used by a corporate group in the concrete case and the "juridical model" under the Stock Corporation Act. ANTUNES, supra note 2, at 366; see also id. at 376 (diagnosing "serious gaps between law and reality in the treatment of intragroup liability issues (hybrid forms of centralized factual groups and decentralized contractual groups)"); Antunes, supra note 4, at 224 ("[A]n inevitable gap between law and reality emerges whenever, as it often happens, the living governance structures of groups in the concrete cases at hand diverge from that juridical model.").

35 For discussions of existing empirical data, see ANTUNES, supra note 2, at 331 n.314; Hofstetter, supra note 2, at 581 n.43.

36 See BLUMBERG, supra note 2, at 645 ("[I]n the absence of voluntary acceptance of liability, the West German parent is, generally speaking, no more liable for the debts of its subsidiaries than its counterparts in other countries imposing such familiar fiduciary obligations."); Hopt, supra note 25, at 94. Indeed, it has often been claimed that contractual concerns in Germany are primarily entered into not for corporate control purposes but—in the absence of check-the-box elections under German corporate tax law—for purposes of income tax consolidation (so-called "Organschaft") and the exploitation of related tax efficiencies. See, e.g., ANTUNES, supra note 2, at 331–32 ("To be sure, the conceptual and technical failure of the system of §§ 311ff. AktG has given cause indirectly to the devaluation of the figure of the domination contract (whose only possible attractiveness rests in the tax advantages of the so-called 'Organschaft'): today, as yesterday, corporate groups are creating and sustaining their governance structures without any apparent need to place them under a contractual charter and without apparently being worried by the (theoretically) heavier restrictions laid down by the system of factual groups on the exercise of their factual power of control.") (citations omitted); BLUMBERG, supra note 2, at 644; Hofstetter, supra note 2, at 580 (noting that German tax laws may grant preferred treatment when there is a control agreement); Wooldridge, supra note 18, at 119 (stating that control contracts "are really only of interest from the point of view of taxation"); Wooldridge, supra note 29, at 628 ("There are no special advantages from the viewpoint of company law in concluding control contracts with GmbH. However, sometimes profit transfer contracts are concluded with such companies for tax
II. THE DUALISTIC FABRIC—THE “CASE LAW” FRAMEWORK

Though not widely used or applicable in practice, the group liability schemes enacted under the German Stock Corporation Act, in particular the one controlling the de facto concern, proved to possess a significant “contagious” effect on a second area of German corporate law not regulated by the Stock Corporation Act (or any other corporate statute).37 This kind of parallel development in the German law of corporate groups—i.e., parallel to the statutory group liability context outlined above—particularly applied to corporate group structures in which the controlled subsidiary was not a German stock corporation (“Aktiengesellschaft”—abbreviated “AG”) but a limited liability company (“Gesellschaft mit beschränkter Haftung”—abbreviated “GmbH”).

The corporate group provisions in the German Stock Corporation Act (as well as the entire act itself) only regulate corporate groups involving AG subsidiaries.38 However, in many cases, the AG corporate vehicle will be employed as a publicly held entity,39 i.e., not as a group subsidiary,40 and will be the larger of the two mainstream types of German companies as far as its usual size is concerned. In contrast, the German limited liability company, generally smaller in size when compared to an AG, typically involves only a limited number of shareholders (and often only a single shareholder—individual or institutional) and, despite its name, is more akin to a U.S. closely held corporation than a U.S.-style LLC.41 Notwithstanding the fact that a GmbH subsidiary is not regulated by the group provisions of the German Stock Corporation Act, corporate groups with both German and foreign parent companies have used wholly or majority-owned GmbH companies extensively in order to organize their respective

37 Hofstetter, supra note 2, at 579 (commenting that the German statutory group liability schemes have “spurred the evolution of an advanced German judge-made law outside the ambit of the Stock Corporation Act”).
38 See Alting, supra note 2, at 237; Assmann, supra note 9, at 329; Hofstetter, supra note 2, at 579, 582; Schiessl, supra note 15, at 499; Daniela Weber-Rey, Insolvency of a German Limited Liability Company: De Facto Shareholders, Group Liability for Individual Shareholders, 7 PACE INT’L L. REV. 523, 526 (1995); Wiedemann, supra note 7, at 24; Wooldridge, supra note 18, at 119; Wyneersch, supra note 12, at 587.
39 Presser, supra note 6, § 5:5, at 5-8 to 5-9; Franck Chantayan, An Examination of American and German Corporate Law Norms, 16 ST. JOHN’S J. LEGAL COMMENT. 431, 434–35 (2002); Miller, supra note 2, at 96.
40 See Hopt, supra note 25, at 82 (“In Germany, by the end of 1988, there were only 2,373 stock corporations as compared with about 400,000 GmbH and probably considerably more than 60,000 GmbH & Co.: more and more subsidiaries take a form other than that of a stock corporation, for example that of a GmbH or even a partnership.”) (citations omitted).
41 See Chantayan, supra note 39, at 434; Miller, supra note 2, at 99.
subsidiary businesses in Germany. In doing so outside of the scope of any statutory regulatory framework as far as parent liability to subsidiary creditors is concerned, the German judiciary ultimately intervened and, beginning in the late 1970s, developed a separate legal doctrine applicable to the so-called "qualified de facto concern" ("qualifizierter faktischer Konzern") which usually involves a dependent GmbH subsidiary in place of the controlled AG.

42 See PRESSER, supra note 6, § 4:3, at 15–16; Hirte, supra note 15, at 96; Hofstetter, supra note 2, at 582; Hopt, supra note 25, at 81 ("According to a recent survey the autonomous corporate enterprise belongs largely to the past and at least 40 per cent. of the GmbHs representing 90 per cent. of the capital of all such companies belong to groups."); Miller, supra note 2, at 98; Stohlmeier, supra note 14, at 136; Wiedemann, supra note 7, at 24 (stating that in 1965, twenty percent of all limited liability companies in Germany were already dependent entities); Wooldridge, supra note 29, at 628.

43 To date, the German Limited Liability Company Act of 1892, as amended ("Gesetz betreffend die Gesellschaften mit beschränkter Haftung"), does not include any provision on affiliated companies or corporate groups involving a GmbH. Cf. Stohlmeier, supra note 14, at 136 (noting that the German law pertaining to companies of limited liability does not address the direct liability of a controlling shareholder); Wiedemann, supra note 7, at 38 ("The position of a limited liability company dependent upon another enterprise is not governed by statute, although the limited liability company represents probably the most widespread form of dependant subsidiary."). Elaborate proposals for a reform of the German Limited Liability Company Act, including the adoption of statutory provisions addressing the GmbH group, were prepared in the early 1970s by the "Arbeitskreis GmbH-Reform" (GmbH Reform Committee) but never became law. See Assmann, supra note 9, at 329; Hirte, supra note 15, at 102 n.34. However, such proposals also regulated and provided the groundwork for the qualified de facto group doctrine eventually adopted by the German courts and discussed here. Cf. Wiedemann, supra note 7, at 28 ("The proposals of the GmbH Reform Committee, which worked out a scheme for the strict regulation of the qualified enterprises, are trail-blazing.") (emphasis added) (citation omitted).

44 The Gervais decision by the Federal Supreme Court of 1979, BGH (Feb. 5, 1979 – II ZR 210/76), Neue Juristische Wochenschrift [NJW], 33 (1980), 231, is often seen as the judicial inception of the qualified de facto group doctrine. See, e.g., Hofstetter, supra note 2, at 583.

45 See Alting, supra note 2, at 234 ("Additionally, there is the concept of qualified (centralized) de facto domination which has no statutory basis and was developed by the Bundesgerichtshof, in the context of a dominated GmbH."); id. at 242–43 (explaining why the qualified de facto group will almost inevitably involve a GmbH subsidiary, and that the court decisions establishing the qualified de facto doctrine were all in the context of a GmbH); see also Miller, supra note 2, at 105 ("Although the contractual Konzern and the De Facto Konzern apply by operation of statute to controlled corporations that are public corporations, the qualified De Facto Konzern arises by judicial construction typically in the context of the private limited liability company or GmbH."). The "qualified" de facto group or "qualified" factual concern has been described in general terms to include:

those non-contractual corporate groups with a centralized organizational-governance structure where the parent corporation exercises a permanent intrusion in and control over the entire business affairs of the subsidiary, not only at the level of its strategic management, but also at the level of its operational and day-to-day management, and where, in consequence, the protective system for the factual subsidiary corporation and its affected constituencies of §§ 311 ff. AktG is virtually ruled out.

ANTUNES, supra note 2, at 368 (emphasis added); see also Singhof, supra note 15, at 167 ("When a parent corporation controls and operates its subsidiary, denying it any direction of its own, and refuses to allow it any opportunity to make an arm's length profit, a court may rely on the notion of 'material
Under this doctrine, once fully developed by the German Federal Supreme Court, a qualified de facto corporate group was characterized by a parent company which exercised a long-standing and pervasive power of control ("andauernde und umfassende Leitungsmacht") over the business affairs of the subsidiary company.46 Once a parent company was found to be "permanently and extensively" involved in the management of its subsidiary, German courts accepted that a legal presumption was created to the effect that the parent company had not shown ample consideration and respect for the independent business interests and autonomy of its subsidiary.48 As a result of such presumption, if the parent company was unable to successfully defend itself in court, it was held personally liable to the creditors of the subsidiary for all of the subsidiary’s obligations.49

The remarkable result of this judge-made "case law" doctrine in Germany was that, by a single stroke of the Federal Supreme Court in a 1985 landmark case, the so-called Autokran decision,50 it remedied all of the statutory shortcomings applicable in the AG factual group context discussed above. First, it shifted the burden of proof to the parent company, asking such majority shareholder to provide exculpatory evidence that its continued interference with the affairs of the subsidiary was not detrimental to such entity. Second, and equally important, the qualified de facto concern doctrine blended the statutory liability concepts applicable to contractual and factual concerns under the Stock Corporation Act.51 Similar to

46 See BGH (Sept. 16, 1985 - II ZR 275/84), Neue Juristische Wochenschrift [NJW], 39 (1986), 188 (191) (Autokran); see also Hofstetter, supra note 2, at 583; Stohlmeier, supra note 14, at 136; Weber-Rey, supra note 38, at 526.

47 See BGH (Sept. 16, 1985 - II ZR 275/84), Neue Juristische Wochenschrift [NJW], 39 (1986), 188 (synopsis 2.) (Autokran) ("dauernd und umfassend"); see also ANTUNES, supra note 2, at 441.

48 See Alting, supra note 2, at 243; Hofstetter, supra note 2, at 583; Miller, supra note 2, at 76, 84; Schiessl, supra note 15, at 505; Weber-Rey, supra note 38, at 531; Wooldridge, supra note 29, at 631.

49 See BGH (Sept. 16, 1985 - II ZR 275/84), Neue Juristische Wochenschrift [NJW], 39 (1986), 188 (191) (Autokran). For a comprehensive summary of this doctrinal development (which would be beyond the scope of this Article), including a detailed discussion of the milestone decisions by the German Federal Supreme Court establishing the qualified factual group doctrine, see ANTUNES, supra note 2, at 440–55; Alting, supra note 2, at 244–47; Weber-Rey, supra note 38, at 526–29. See also Wooldridge, supra note 29, at 627 (offering a brief summary).


51 The Federal Supreme Court developed and repeatedly justified the qualified de facto group doctrine by an analogous application of the contractual concern liability scheme as provided in §§ 302–03 AktG and discussed in Part I.A, supra. See, e.g., BGH (Sept. 16, 1985 - II ZR 275/84), Neue Ju-
the conclusion of a control agreement as the single, controlling factor in order to create the contractual concern and to thereby, *ipso facto*, establish unlimited liability by the parent company for all debts of the contracting AG subsidiary, it became sufficient for the qualified factual concern to exist,\(^52\) i.e., to be created by a single, controlling factor—viz., the "permanent and extensive" involvement by the parent in the management of its subsidiary.\(^53\) This very fact, together with a complete absence of any focus by the courts on particular interferences and any evaluation of their respective, specific detrimental effect and causation link to the actual damages suffered by the subsidiary (which had proved inhibitive to intragroup liability in factual groups as shown in Part I.B), again resulted in an unlimited liability of the parent company with respect to all debts of the "disrespected" GmbH subsidiary. Finally, by also granting creditors of the subsidiary a direct claim against the parent company, this parallel development in the German law of corporate groups designed by the courts (with ample assistance by the legal commentators), in sum, created a very powerful and compelling strategy of intragroup liability which, in order to use Professor Antunes's classification again, indeed, operated as a hybrid or "dualist approach,"\(^54\) in the otherwise antagonistic spectrum created by entity liability on the one hand and enterprise liability on the other hand.\(^55\)

\(^52\) This occurs at least in those cases in which the parent company could not overcome the detrimental-effect presumption. This is so in most cases. Cf. Schiessl, supra note 15, at 505 ("Since it is rarely possible to show that no transactions were disadvantageous to the subsidiary, only one legal consequence can follow. Insofar as the parent company is able to prove that the losses of the subsidiary are not caused by the *Konzern* relationship but by an external factor, such as a nationwide crisis, the parent company will not be held liable by the court.") (emphasis added).

\(^53\) Cf. Antunes, supra note 4, at 218 ("By conceiving the polycorporate group as a sort of vertically-controlled, unitary enterprise with a highly centralized governance structure whose organizational axle (parent corporation) exercises complete control over the various subunits (subsidiaries), this strategy imposes liability of the parent corporation as following automatically from the very existence of the polycorporate group.") (emphasis added).

\(^54\) In this respect, the "dualist" fabric of the German law of corporate groups not only refers to the dualistic system of the statutory framework outlined in Part I, supra, i.e., the dogmatic differentiation between contractual and factual concerns in the German Stock Corporation Act, but—more generally—also to its intermediate, regulatory dominion between the opposing principles of entity law and enterprise liability (which intermediate dominion is therefore constantly exposed to, and thus, at the same time, nurtured and delineated by a sphere of tensive public policy conflicts created between such two irreducible poles).

\(^55\) Cf. Hofstetter, supra note 2, at 595–96 (discussing the respective challenges associated with entity and enterprise liability); Wei, supra note 2, at 400 (stating that the German model of intragroup liability is "definitely closer to economic reality, and the adoption of this model is beneficial in terms of reducing practical and theoretical complexities associated with providing an appropriate legal system to govern corporate groups") (citation omitted); Wooldridge, supra note 29, at 638 (commenting that decisions such as *Autokran* and *TBB* were "of seminal importance in the development of German
III. THE DUALIST FABRIC—THE DECONSTRUCTION

Encouraged by such parallel development in the jurisprudence of the Federal Supreme Court, corporate law scholars in Germany started to discuss what could be called a "reverse contagious" effect of the qualified factual group doctrine—viz., that the German courts would use the more progressive, enterprise-liability oriented approach to intragroup liability employed under such doctrine in order to revive the unworkable, "comatose" de facto group liability provisions of the Stock Corporation Act. Eventually, one could have also imagined German "case law" to completely transcend the piecemeal structure of the divergent regulatory schemes applicable to the liability of corporate groups in Germany and to overhaul such structure with uniform, fully harmonized intragroup liability company law, and the adoption of a more sophisticated approach to certain of the problems of groups of companies than does English law"). Klaus Hopt, commenting with respect to the Autokran decision of the BGH, wrote:

The court held the defendant liable, but not on the basis of piercing the corporate veil. Under German law this concept is only applied by way of exception, and is reserved, for example, for cases where there is confusion of the assets of two companies or persons, or where other clear abuses exist. Instead the court based its decision on principles of the law of groups which it developed freely when deciding the case.

Hopt, supra note 25, at 104.

56 Cf. Assmann, supra note 9, at 345 (commenting on "[t]he failed arrangements for 'de facto groups' in the Stock Corporation Law, widely regarded as in need of reform"); Hofstetter, supra note 2, at 582 ("The provisions about the de facto concern in the German Stock Corporation Act have remained almost a dead letter."); Schiessl, supra note 15, at 501 ("In practice, the concept of balanced safeguards did not turn out to be feasible. The compensation system in the de facto Konzern did not work when the parent company took such complete control of the subsidiary's finances, policies, and practices that the subsidiary had no direction of its own.") (citation omitted); Wooldridge, supra note 18, at 119 ("There is a general consensus that the provisions of German law governing de facto groups and simple dependency relationships have not worked well, and have caused business men to make use of the de facto rather than the contractual groups. There is clearly no case for the adoption of these provisions in any other jurisdiction without their very substantial modification.") (citation omitted); id. at 127 ("[T]he provisions of German law relating to de facto groups are unsatisfactory."). For discussions of the German statutory group liability framework generally, see Antunes, supra note 4, at 223 ("In more than twenty-five years that have passed since its enactment, it is quite clear that German group law has not succeeded in reaching its most basic legal policy goals in the treatment of parent-subsidiary liability problems."); Wymeersch, supra note 12, at 588 ("As was ably stated by Hommelhoff and Druey, the German system is far from satisfactory. It is based on a valid theoretical concept—that of balancing the profits and losses—but is unworkable in practice.") (emphasis added) (citation omitted).

57 See Assmann, supra note 9, at 330 (commenting with respect to the juridical adoption of the qualified de facto group doctrine: "The principles established by case law in this connection ought in turn to have some repercussions on codified group enterprise law, speeding up processes of transformation there too"); Hofstetter, supra note 2, at 582 ("This is why many German commentators advocate a development of the German Stock Corporation Act along the 'qualified concern' device.") (citing EMMERICH/SONNENSCHEIN, KONZERNRECHT VOl.3.A, at 130, 149–52, 327–28 (1989), and Marcus Lutter, Die zivilrechtliche Hohfung in der Unternehmensgruppe, in 11 Zeitschrift für Gesellschaftsrecht [ZGR] 245, 263–67 (1982); see also PRESSER, supra note 6, § 4:3, at 4–15 ("The future for the veil piercing doctrine as applied to American limited liability companies, though uncertain at this time, might be expected to replicate the experience of the German limited liability company.").
regimes—whether they ultimately be entity or enterprise-based—which could be linked to the organizational *substance* of a given corporate group and, thus, could be formulated irrespective of the organizational *forms* (i.e., AG or GmbH subsidiaries) used in order to structure such group internally.58

Such a clearly ambitious but also homogeneous system of intragroup liability rooted in the organizational substance of the business enterprise—as well as the qualified de facto group doctrine itself—received a major setback in September 2001 when the Federal Supreme Court handed down a new landmark decision regarding the liability of corporate groups, the so-called *Bremer Vulkan* decision.59 *Bremer Vulkan* was a major shipbuilding group in West Germany. It acquired an East German shipyard company, MTW, a GmbH, which the German Federal Government had privatized after the German reunification. As part of the acquisition, the Bremer Vulkan corporate group received substantial subsidies from the German government—officially paid to MTW, the new subsidiary—under the condition that such funds would be used exclusively for the benefit of MTW. However, since the Bremer Vulkan group had a centralized cash-management system, controlled all financial decisions of MTW, and required MTW to join the central intragroup cash-management system, the subsidies were paid into the collective cash pool held with the parent company’s treasury instead of being kept in a separate bank account held by MTW. In 1995, the Bremer Vulkan group encountered serious financial difficulties pursuant to which the cash-pool assets were lost in their entirety, including all remaining MTW subsidies equivalent to approximately $410,000,000 at the time. MTW only survived such dispossession of its funds (as well as the subsequent bankruptcy and liquidation of the Bremer

58 *Cf.* ANTUNES, supra note 2, at 368 (stating that “intragroup liability schemes should be linked with the real organizational patterns of the group at stake rather than with its legal form”); Raiser, supra note 6, at 114 (stating in more general terms that “enterprise law is to be understood as a comprehensive theory which embraces all autonomous enterprises without concern for their legal form or for the nature of their activity”); *id.* at 119 (explaining that the group provisions of the Stock Corporation Act aim “to be a general affiliated-entity law which, at least as a conceptual structure, no longer differentiates on the basis of legal forms”).

Vulkan group) because the company was re-transferred by Bremer Vulkan to the German Federal Government and was later re-privatized after the injection of additional public funds.60

This case seemed to have all the "bells and whistles" of parent-company liability imposed under the qualified de facto concern doctrine. However, in explicitly reversing its earlier decisions, the Federal Supreme Court determined that the protective system offered by German corporate law to a controlled GmbH subsidiary against detrimental interferences by its parent shareholder should no longer follow the statutory liability system for corporate groups as created by the Stock Corporation Act for AGs61 and applied by analogy to GmbH subsidiaries under the qualified de facto group doctrine.62 Thus, with a single stroke, and without much, if any, explanation for its doctrinal reversal, the Federal Supreme Court effectively abandoned the qualified de facto group doctrine63—a doctrine it had firmly established by a similar single stroke64 and which German corporate law had known for more than twenty years.65

Instead, the Court held that such protection should be limited to the maintenance of the mandatory stated capital requirements—as applicable to the GmbH subsidiary under the German Limited Liability Company Act ("Erhaltung ihres Stammkapitals")66—and a guarantee of its legal and fac-

60 The plaintiff in this litigation was a special agency of the German Federal Government in charge of privatizations following the German reunification ("Bundesanstalt für vereinigungsbedingte Sonderaufgaben"); it sued several members of the management board ("Vorstand") of Bremer Vulkan Verbund Aktiengesellschaft, the ultimate parent company in the Bremer Vulkan corporate group. Liability Within Corporate Groups ("Bremer Vulkan"): Federal Court of Justice Attempts the Overhaul, 3 GERMAN L.J. No. 1, para. 2, (Jan. 1, 2002), at http://www.germanlawjournal.com/article.php?id=124 [hereinafter Overhaul] (on file with the Connecticut Law Review).


62 BGH (Sept. 17, 2001 – II ZR 178/99), Neue Juristische Wochenschrift [NJW], 54 (2001), 3622 (synopsis 1.) (Bremer Vulkan); see also Overhaul, supra note 60, para. 1.

63 See Overhaul, supra note 60, para. 8; see also id. para. 7 (referring to the decision as representing "nothing less than a decisive disruption in the Court's reasoning with regard to the liability regime for corporate groups") (emphasis added). After some discussion among corporate law scholars in the aftermath of Bremer Vulkan, the Federal Supreme Court eventually confirmed in a subsequent decision that it had meant to completely abandon its former qualified de facto concern liability doctrine. See BGH (Feb. 25, 2002 – II ZR 196/00), Neue Juristische Wochenschrift [NJW], 55 (2002), 1803 (1805) (Bremer Vulkan II); see also infra notes 71-74 and accompanying text.

64 See supra note 50 and accompanying text.

65 The first expression of such doctrine can be found in the Gervais decision of the Federal Supreme Court in 1979. See supra note 44.

66 See German Limited Liability Company Act [hereinafter GmbHG] §§ 30–31. In contrast to the corporate laws of the U.S. state jurisdictions, German corporate law statutes require minimum stated or registered capital for stock corporations and limited liability companies. See Alting, supra note 2, at 207; Lee & Blumental, supra note 2, at 227; Miller, supra note 2, at 95; see also supra text accompanying note 41 (explaining that the German limited liability company is more akin to the U.S. closely held corporation than to the U.S.-style LLC).
Such guarantee seemed to imply, in effect, a rather expansive duty by a parent company to show sufficient consideration ("angemessene Rücksicht") for the subsidiary’s own, independent business interests ("Eigenbelange"). Notwithstanding such a broad statement which, at first sight, displays a striking similarity to the legal presumption formerly employed under the qualified de facto group doctrine (i.e., lack of sufficient consideration and respect for the independent business interests and autonomy of the subsidiary), the Court in Bremer Vulkan merely held that a deficiency of sufficient consideration clearly existed in the case at bar where the subsidiary was rendered incapable to pay its own debts due to the interference by the parent company.

In two subsequent decisions in 2002 (Bremer Vulkan II and KBV), the Federal Supreme Court further refined and limited this completely revised liability strategy for corporate groups not governed by the Stock Corporation Act: Today, the direct liability of the parent company vis-à-vis the creditors of its subsidiary ("Aufenthaltung") will only be imposed in cases in which the parent company’s interference effectively destroys the continued, autonomous existence of the subsidiary ("bestandsvernichtender Eingriff"); in other words, where the subsidiary will either become immedi-

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68 BGH (Sept. 17, 2001 – II ZR 178/99), Neue Juristische Wochenschrift [NJW], 54 (2001), 3622 (3623) (Bremer Vulkan) ("[A] guarantee of its legal and factual existence insofar as the sole shareholder, while interfering with the assets and business opportunities of the controlled GmbH, is required to show sufficient consideration for those own, independent interests of the GmbH which are beyond such shareholder’s disposition.") (original in German).
69 See supra text accompanying note 48.
71 In contrast, "Binnenhaftung" describes the continued internal liability of the shareholder to the GmbH only, which is complimented by the external liability of the GmbH to its creditors who, accordingly, have no direct recourse or claim against the shareholder.
72 BGH (Feb. 25, 2002 – II ZR 196/00), Neue Juristische Wochenschrift [NJW], 55 (2002), 1803 (1805) (Bremer Vulkan II); BGH (June 24, 2002 – II ZR 300/00), Neue Juristische Wochenschrift [NJW], 55 (2002), 3024 (3025) (KBV); similarly, BGH (Sept. 17, 2001 – II ZR 178/99), Neue Juristische Wochenschrift [NJW], 54 (2001), 3622 (3623) (Bremer Vulkan) ("bestandsvernichtender
ately insolvent or where the parental interference will leave the subsidiary in a financial state of inevitable and almost instant collapse. According to the Federal Supreme Court in the KBV decision, the doctrinal foundation and justification for such liability strategy is the parent company’s abuse of the corporate form of the GmbH (“Mißbrauch der Rechtsform der GmbH”).

IV. THE CHANGING PARADIGMS

The abandonment of the qualified de facto group doctrine in the jurisprudence of the Federal Supreme Court can be diagnosed as the symptom and, at the same time, the cause of a most fundamental and multi-faceted paradigm shift in the Court’s core conception of the intragroup liability in highly centralized, non-contractual corporate groups not governed by the German Stock Corporation Act. Looking at its many layers and characteristics, such paradigm change can be evaluated and recognized as both perceptual in its nature, and conceptual in its resultant legal principles.

A. The Perceptual Paradigm Shifts

As is the case in most (if not all) civil law jurisdictions (as opposed to common law jurisdictions), a deeply ingrained, positivistic understanding still exists in German law that courts do not—even cannot—create legal rules but only interpret and apply the codified law which is already formulated by the legislature and deemed comprehensive and conclusive (i.e., intended by design to address any and all potential cases that come within its respective regulatory tenet). Thus, by adopting the qualified de facto
concern doctrine, the German Federal Supreme Court arguably ventured out on fairly "thin ice."

If there has been one shared comment among German corporate law scholars regarding such doctrine, it was that the Bundesgerichtshof and the lower German appeal courts—notwithstanding many landmark cases trying to firmly establish the doctrine—appeared to have been unable to arrive at an adequate formulation of the qualified de facto group doctrine which would have addressed, in a satisfactory manner, all possible liability aspects related to the qualified de facto concern.

Perceptually, it is therefore not surprising that the Federal Supreme Court, the German Federal Court, 34 AM. J. COMP. L. 349, 359 (1986) ("Not every Common lawyer would dream of generalizing about the difficulties of German judicial style; but most would hold to the belief that civil law judges in general, and German judges in particular, tend to apply the Code, rather than make law. Interestingly enough, legal orthodoxy even in German style would deny judges any pure law-making powers."); § 12 Allgemeines Bürgerliches Gesetzbuch – AGBG (Austrian Civil Code of 1812) ("Decisions taken in individual cases and judgments delivered by courts in specific cases never have the force of law and cannot be extended to other cases or other persons.") (original in German). Philosophically, such understanding can be traced back, at least in part, to Montesquieu and his influence on the French Revolution (in turn, influenced by the reception of Roman law). See Montesquieu, THE SPIRIT OF LAWS 156 ~ 2 (David Wallace Carrithers trans., Univ. of California Press 1977) ("In republics the very nature of the constitution requires the judges to follow the letter of law. Here there is no possibility of interpreting a law against a subject, in case where either his property, honor, or life is concerned."); id. at 209 ¶ 49 ("But as we have already observed, the national judges are no more, than the mouth that pronounces the words of the law, mere passive beings incapable of moderating either its force or rigor."); see also Mauro Cappelletti, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 192 (1989); David, supra, ch. 3, § 215, at 15. Because of such understanding, there can arguably be no genuine "case law," i.e., "judge-made" law, in Germany (or any other civil law jurisdiction) as such term would be commonly used and understood in common law jurisdictions. Nevertheless, German legal scholars will often use and refer to the holdings of German appellate decisions, in particular those of the Federal Supreme Court, as "case law." See, e.g., Assmann, supra note 9, at 322 ("Thus, for instance, the vehicle for the development of German group enterprise law has for long not been the parliamentary legislator but case law led by legal science."); id. at 329 ("The regulatory lacuna filled by judge-made law, however, further demonstrates that the legislator is swamped when it comes to the codification of areas that are in development, involve a multiplicity of conflicting interests and presents little room for consensus, and therefore deliberately makes use of case law to determine and implement the need for 'juridification'. Case law in turn found lots of blanks on the map of group enterprise law, and rightly saw itself as compelled in doing its job of judicial rule-making to move beyond the regulatory approach offered by the group enterprise law of the Stock Corporation Act."). (citation omitted); Hopt, supra note 25, at 83 (commenting on the then developing qualified de facto group doctrine in German jurisprudence: "A law of groups applicable to [limited liability] companies is emerging only more recently from case law"); Wiedemann, supra note 7, at 39-40 (predicting correctly in 1982 with respect to the possible enactment of a model law for the qualified de facto combination in Germany: "It is apparently not impossible that the courts in the next few years will 'enact' several of the individual elements of the proposed model as case-law").

76 However, the analogous application of the intragroup liability provisions under the AktG to a GmbH pursuant to the qualified de facto group doctrine was held constitutional by the German Federal Constitutional Court (Bundesverfassungsgericht—BVerfG). See BVerfG (Aug. 20, 1993 – 2 BvR 1610/91), Der Betrieb [DB], 46 (1993), 1917 = Neue Juristische Wochenschrift [NJW], 46 (1993), 2600 = Zeitschrift für Wirtschafts- und Bankrecht (Wertpapier-Mitteilungen IV) [WM], 47 (1993), 1714 = Zeitschrift für Wirtschaftsrecht [ZIP], 14 (1993), 1306; see also Presser, supra note 6, § 4:4; Weber-Rey, supra note 38, at 529.

77 Overhaul, supra note 60, paras. 1, 6.
Court must have looked for ways which would allow it to retreat from the "thin ice" before it could be declared to actually formulate "case law," i.e., legal as opposed to interpretive rules which would be straying too far from and, therefore, could no longer be seen as an interpretation of a codified, statutory mandate. In other words, the working rule of the qualified de facto concern doctrine, created in analogy to the AG contractual group provisions in the German Stock Corporation Act, proved too much of a constructive stretch in order to still be confidently perceived as a result of either the mere juridical interpretation and "finding" of the law ("richterliche Rechtsfindung") or the continual judicial development and construction of codified legal norms through authoritative, though non-binding precedents ("richterliche Rechtsfortbildung"). In addition, the retreat or even retrenchment by the Bundesgerichtshof results in an abandonment in toto of any application of genuine corporate group liability concepts to the qualified factual concern. The Court not only dogmatically "shelters" the new intragroup compensation system of existenzvernichtender Eingriff (i.e., an interference destroying the continued, autonomous existence of the subsidiary) by restraining its holding in the Bremer Vulkan and KBV decisions to an almost mechanical application and enforcement of statutory safeguards for GmbH creditors which already existed under the Limited Liability Company Act. But the Court's perception also exclusively shifts to the mandatory capital maintenance liability system under the Limited Liability Company Act. Such statutory system, however, applies to any GmbH company, i.e., it is completely blind and oblivious to factual intragroup liability issues, namely whether the relevant GmbH is held by individual or corporate shareholders, whether the latter are investor or non-investor shareholders, and whether the GmbH is held within, or outside of, any corporate group. Apparently trying hard to show that it is not

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78 Cf. David, supra note 75, § 218, at 116:
In fact, however, case law plays a considerable role in many countries of the ROMANO-GERMANIC family. Not only does it often, under the guise of interpretation, distort the rules enacted by the legislature, but judges find decided cases of such persuasive value that it is difficult not to see therein the acceptance of a pure rule of precedent. Each country still denies that such a rule exists and that decided cases are a source of law.

Id. Nonetheless, one could have argued (before its abandonment) that the qualified de facto group doctrine was a form of "settled" case law by German courts (so-called "ständige Rechtsprechung") and, thus, part of customary law which is recognized as a source of law in Germany.

79 In particular, the capital maintenance provision included in GmbHG §§ 30–31.

80 Indeed, the Court's KBV decision, which provided much needed clarification and refinement of the Bremer Vulkan holding, was not a corporate group case. BGH (June 24, 2002 – II ZR 300/00), Neue Juristische Wochenschrift [NJW], 55 (2002), 3024. KBV, the GmbH subject to the detrimental shareholder interferences in the decision, was owned by a couple of individual (though non-investor) shareholders. Id. In addition, the Federal Supreme Court has expressly designed the new direct liability scheme for existenzvernichtender Eingriff only as a contingent liability ("Ausfallhaftung"), i.e., direct shareholder liability will only be the result if compensation for the detrimental shareholder interferences cannot be obtained directly between company and shareholder through the capital maintenance
doing anything extraordinary which could not be fully backed by the
pre-existing statutory GmbH framework (and, arguably, while succeeding
at this endeavor), already perceptually the Federal Supreme Court does
something very extraordinary: It perceives intragroup liability concepts—
be they veil piercing or enterprise-liability oriented—as of no particular use
for the qualified de facto group context.

B. The Conceptual Paradigm Shifts

Looking at the perceptual paradigm shifts, discussed above, through
the “lens” of U.S. corporate law, it appears that—notwithstanding an ex-
clusive focus by the Federal Supreme Court on the capital maintenance
provisions under the Limited Liability Company Act—the Court’s recently
adopted liability for existenzvernichtender Eingriff constitutes a form of
veil piercing.\(^1\) Though the capital maintenance system provides the statu-
tory foundation, the Bundesgerichtshof has been careful to structure such
liability as a piercing of the limited liability veil of the GmbH (“Durch-
griffshaftung” or “Außenhaftung”) and has repeatedly stated, expressis
verbis, that the limitation of the GmbH shareholders’ liability pursuant to
section 13(2) of the Limited Liability Company Act\(^2\) does not apply in
cases of existenzvernichtender Eingriff.\(^3\)

Thus, if one agrees that such new direct liability strategy of the Federal
Supreme Court qualifies, in substance, as veil piercing (at least, when ex-
amined through a U.S. corporate law “lens”), and if, in addition, one takes
into account the Court’s complete abandonment of the qualified de facto
group doctrine, i.e., of a significant portion of the dualist fabric of German
corporate group law as discussed earlier,\(^4\) then another fundamental, this
time conceptual paradigm change emerges: The enterprise-liability orien-
ted, hybrid approach pursued by the qualified de facto concern doctrine—and any and all resemblances thereof—has been (apparently judi-
ciously) avoided by the Federal Supreme Court while substituting such
doctrine with existenzvernichtender Eingriff. Thus, in cases of a GmbH

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\(^1\) For a detailed description of the general German veil piercing jurisprudence outside the realm of
corporate group law (“Konzernrecht”) (which would be beyond the scope of this Article), see, for
example, Alting, supra note 2, at 199–220; Singhof, supra note 15, at 148–63.

\(^2\) This section prescribes the so-called “Trennungsprinzip,” i.e., the principle of the separateness
of the shareholders’ and the company’s respective asset spheres. GmbH § 13(2) reads: “Only
the company’s assets are accountable for the liabilities of the company to its creditors.” (original in
German). GmbH § 13(2), translated in BURKHARDT MEISTER & MARTIN HEIDENHAN, THE GERMAN
LIMITED LIABILITY COMPANY 252–53 (5th ed. 1988); see, e.g., Lutter, supra note 3, § 198, at 100;
Singhof, supra note 15, at 146; Stohlmeier, supra note 14, at 136.

\(^3\) See, e.g., BGH (June 24, 2002 – II ZR 300/00), Neue Juristische Wochenschrift [NJW], 55
(2002), 3024 (synopsis 1.) (KBV).

\(^4\) See supra discussion Part II.
concern, piercing the corporate veil (i.e., "Durchgriffshaftung") has become the Court’s exclusive conceptual premise of direct shareholder liability.\(^8\) Put bluntly, the application of genuine intragroup liability concepts (i.e., "Konzernhaftung") to the qualified GmbH group has become a thing of the past.

Having discussed the symptomatic significance of the abandonment of the qualified de facto concern doctrine in order to better understand both the perceptual and the most critical (since veil piercing driven) conceptual paradigm changes in the Federal Supreme Court’s notion of intragroup liability in qualified GmbH groups, two noteworthy consequences of such abandonment will be analyzed in the following which demonstrate how the conceptual force of such abandonment is likely to cause additional changes in the German law of corporate groups. Such changes can be expected to further encourage (at least, for the foreseeable future) the Federal Supreme Court’s “deconstruction” of the dualist GmbH group liability archetype.

1. "Verhaltenshaftung" vs. "Zustandshaftung" vs. "Reine Verhaltenshaftung"

Within the former doctrine of qualified factual groups as developed by the Federal Supreme Court, two branches of such doctrine had evolved over time in the BGH jurisprudence as well as in German corporate law scholarship.\(^8\) The first branch—so-called "Verhaltenshaftung" (conduct-based liability)—argued that the doctrine should be applied only if, in addition to the qualified group relationship between parent company and subsidiary (as evidenced by a permanent and pervasive control of the subsidiary), the subsidiary was harmed by particular conduct of the parent, i.e., by a breach of the standards of diligent and orderly group management.\(^8\) The second segment, called "Zustandshaftung" (status-based liability), considered it sufficient for imposing (strict, no-fault) parent liability that the qualified group relationship had been established.\(^8\) As has been discussed

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\(^8\) See generally Alting, supra note 2, at 197 ("Durchgriffshaftung refers to situations not governed by statutory or other legal rules in which an entity’s existence is disregarded and the owner is held individually liable for the obligations of the company. This does not negate the legal entity itself even if the veil is pierced.") (citation omitted).

\(^8\) See ANTUNES, supra note 2, at 372–76. See also Wooldridge, supra note 29, at 635–36.

\(^8\) See BGH (Sept. 16, 1985 – II ZR 275/84), Neue Juristische Wochenschrift [NJW], 39 (1986), 188 (synopsis 2. & 191 (AutoKran), pursuant to which intragroup liability would only be imposed if the parent company was unable to demonstrate that a manager of an independent GmbH, acting diligently and orderly, would have conducted the business affairs at issue in the same manner. See Hopt, supra note 25, at 104–05; Schiessl, supra note 15, at 505; Stohlmeier, supra note 14, at 137.

\(^8\) See ANTUNES, supra note 2, at 455. The status liability strategy was at least partially adopted in the so-called Video decision of the Federal Supreme Court (BGH (Sept. 23, 1991 – II ZR 135/90), BGHZ 115, 187 = Der Betrieb [DB], 44 (1991), 2225 = Monatsschrift für Deutsches Recht [MDR], 45 (1991), 1148 = Neue Juristische Wochenschrift [NJW], 44 (1991), 3142 = Zeitschrift für Wirtschafts-
in Part II above, such status-based liability, with its focus on the status of the organizational control and management structure of the group and no emphasis on any particular, detrimental conduct by the parent company, established a very powerful and compelling dualist strategy of intragroup liability in qualified concerns. 89

The recent Bremer Vulkan 90 and KBV 91 decisions of the German Federal Supreme Court, however, are the complete opposite of such strategy. Not only do they signal a return by the German courts to conduct-based liability, i.e., requiring both pervasive control status and some sort of detrimental conduct, but thereby return to the "middle ground" of Verhaltenshaftung. Bremer Vulkan and KBV, when considered in the aggregate, have gone much further and seem to establish that one singular, isolated exercise of control—with neither precedent nor repetition—will be sufficient in order to create direct shareholder liability if such exercise constitutes an existenzvernichtender Eingriff. Thus, in light of the terminology used to describe the two former branches of the qualified de facto group doctrine ("Verhaltenshaftung" and "Zustandshaftung"), this additional conceptual paradigm change caused by Bremer Vulkan/KBV could be labeled, in a nutshell, "Reine Verhaltenshaftung" (pure conduct-based liability): a liability system driven exclusively by a hermetically sealed cause-and-effect analysis of each particular parental conduct and, thus, devoid of any determination of the factual corporate group status—i.e., the static and dynamic substance of its organizational control and management architecture—or of any group status for that matter. 92

2. Old Casuistic Unpredictability vs. New Casuistic Unpredictability

The basic, conceptual shift by the Federal Supreme Court to an entity law, veil piercing oriented approach to intragroup liability also originates a change in both the substance and the perspective of such Court's jurisprudential methodology which is likely to be applied and further refined in future parent liability cases. As is probably inevitable for any system of judge-made rules (be they actual legal rules or only interpretative, non-binding "findings"), the development of the qualified de facto group doctrine has, at times, been described as a "source of a[n] unprincipled caselaw jurisprudence, largely casuistic in present cases and unpredictable in future cases." 93 How much easier (and methodologically less casuistic) it then seems to determine parent liability for existenzvernichtender Eingriff,
being such a narrow category of possible factual patterns, at least, as far as the factual consequences of parental interferences are concerned, i.e., either insolvency or inevitable financial collapse. As has been discussed earlier, such new liability strategy indeed manages to avoid the pitfalls of the qualified de facto group doctrine which had faced the Federal Supreme Court, namely over-inclusive holdings and the creation of doctrinal "case law" without a sound statutory foundation in the German Limited Liability Company Act.94

Notwithstanding such methodological substitution of the qualified de facto group doctrine, dogmatically existenzvernichtender Eingriff only marks the other end of the same spectrum—viz., the end exactly opposite such doctrine. There is a vast expanse of still mostly uncharted territory between them—an immense gray zone which one of the preeminent German corporate law scholars, Professor Marcus Lutter, has once described "as large as the halo of a full moon in a foggy November night!"95 Most corporate law scholars will probably agree that intentional interferences by the parent company which destroy, in absoluto, the legal existence of a GmbH subsidiary should trigger some form of direct parent liability to the otherwise frustrated creditors of such subsidiary.96

94 See supra Part IV.A.

95 ANTUNES, supra note 2, at 371 (quoting and translating Marcus Lutter, Der qualifizierte fak­tische Konzern, in Die Aktiengesellschaft, Zeitschrift für das gesamte Aktienwesen [AG], 35 (1990), 179 (184)). Professor Lutter, who finds the U.S. veil piercing terminology poetic, see supra note 3, appears to allude here to the famous trio of almost identical "moonwatchers" paintings by the German Romantic painter Caspar David Friedrich (1774-1840): Two Men Contemplating the Moon (Zwei Männer in Betrachtung des Mondes), 1819 (located at Gemäldegalerie Neue Meister, Staatliche Kunstsammlungen Dresden); Man and Woman Contemplating the Moon (Mann und Frau in Betracht­ung des Mondes), ca. 1824 (located at Nationalgalerie, Staatliche Museen zu Berlin); and Two Men Contemplating the Moon (Zwei Männer in Betrachtung des Mondes), ca. 1830 (located at The Metropolitan Museum of Art, New York). SABINE REWALD, CASPER DAVID FRIEDRICH: MOONWATCHERS 30-34 (2001). Tributes to the moon as a central motif of artistic inspiration was so strong in German Romanticism that the era has even been called the "lunar period" in German poetry, literature, and philosophy. Id. at 10. The earliest (1819) variation of Friedrich’s "moonwatchers" paintings has been described to bathe the landscape and sky of a late-autumnal forest in an "all-pervasive, rust-brown haze." Id. at 30. The same all-pervasive, halo-caused haze applies here and might have inspired Professor Lutter’s comment.

96 This is, in particular, when there is already an alternative cause of action pursuant to the capital maintenance liability system, set forth in GmbHG §§ 30-31. See BGH, (Mar. 29, 1993 – II ZR 265/91), Neue Juristische Wochenschrift [NJW], 46 (1993), 1200 (1203) (TBB); Alting, supra note 2, at 239–40 ("A different situation exists where a parent is the sole member. According to most commentators, a company has no rights per se as to its existence. They argue that a sole member, able to dissolve its company, owes no fiduciary duties to the company. Here, creditors can only resort to other rules such as GmbHG sections 30-32(b) (preservation of stated capital) . . . .") (citation omitted); Wooldridge, supra note 29, at 630 ("The sole shareholder is not bound by any duty of good faith and, provided that he observes the rules contained in paragraphs 30 and 31 concerning the maintenance of capital, he may dispose of the property of the company freely, and the company has no remedy against him.").
tal interferences by a parent company in order to impose direct liability. But what about the minimum level, the much more crucial, regulatory borderline where limited liability suddenly evaporates and a parent shareholder can be held directly accountable? What about parental interferences with a less-destructive but still significant detrimental impact on the subsidiary? In modern corporate group reality, one can expect literally hundreds of factual patterns which are only a few, gradual steps removed from existenzvernichtender Eingriff. For example, an interference by the parent company that significantly increases the risk of the subsidiary’s insolvency but does not, by itself, immediately cause such result (so-called “Existenzgefährdung”) could also become grounds for direct parent liability. The same could be true in cases of “material” (also called “substantial”) undercapitalization of a GmbH, i.e., where the company’s assets may still comply with the statutory capital maintenance protection under the German Limited Liability Company Act (otherwise called “formal” or “nominal” undercapitalization) but nonetheless will be inadequate in order to meet the subsidiary’s actual and foreseeable operational expenses and financial needs, i.e., its cost of doing business.\footnote{97 See Antunes, supra note 4, at 215–16 (describing this issue as “the question of where to place the decisive borderline between normal cases, in which the separateness of group constituent corporations will prevail, and exceptional cases, where the courts deemed justifiable the disregard of such separateness”).} \footnote{98 Where the ultimate elimination of the independent legal existence of the subsidiary (“Existenzvernichtung”), i.e., either insolvency or financial collapse, is somehow avoided in the eleventh hour (either autonomously by the subsidiary or through an intervening act by a third party or the same parent company) but which avoidance, in any case, will not neutralize the detrimental effects already caused to the financial situation of the subsidiary, including its almost inevitable avoidance costs. \footnote{99 Existenzgefährdung means the endangerment of the independent legal existence of the subsidiary.} \footnote{100 See Singhof, supra note 15, at 164–65, stating before the Federal Supreme Court’s decisions in Bremer Vulkan and KBV: Control may result in commingling of funds and material undercapitalization of the subsidiary (konzernebedingte Vermögensausköhlung). Piercing the corporate veil may be allowed where a parent corporation completely strips the subsidiary of its assets thereby rendering the subsidiary insolvent to the prejudice of creditors, or where the parent company intentionally schemes to squirrel assets into a liability-free sub-corporation while heaping liabilities upon an asset-free sub-corporation. German court dockets, however, are nearly devoid of these types of piercing cases because the large body of German law governing affiliated companies (Konzernrecht) endeavors to protect creditors and shareholders against typical dangers, such as unfair inter-corporate transactions. . . . That being so, in Germany, it is imperative that specific laws provide for the taming of majority shareholders—either corporations or individual entrepreneurs—who have significant business interests outside the corporation. Id. (emphasis added) (citation omitted); see also PRESSER, supra note 6, § 5:5, at 5–10 (discussing nominal and material undercapitalization in Germany); Buxbaum, supra note 6, §§ 67–69, at 37 (discussing the modern trend toward examining “capitalization of the corporation (formal and actual) as the primary touchstone of the disregard concept”); Lee & Blumental, supra note 2, at 227 (discussing nominal and material undercapitalization in Germany) (citation omitted); Schiessl, supra note 15, at 489–92.}
All these open issues demonstrate that, with respect to the substance of the methodology used by the Federal Supreme Court in Bremer Vulkan and KBV, existenzvernichtender Eingriff may not, and in all likelihood will not be the last word of the German courts with respect to intragroup liability outside of the statutory AG context. Rather, existenzvernichtender Eingriff will be the stepping-stone for what is predicted here to become a "methodological feast of analogy," a new jurisprudential line of direct parent liability cases in those factual categories which will be found sufficiently analogous to existenzvernichtender Eingriff in order to trigger the same legal result.  

However, instead of a calibrated, systematic and structural response by the Bundesgerichtshof to the "halo" which today—notwithstanding the Bremer Vulkan and KBV decisions (and arguably even more so because of such decisions)—still prevails around the qualified factual group phenomenon, it must be expected, de lege lata and consistent with the Court's pendulum shift to veil piercing paradigms, that the Federal Supreme Court will use the same casuistic, largely unprincipled and fragmental approach to direct parent liability as is characteristic for the veil piercing jurisprudence in the United States.

Solvitur ambulando is

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101 See Singhof, supra note 15, at 174 (commenting before the Federal Supreme Court's Bremer Vulkan and KBV decisions: "It is clear, however, that additional protection of the corporate capital beyond the statutory protection of the stated capital is of paramount importance") (emphasis added); see also Alting, supra note 2 at 241 ("German courts and commentators agree that qualified de facto domination requires special protection for creditors."); Antunes, supra note 4, at 213-14 ("This hybrid nature of polycorporate enterprises soon brought about the crucial problem of the unsuitability to polycorporate enterprises of the traditional liability standards, designed by classical corporation law for the case of singlecorporate [sic] enterprises. . . . It soon became apparent that the automatic extension of these old archetypes to the new reality of corporate groups led inevitably to untenable distortions and could not be applied indiscriminately without leading to grossly unfair results.").

102 One could argue that with existenzvernichtender Eingriff based on statutory capital maintenance rules and its abandonment of the qualified de facto group doctrine, the Federal Supreme Court returned to an approach of judicial self-restraint which is more consistent with the governmental function of German courts because any attempt at a general, conclusive doctrine and liability system for intragroup liability in the GmbH concern should be undertaken by the German parliament. However, no reference to a need for such legislative action (similar to the promulgation of the German Stock Corporation Act in 1965) can be found in the new BGH decisions.

103 With respect to the context of the BGH's qualified de facto group jurisprudence, compare Antunes, supra note 2, at 370 (diagnosing "a surprising similarity to the well-known unprincipled piercing-the-veil 'jurisprudence of metaphor and epithet' of US courts"); and, with respect to general German veil piercing jurisprudence outside the realm of corporate group law ("Konzernrecht"), compare Singhof, supra note 15, at 174 ("The doctrine of piercing the corporate veil triggering equity holders' direct external liability to creditors remains an obscure safeguard for corporate creditors . . . ."). Singhof even argues that "veil piercing should be abolished" in Germany. Id. at 174. Professor Antunes' "metaphor and epithet" language referenced above has its origin in Professor Blumberg's much-quoted comment on the veil piercing law of the United States:

This is jurisprudence by metaphor or epithet. It does not contribute to legal understanding because it is an intellectual construct, divorced from business realities. The metaphors are no more than conclusory terms, affording little understanding of the considerations and policies underlying the court's action and little help in predicting results in future cases.
the Court's new methodological motto.

That such hermeneutical evolution in the group law jurisprudence of the Federal Supreme Court only substitutes the old casuistic unpredictability under the qualified de facto group doctrine (which was created by an infinitely smaller "halo" composed by the lack of the Court's clarity re-

PHILLIP J. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS 8 (1983); see also BLUMBERG ON CORPORATE GROUPS, supra note 4, § 10.02[B]. This, in turn, is a terminological continuance of Justice Cardozo's famous words in 1926: "The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor." Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926); see also WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE—LEGAL AND ECONOMIC PRINCIPLES 142 (8th ed. 2002) (characterizing U.S. veil piercing law as "exceedingly murky"); Alting, supra note 2, at 250 (describing general veil piercing rules in German and American law as producing "unpredictable and random decisions"); Frank Easterbrook & Daniel Fischel, Limited Liability and the Corporation, 52 U. CHI. L. REV. 89, 98 (1985) (stating, with respect to U.S. law, "[t]here is a consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law").


A civilian system differs from a common law system much as rationalism differs from empiricism or deduction from induction. The civilian naturally reasons from principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogism, the common lawyer in precedents; the first silently asking himself as each new problem arises, "What should we do this time?" and the second asking aloud in the same situation, "What did we do last time?"... The instinct of the civilian is to systematize. The working rule of the common lawyer is solvitur ambulando.

Id. This also shows that the working rule of civilian lawyers since the time of Lord Cooper, at least in today's complex world of corporate groups, has become very similar, if not identical, to the approach taken by their common law counterparts. See Roscoe Pound, What is the Common Law?, in The Future of the Common Law 1, 18–19 (1937):

For behind the characteristic doctrines and ideas of the common-law lawyer there is a significant frame of mind. It is a frame of mind which habitually looks at things in the concrete, not in the abstract; which puts its faith in experience rather than in abstractions. It is a frame of mind which prefers to go forward cautiously on the basis of experience from this case or that case to the next case, as justice in each case seems to require, instead of seeking to refer everything back to supposed universals. It is a frame of mind which is not ambitious to deduce the decision for the case in hand from a proposition formulated universally... It is the frame of mind behind the sure-footed Anglo-Saxon habit of dealing with things as they arise instead of anticipating them by abstract universal formulas.

Id.; see also Frederick W. Maitland, Outlines of English Legal History, 560-1600, in II The Collected Papers of Frederic William Maitland 438–39 (H.A.L. Fisher ed., 1911). Maitland spoke of the methodological approach of English common law:

King Henry and his able ministers came just in time—a little later would have been too late: English law would have been unified, but it would have been Romanised. We have been wont to boast, perhaps too loudly, of the pure 'Englishry' of our common law. This has not been all pure gain. Had we 'received' the Roman jurisprudence as our neighbours received it, we should have kept out of many a bad mess through which we have plunged. But to say nothing of the political side of the matter, of the absolute monarchy which Roman law has been apt to bring in its train, it is probably well for us and for the world at large that we have stumbled forwards in our empirical fashion, blundering into wisdom.

Id. (emphasis added).
arding the precise factual prerequisites of corporate control)\(^{105}\) with a new, exponentially larger and arguably also much less consistent casuistic unpredictability of veil piercing paradigms,\(^{106}\) is also evident in the Court’s newly adopted, methodological perspective. In Bremer Vulkan\(^{107}\) and KBV,\(^{108}\) the Bundesgerichtshof establishes a new and exclusive focus on singular occurrences of parental interference and on the very limited, judicially recognized consequences thereof (i.e., either insolvency or inevitable financial collapse) in order to impose veil piercing liability. The Court’s perspective is therefore \textit{ex post}, concentrating on conduct and operating in the same analytical fashion as would be applied to a case of straightforward, single-cause-and-effect tort liability. By putting the spotlight of its judicial review on the one particular issue which is sufficient to resolve the case (i.e., “\textit{Existenzvernichtung}”), the Court inevitably neglects to doctrinally abstract, structure and systematize the many remaining control and interference aspects which characterize the living complexity of modern corporate groups. It thereby neglects to provide any legal guidance with respect to the organizational planning\(^{109}\) of corporate headquarters in order to minimize intragroup liability exposure. It is in this respect that the law of corporate groups in Germany still requires (and even more so after the abandonment of the qualified de facto group doctrine) “differentiated, yet operable,”\(^{110}\) “properly tailored, yet enforceable”\(^{111}\) normative criteria which, from an \textit{ex-ante} perspective, help demarcate\(^{112}\) the borderline of potential parent liability by focusing on the status and, thus, the specific static as well as dynamic organizational control and management archetypes at work in modern business enterprises.

In sum, the Federal Supreme Court’s adoption of \textit{existenzvernichtender

\(^{105}\) See, e.g., Antunes, supra note 2, at 451–52; Hofstetter, supra note 2, at 583 (commenting that the qualified concern doctrine left open “many questions about its reach and applications”); Miller, supra note 2, at 107 (“[T]he court fails to provide guidance on the nature of the control that justifies the creation of a qualified \textit{De Facto Konzern} and the imposition of liability upon the dominating business entity . . . .”); Wooldridge, supra note 29, at 638 (“However, as far as the rules governing qualified \textit{de facto} groups are concerned, some difficulties and ambiguities remain. Thus, the exact scope of these rules is not entirely clear and they may not prove suitable for transplantation to other jurisdictions.”).

\(^{106}\) Cf. Antunes, supra note 4, at 215 (stating that “the major weakness of traditional orthodox ‘entity law’ is the fact that it represents an \textit{unprincipled} regulatory strategy to intragroup liability problems, in which results are largely casuistic in present cases and almost unpredictable in future cases”) (emphasis added); see also Alting, supra note 2, at 199 (“The general statements of the courts are not very conclusive, but they make clear that piercing the veil is decided on a case by case basis.”).

\(^{107}\) See supra note 59.

\(^{108}\) See supra note 71.

\(^{109}\) Cf. Antunes, supra note 2, at 450.

\(^{110}\) Hofstetter, supra note 2, at 597.

\(^{111}\) Id. at 598.

\(^{112}\) Cf. Immenga, supra note 23, ch. 7, § 52, at 60 (stating that “[t]he consent of the participating companies, upon which contractual affiliations are predicated, provides a clear and categorical line of demarcation”).
Eingriff and its simultaneous abandonment of the qualified de facto group doctrine arguably signal a new era in its intragroup liability jurisprudence—the beginning of a period of recession for genuine Konzernrecht principles. However, its paradigmatic shift to a casuistic, incremental, veil piercing based system of direct shareholder liability seems methodologically inadequate in order to address the issue of intragroup liability in the (qualified) GmbH concern in an encompassing and, thus, satisfactory manner. As with corporate veil piercing, this new jurisprudential, almost anti-doctrinal\textsuperscript{113} approach—adopted by the German Federal Supreme Court in trying to regulate modern qualified factual group reality—is geared at creating narrow factual categories where direct parent liability will only be imposed via the paradigmatic rule-exception technique of entity law. It therefore seems inevitable that, incrementally and over time, new categories (i.e., those recognized as sufficiently analogous to existenzvernichtender Eingriff) will be crafted by the Court when it feels the need to do so.\textsuperscript{114} Like piercing “happen[ing] freakishly,” this gradual imposition of direct

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\textsuperscript{113} Cf. Alting, supra note 2, at 199 (stating, with respect to direct shareholder liability based on corporate veil piercing (“Durchgriffshaftung”) in Germany, that “it is commonly agreed that the term Durchgriffshaftung does not represent a particular doctrine of law”).
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\textsuperscript{114} This methodological approach correlates to the equitable nature and origin of corporate veil piercing rules in common law jurisdictions. See, e.g., Blumberg, supra note 6, at 330 (describing the doctrine of piercing the corporate veil as “a creation of nineteenth century equity jurisprudence under which equity courts disregard corporate forms where required to prevent fraud”); see also I. MAURICE WORMSER, DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATION PROBLEMS 44 (1927) (“It has been oftentimes stated that courts of law invariably adhere to the entity theory even though gross miscarriages of justice result. It is quite true that equity, less abashed by forms or fictions than a court of law, is more willing to draw aside the veil and look at the real parties in interest.”); Cashel, supra note 3, at 20, 45 (“In reviewing the authorities mentioned above, the reluctance of courts to ignore the separate identity of corporation is apparent. Nevertheless, piercing the corporate veil concepts, while perhaps imperfect, are available where equity requires.”) (emphasis added). One of the now classic formulations of such casual, opportunistic (if not fatalistic) methodological style employed by appellate courts in common law systems and civil law jurisdictions alike is found in the 1966 Practice Statement of the House of Lords, allowing the court of last resort for England and Wales for the first time in English legal history to overrule its own, earlier decisions:

Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

Practice Statement, [1966] 3 All E.R. 77 (H.L.) (emphasis added). In addition, it can be expected that the German Federal Supreme Court will only “feel the need to do so” if no other viable avenue, i.e., no alternative cause of action (e.g., capital maintenance provisions, breach of fiduciary duties, fraud, misrepresentation, culpa in contrahendo, etc.), is available in order to impose direct shareholder liability. In this respect, piercing the corporate veil in Germany (i.e., “Durchgriffshaftung”) has often been described as a complementary, ultima-ratio shareholder liability. See Alting, supra note 2, at 197. Thus, dogmatically as well as methodologically, it is inevitable for this liability approach to be inherently erratic in the courts’ application.
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V. CONCLUSION

This Article argues that in conjunction with the abandonment of the qualified de facto group doctrine in the Bremer Vulkan and KBV decisions of the German Federal Supreme Court, such Court has also abolished an entire (and the most effective and relevant) area of the German law of corporate groups ("Konzernrecht"). Today, there is no remaining Konzernrecht for the type of corporate group which is by far the most prevalent in Germany, namely the GmbH group. As has been shown, this judicial development is not a mere dogmatic and methodological course correction by the Federal Supreme Court. To the contrary, the Bundesgerichtshof (and, with it, the German law of corporate groups) has meticulously revised its course and gone back the opposite way—making a complete 180-degree turn and immediately leapfrogging to the paradigmatic junction facing German courts before Autokran was decided in 1985 (and established a group law doctrine in Germany firmly rooted in enterprise-liability paradigms). With the adoption of existenzvernichtender Eingriff and the simultaneous abandonment of the qualified de facto group doctrine in Bremer Vulkan and KBV, GmbH Konzernrecht has lost its innovative momentum. Corporate veil piercing ("Durchgriffshaftung") has become the sole premise of direct parent liability in the GmbH concern. The most significant area of German group law has retrenched from enterprise principles and is moving back to entity law paradigms.

In addition—and equally perplexing—such dogmatic and methodological course inversion under Bremer Vulkan and KBV has been designed

115 See the famous criticism of the U.S. veil piercing jurisprudence by Easterbrook & Fischel, supra note 103, at 89 ("Piercing' seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled."). See also BLUMBERG ON CORPORATE GROUPS, supra note 4, § 10.02[B] ("[W]e are faced with hundreds of decisions that are irreconcilable and not entirely comprehensible. Few areas of the law have been so criticized by commentators."); Antunes, supra note 4, at 216 ("Intragroup liability cases, where courts occasionally have disregarded the corporate entity of affiliate corporations and stepped over the corporate autonomy principle, imputing the acts or debts of subsidiaries to the parent corporation, are being decided according to guidelines that defy any possibility of rational systematization or predictability."); E.J. Cohn & C. Simitis, "Lifting the Veil" in the Company Law of the European Continent, 12 INT'L & COMP. L.Q. 189, 190 (1963) ("The problem of 'lifting the veil' is known in Germany as that of the 'breaching of the wall of the corporation.' It is recognised that there are a number of cases when such a breach occurs. Many attempts have been made to find a principle behind the various lines of cases. So far none of them have been successful."); sources cited supra note 103.

116 See supra notes 49-50 and accompanying text.

117 Cf. Blumberg, supra note 6, at 298 (observing a "movement from entity law to enterprise principles" in different areas of American corporate group law). In this respect, German group law has experienced a sudden reversal of the "emancipation of parent liability law from the constraints of traditional 'piercing' law." Hofstetter, supra note 2, at 597.
to completely abandon the application of group liability concepts in the German qualified de facto group context. As argued in Parts IV.A and IV.B.1, group status (i.e., the determination of the actual existence of a group affiliation and the potential control-dependency relationship in the first place, as well as of the specific factual embedment of the dependent subsidiary at issue within the organizational control and management substance of such corporate group in a second phase) is no longer relevant for the imposition of direct shareholder liability. By focusing on "group-blind" capital maintenance requirements in crafting existenzvernichtender Eingriff, the German Federal Supreme Court has avoided—unequivocally and systematically—drawing any distinction between factual situations involving parent-company shareholders (Bremer Vulkan) and fact patterns in which the shareholders are individual equity investors (KBV). Notwithstanding the (perhaps recaptured) theoretical elegance\(^1\) of such a universal approach, the evolution of direct parent liability in corporate groups, when reviewed comparatively, shows that indiscriminate, one-size-fits-all applications of veil piercing paradigms (including the recently adopted category of existenzvernichtender Eingriff) have proven inappropriate, individually and on aggregate, in order to develop parent responsibility systems that serve the "purpose of convenience and . . . subserve the ends of justice."\(^2\)

In light of the overwhelming historical evidence that universal, indiscriminate paradigms of shareholder liability do not work appropriately in the corporate group context (i.e., that there exists a legitimate regulatory need for genuine parent/group liability strategies),\(^3\) the German Federal Su-

\(^{118}\) See Antunes, supra note 4, at 226 n.95 (describing the qualified de facto group as "a hybrid form of corporate group which destroyed the theoretical elegance of the rigid two-stage regulatory framework"); see also Antunes, supra note 2, at 368.

\(^{119}\) WORMSER, supra note 114, at 9–10 (commenting on the fiction of the corporate entity as a legal person (persona ficta): "All fictions of law are introduced for the purpose of convenience and to subserve the ends of justice. When they are urged to an intent and purpose not within the reason and policy of the fiction, they must be disregarded by the courts"); id. at 10 ("Fictions are invented and instituted for the advancement and promotion of justice, and will be applied for no other purpose."); see also Assmann, supra note 9, at 330 (commenting on the qualified de facto group "case law" of the BGH: "The normative view in case law mentioned earlier, in relation (but not only) to group situations, is expressed above all in the setting up of norms that serve the protection of the interests involved") (citation omitted) (emphasis added); Immenga, supra note 23, § 33, at 39 ("As long as the decisions of one company can be determined by another, repercussions on the protective goals and fundamental principles of general company law can be expected.") (emphasis added); Lutter, supra note 3, § 202, at 101 ("The generally recognized principle that members’ liability for the company’s obligations is limited . . . has no fundamental value in and of itself. Rather it is practical legal strategy to promote honest business transactions and, like all regulatory strategies, it is therefore exposed to the danger of being abused for dishonest purposes.") (emphasis added).

\(^{120}\) See, e.g., BLUMBERG ON CORPORATE GROUPS, supra note 4, § 10.05 ("In brief, with some exceptions, the vision of the courts has been myopic. Because of concentration on the trees, consideration of the various types of forest has been neglected. In consequence, the rich variety of alternative doctrines under which American courts have recognized intragroup legal attribution in various areas of the law has gone unrecognized, and the judicial limitations arising from blunderbuss reliance on classic piercing to deal with the underlying problems have gone uncorrected."); BLUMBERG, supra note 6, at
preme Court has yet to identify and pronounce, in express and elucidating terms, those legal reasons and public policy considerations which, in such Court's opinion, make corporate veil piercing in the form of *existenzver­
achtung* (and the expected, subsequent categories of *Durchgriffe­
haftung* developed by analogy) more convenient and—at the same time—
more just and protective for the various constituents of modern corporate
groups and their respective interests than the normative equilibrium which
had been accomplished (or which continued to be accomplishable) under
the former qualified de facto group doctrine.
Prior to the *Bremer Vulkan* and *KBV* retrenchment by the Federal Supreme
Court, the German law of corporate groups had sometimes been hailed as

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136 ("As repeatedly emphasized in the various volumes of *The Law of Corporate Groups*, cases arising
in different areas of the law require analysis in terms of the underlying policies of the area under con­
sideration. The indiscriminate application of 'piercing the veil jurisprudence' as a universal concept
has been one of its most serious limitations."); Alting, *supra* note 2, at 241 ("German courts and com­
mentators agree that qualified de facto domination requires special protection for creditors."); Antunes,
*supra* note 4, at 213–14 ("This hybrid nature of polycorporate enterprises soon brought about the cru­
cial problem of the unsuitability to polycorporate enterprises of the traditional liability standards, de­
dsigned by classical corporation law for the case of singlecorporate [sic] enterprises. . . . It soon became
apparent that the automatic extension of these old archetypes to the new reality of corporate groups led
inherently to untenable distortions and could not be applied indiscriminately without leading to grossly
unfair results."); Hofstetter, *supra* note 2, at 577 ("In his seminal, encyclopaedic work about corporate
groups Professor Phillip Blumberg noted that one of the most serious limitations of United States law in
dealing with parent liability has been the indiscriminate 'piercing the corporate veil jurisprudence'.")
(citation omitted); Hopt, *supra* note 25, at 85 ("In some other countries the prevailing opinion is that
the problems of the groups of companies can be solved by traditional civil law. In some of them not
only specific legislation is lacking, the courts have not had the opportunity or the courage to develop
their own rules for group problems. Most textbooks of company law neglect the group of companies
almost entirely. As a foreign observer one almost has the impression that sometimes the phenomenon
is virtually ignored. The separate entity doctrine is usually not challenged, to the detriment of the
creditors of the (closely held) subsidiary. The interest of the outside shareholders is treated as being
adequately provided for by the doctrine that account may not be taken of the group interest."); *id.* at
102–03 ("For groups of companies the separate entity doctrine cannot remain the final answer."); Immenga,
*supra* note 23, § 49, at 58 ("The need to introduce a regime for affiliated groups would
appear to be unavoidable, even though there are still many unresolved questions as to both principles
and details."); Raiser, *supra* note 6, at 114 ("The law has become aware of the fact that the governance
of an enterprise includes the exercise of power, and therefore requires legal mechanisms for its con­
trol."); Wymeersch, *supra* note 12, at 588–89 ("According to the prevailing European opinion, all fields
of the legal system have been affected by the group phenomenon. . . . One of the central issues affecting
groups of companies is the criterion of permissible group influence: is the subsidiary allowed to take
account of the presence and even of the interest of the group, or should it be managed exclusively in its
own interest? The answer to this question . . . affects the liability of the group vis à vis third parties,
especially creditors, and the relationship of the group towards minority shareholders as well."); *id.* at
599 ("Therefore, it seems reasonable to assume that in the longer term also, there will remain a need for
group law, probably less for listed companies but mainly, but not exclusively, for unlisted ones.");
sources cited *supra* note 101. For further discussion on the indiscriminate application of veil piercing
paradigms under U.S. corporate law, see, for example, *Wormser*, *supra* note 114, at 83 ("[C]orporate
entity will not be ignored at law or equity simply because the number of stockholders is few, or even
one, unless the circumstances are such as would warrant the same disregard of the entity were there ten
thousand shareholders.") (emphasis added); Robert B. Thompson, *Close Corporations in the United
States of America, in THE EUROPEAN PRIVATE COMPANY? 187, 193 (Harm-Jan De Kluiver & Walter
Van Gerven eds., 1995) ("Courts regularly pierce the veil within corporate groups, but somewhat
surprisingly, the percentage of piercing is somewhat less than when the shareholder is an individual.").
an example for other legal jurisdictions,121 and it had been claimed that the significance and breadth of its example could not be fully understood by a mere examination of the statutory dualist fabric under the German Stock Corporation Act of 1965, discussed in Part I.122 Given the revival of corporate-veil piercing, i.e., entity-law paradigms in German group law (discussed in Parts III and IV) and the very limited practical utilization of the—on aggregate, almost comatose—concern liability rules under the German Stock Corporation Act (as discussed in Part I), a truly (i.e., substantively) intermediate, dualist approach addressing the parent-subsidiary liability conundrum is no longer perceptible in German corporate law. For the foreseeable future, the once hailed example of the progressive, dualist qualified group fabric has been dismantled in its entirety. What remains is a mostly theoretical, dualist structure of enterprise liability under the Stock Corporation Act—a regulatory paper tiger. After forty years of struggle, corporate veil piercing has prevailed.

121 See PRESSER, supra note 6, § 4:3, at 4–15 ("The future for the veil piercing doctrine as applied to American limited liability companies, though uncertain at this time, might be expected to replicate the experience of the German limited liability company."); Alting, supra note 2, at 250–51 ("Although imperfect, the German Konzerrecht, which was the first of its kind when promulgated in 1965, may be looked upon by other jurisdictions, such as the United States, as an example.") (citation omitted); Hofstetter, supra note 2, at 597 (concluding, with respect to the qualified de facto group doctrine, that such "German judge-made law in particular has projected a solution that might come close to an optimal balance between maintaining the principle of limited liability and breaking it to the extent of a parent's management interference in subsidiary affairs"). But see Wooldridge, supra note 18, at 125:

There is a general consensus that the provision of German law governing de facto groups and simple dependency relationships have not worked well, and have caused business men to make use of the de facto rather than the contractual groups. There is clearly no case for the adoption of these provisions in any other jurisdiction without their very substantial modification.

Id. (emphasis added) (citation omitted).

122 See Hopt, supra note 25, at 83–85:

In Germany, legal discussion of groups of companies began in 1910 and was particularly intense between the two world wars. The German Konzerrecht of 1965 has to be seen against this background. It is not a sudden original postwar invention. Legal development did not cease in 1965. German courts and authors have discovered serious shortcomings of the 1965 Act as far as stock corporations are concerned. Furthermore, they no longer accept that the German legislator has enacted a law of groups for stock corporations only, leaving aside other forms of companies such as the GmbH . . . Legal developments in the latter area are far more dynamic than in the field of traditional stock corporation law . . . . Thus it should be evident that if a foreign lawyer simply examined the 1965 Act, he would have a very misleading picture of the German law of groups.

Id.