Legal Transplants in European Company Law – The Case of Fiduciary Duties

by

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The following article explores the concept of legal transplants with a view to the emerging coporate governance issue of directors' fiduciary duties which has been developed in UK and US company law and now enters central Continental jurisdictions. It reaches a positive overall assessment of this development and underlines the growing importance of comparative research.

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I. Legal transplants as juridical metaphor

The legal historian and comparativist *Alan Watson* has coined the perceptual phrase of *legal transplants*.[1] In a small monograph, he describes their effect as "the moving of a rule or a system of law from one country to another, or from one people to another"[2] and refers to the reception of ancient Roman law as a prime example. His metaphor has a strong intuitive appeal for com-

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1 See Watson, *Legal transplants. An Approach in Comparative Law*, 1st ed. (1974), 2nd ed. (1993) 21 *et seq*.

2 Watson (n 1) 21.

pany law scholars and practitioners on the European continent who face an ever increasing influx of Anglo-American legal concepts.[3] Their smooth integration into the national legal system provides an ongoing challenge for legal academics and the courts and poses intriguing questions with regard to legal methodology.

From a theoretical perspective, *Watson's* work - imaginative as it is - does not offer a coherent framework for the analysis of legal transplants.[4] Criticism has already been voiced against his choice of terms. *Rodolfo Sacco*, head of the Italian Guild of Comparative Law, prefers the expression *legal formants*, this being an attempt to capture the social, economic, political and doctrinal elements of a particular legal system.[5] *Gunther Teubner*, a leading German legal sociologist, suggests *legal irritants*, which cannot be transferred from something alien into something familiar, but rather will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change.[6] *Pierre Legrand*, a Franco-Canadian comparativist, outrightly denies the possibility of legal transplants.[7]

Under the surface of this terminological dispute, one can discern deeper differences about the preconditions and success factors of legal transplants[8]:

3 For a detailed account of legal transplants in German company law Fleischer, NZG 2004, 1129 *et seq* referring to legal concepts such as corporate opportunities, business judgment rule, corporate compliance, shareholder value, stock options, corporate social responsibility, audit committee, tracking stocks, financial assistance, veil piercing, equitable subordination, and appraisal rights. See also Böckli, in *Festschrift Bär und Karrer* (1997) 9 under the title "Osmosis of Anglo-Saxon Concepts in Swiss Law". From a French perspective the numerous contributions in Arch. phil. droit 45 (2001) 7–267 under the general topic "L'américanisation du droit".

4 For a notorious criticism Abel, 80 Mich. L. Rev. 785, 793 (1982): "Perhaps the most serious problem with Watson's theory is that it is not a theory at all"; contra Ewald, 43 Am. J. Comp. L. 489, 504 *et seq* (1995) and the reply by Watson, 131 U. Pa. L. Rev. 1121 (1983).

5 See Sacco, 39 Am J. Comp. L. 1 (1991) under the heading "Legal Formants: A Dynamic Approach to Comparative Law"; agreeing with this shift of emphasis Watson, 43 Am. J. Comp. L. 469 (1995).

6 See Teubner, 61 Mod. L. Rev. 11, 12 (1998).

7 See Legrand, 4 Maastricht Journal of European and Comparative Law 111 (1997) under the title "The Impossibility of Legal Transplants".

8 For detailed studies the volumes by Nelken/Feest (eds.), *Adapting Legal Cultures* (2001), and Nelken (ed.), *Comparing Legal Cultures* (1997). For an economic perspective Garoupa/Ogus, CEPR Discussion Paper No. 4123 (November 2003): "A Strategic Interpretation of Legal Transplants"; recently Fleischer, in Doralt/Kalss (eds.), *Franz Klein – Vorreiter des modernen Aktien- und GmbH-Rechts* (2004) 115, 117.

Why are they introduced? Where do they come from? Who are the carriers of reception? When can we rely on an uncomplicated assimilation and when must we expect an eventual repulsion? Presumably, sociologists, comparativists and scholars closer to traditional legal doctrine will approach these issues in a different manner and reach different results.[9] Indeed, this paper does not claim to offer definite answers to the questions mentioned above. Its goal is much more modest. In trying to understand the phenomenon of legal transplants in European company law, it sees many advantages in beginning with details of specific case studies ("bottom up") rather than with general concepts and categories ("top down").[10] A fruitful venue for this endeavor is the area of directors' fiduciary duties in company law, which has been flourishing in recent years in court opinions and legal doctrine.[11]

II. Legal transplants at work: directors' fiduciary duties

1. Anglo-American origin

a) United Kingdom

From an international perspective, English company law has been a pioneer in the field of fiduciary duties. It developed the influential concept of the *director as a trustee*[12], this having its historical origin in the fact that, in

9 In this direction also Dezalay/Garth, in Nelken/Feest (n 8) 241, 242: "Research on the subject of legal transplants also reveals a dividing line between legal sociologists and lawyers closer to legal doctrine."

10 Similarly the recommendation by Nelken, in Nelken/Feest (n 8) 7, 21.

11 See Enriques, 2 Int. Comp. Corp. L. J. 297 (2000); Fleischer, in Ferrarini/Hopt/Wymeersch (eds.), *Reforming Company and Takeover Law in Europe* (2004) 373, 374 *et seq;* Godon, Rev. soc. 2005, 140; Goshen, 91 California L. Rev. 393 (2003); Hopt, ZGR 2004, 1; Kasolowsky, *Fiduciary Duties in Company Law. Theory and Practice* (2003); Paz-Ares, *La responsabilidad de los administradores como instrumento de gobierno corporativo*, InDret 4/2003. For pioneer studies on the impact of U.S.-American fiduciary duties on the company law in Asia and Eastern Europe Pistor/Xu, in Milhaupt (ed.), *Global Markets, Domestic Institutions: Corporate Law and Governance in New Era of Cross Border Deals* (2003) 77 (Russia and Poland); Kanda/Milhaupt, *Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, ssrn.com/abstract=391821 (Japan).

12 See *Great Eastern Rly Co v. Turner* (1872) 68 Ch. App. 149, 152: "The directors are the mere trustees or agents of the company, trustees of the company's money and property and agents in the transactions which they enter into on behalf of the company."

the earliest companies, the director *was* a trustee in the full technical sense.[13] Later, when ownership of property shifted to the company in its own right, resulting from general incorporation, courts continued to use the label 'trustee' by analogy since the company's assets were still under the director's close control. Over the years, however, it became more and more apparent that, in important respects, directors' duties required a notable departure from trust principles: Unlike trustees who must be careful to preserve the trust property and avoid exposing it to unnecessary risks, directors have to encounter risks and decide whether a risk is worth taking.[14] Today, it is generally held that directors are not trustees, but that they owe strict fiduciary duties to the company.[15] As a consequence, directors are required to act bona fide in the best interests of the company and must not exercise their power improperly.[16] Moreover, they cannot, without the consent of the company, fetter their future discretion and have to avoid placing themselves in a position in which there is a conflict between their duties towards the company and their personal interests.[17] In this respect, English company law has taken a strong stance: "Good faith must not only be done but manifestly be seen to be done, and the law will not allow a fiduciary to place himself in a position in which his judgement is likely to be biased and then to escape liability by denying that in fact it was biased."[18]

b) United States

In the States, the law of fiduciary obligations, originating in equity, fell on fertile grounds.[19] Its continued evolution in the corporate context was

13 See Gower/Davies, *Principles of Modern Company Law*, 7th ed. (2003) 380; for an extensive historical account Sealy, 1967 Cambridge L. J. 83.

14 See Pettet, *Company Law*, 2nd ed. (2005) 160: "From one angle the director can be seen as a trustee, whose role it is to protect and preserve the assets of the beneficiary. From the other angle, he is seen as a dynamic entrepreneur whose job it is to take risks with the subscribed capital and multiply the shareholders' investment."

15 See *Regal (Hastings) Ltd. v. Gulliver* [1967] 2 AC 134, 139: "Directors, no doubt, are not trustees, but they occupy a fiduciary position towards the company whose board they form."; Ferran, *Company Law and Corporate Finance* (1999) 156 *et seq;* Mayson/French/Ryan, *Company Law*, 21st ed. (2004) 514 *et seq*.

16 See Ferran (n 15) 157; Gower/Davies (n 13) 385 *et seq; Mayson/French/Ryan* (n 15) 519 *et seq*.

17 See Hannigan, *Company Law* (2003) 245 *et seq;* Kasolowsky (n 11) 174 *et seq;* for recent developments and current UK reforms in this area Rickford, ECFR 2005, 63, 65 *et seq*.

18 Gower/Davies (n 13) 392.

19 In chronological order Scott, 37 California L. Rev. 539 (1949); *Anderson*, 25 UCLA L. Rev. 738 (1978); *Frankel*, 71 California L. Rev. 795 (1983); Davis, 80 Northwestern L. Rev. 1 (1985); Goshen, 91 California L. Rev. 393 (2003).

furthered by the fact that the most prominent corporate law court – Delaware's Court of Chancery – was (and still is) a separate court of equity.[20] As a general rule, the directors' fiduciary duties go beyond mere fairness and honesty. Often-cited is *Benjamin Cardozo's* assertion in *Meinhard v. Salmon*: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honour the most sensitive, is then the standard of behaviour."[21] Courts and academic writers agree that the director's paramount fiduciary obligation is to subordinate his individual and private interests to his duty to the corporation whenever the two conflict.[22] A nice illustration is the corporate opportunities doctrine, according to which directors may not exploit corporate information or business opportunities for themselves.[23] In recent years, the elaboration of directors' fiduciary duties has profited much from the 'Principles of Corporate Governance' published by the American Law Institute in 1994. The 'Principles', in a separate section of almost 200 pages in length, analyze the fiduciary duties of directors (Chapter 2), of controlling shareholders (Chapter 3) and of the particular responsibilities in transfer-of-control-situations (Chapter 4).[24] With respect to terminology, it is noteworthy that the 'Principles' avoid the use of the term *duty of loyalty* when dealing with the obligation of a person who acts with a pecuniary interest in a matter and instead use the term *duty of fair dealing*.[25]

2. Reception on the Continent

a) France

On the continent, the concept of fiduciary duties also proved highly influential. Nowadays, most civil law jurisdictions impose a general duty of loyalty

20 See DeMott, 1988 Duke L. J. 879, 882.

21 *Meinhard v. Salmon* 249 N.Y. 456, 464 (1928).

22 See *Bayer v. Beran* 49 N.Y.S. 2d 2, 5 (1944); similarly *City Bank Farmers Trust Co. v. Gannon*, 51 N.E. 2d 674, 675 (1943): "Undivided loyalty is the supreme test, unlimited and unconfined."; Bauman/Weiss/Palmiter, *Corporations Law and Policy*, 5th ed. (2003) 718 *et seq*.

23 See Allen/Kraakman, *Commentaries and Cases on the Law of Business Organisation* (2003) 329 *et seq*.

24 See American Law Institute, Principles of Corporate Governance: Analysis and Recommendations (1994), Part V, p. 199–382.

25 See American Law Institute (n. 24), p. 200.

upon directors.[26] A recent example is to be found in French company law, where commentators have discerned a close connection between the 'Principles of Corporate Governance' and two judgments of the *Cour de Cassation*[27] which explicitly recognise a *devoir de loyauté* of directors.[28] In the first case, the president of a public, but unlisted company bought shares from shareholders for 3.000 F. each and sold them a few days later for 8.800 F. The *Chambre commerciale* held that, by not disclosing the shares' true value, he had violated his duty of loyalty which a director owes to each individual shareholder.[29] The second case dealt with a director who resigned, formed a new company and persuaded key employees of his former company to join him. Unlike the appellate court, the *Cour de cassation* granted damages to the company on the theory that the director had violated his duty of loyalty *vis-à-vis* the company.[30] Academic writers emphasise the general convergence between American and French corporate governance principles[31] and regard the recent case law as further support for the continuing *moralisation du droit des sociétés*.[32] Moreover, the evolving civil responsibility is welcomed as a complement to the strict criminal sanctions against directors. A new decision of the *Cour de cassation* rendered in May 2004 has reaffirmed the concept of director's fiduciary duties.[33] Summarising the recent developments

26 For a detailed analysis Fleischer, WM 2003, 145 with many comparative references.

27 See Cass. com., 27. 2. 1996, JCP éd. E 1996, II, 838; Cass. com., 24. 2. 1998, Bull. Joly 1998, 813.

28 See Daille-Duclos, JCP éd. E 1998, 1486: "Le devoir de loyauté du dirigeant est une création jurisprudentielle de la Chambre commerciale de la Cour de cassation (…) Le devoir de loyauté du dirigeant apparaît directement issu des 'principles of corporate governance' définies aux Etats-Unis par l'American Law Institute (…)." For a thoughtful analysis also *Magnier*, 45 (2001) Arch. phil. droit 213, 219 *et seq* under the heading "Réception du droit américain dans l'organisation interne des sociétés commerciales".

29 See Cass. com., 27. 2. 1996, JCP éd. E 1996 II, 838 with the key sentence: "M. Bernhard V a manqué au devoir de loyauté qui s'impose au dirigeant d'une société à l'égard de tout associé." For a comparative account and the contractual foundation of the case Fleischer, *Informationsasymmetrie im Vertragsrecht* (2001) 706 *et seq* with many references to French contract law, in particular to the concept of *dol par réticence*.

30 See Cass. com., 24. 2. 1998, Bull. Joly 1998, 813 with the key sentence: "Monsieur K. avait successivement les fonctions de gérant puis après sa transformation en société anonyme de directeur général de la société P., ce dont il découlait qu'il était tenu à une obligation de loyauté à l'égard de cette entreprise."

31 See Peltier, JCP éd. G 1997, 245; Baker, 45 (2001) Arch. phil. droit 199, 200 *et seq* (2001); for a comprehensive analysis Dion, *Les obligations fiduciaires des dirigeants de sociétés commerciales: droit des Etats-Unis d'Amérique et droit français* (1994); see also Cozian/Viandier/Deboissy, *Droit des sociétés*, 17° éd. (2004) n° 290.

32 See Daille-Duclos, JCP éd. E 1998, 1486, 1489 *et seq*.

33 See Cass. com., 12. 5. 2004, Rev. soc. 2005, 140.

a commentator notes: "Ces devoirs sont bien connus du droit anglais et le droit américain qui consacrent l'existence de *fiduciary duties* parmi lesquels figure un devoir de loyauté (*duty of fair dealing*). Nul doute qu'en France la reconnaissance expresse d'un tel devoir a été encouragée par la réflexion sur le 'gouvernement d'entreprise' et sur le renforcement en droit français des devoirs des dirigeants de sociétés, à l'instar des dirigeants anglo-saxons." [34]

b) Germany

The German Stock Corporation Act (AktG) has codified the duty of loyalty only in a rudimentary fashion: § 88 (1) AktG prohibits management board members from competing with the company in its line of business, and § 93 (1) AktG stipulates a statutory duty of confidentiality. The general concept, however, is not mentioned in the Act. This caused considerable difficulties in shaping the duty of loyalty.[35] Over the years, contributions from comparative law scholarship have helped to fill in the gaps and flesh out the law of fiduciary obligations.[36] Meanwhile, the duty of loyalty is firmly entrenched in the case law[37], and the recently introduced 'German Code of Corporate Governance' highlights some of its most important features.[38] Academic writers characterise the director's position almost unanimously as fiduciary[39], or like a trustee[40]. The legal vocabulary, however, is limited and not entirely clear: German jurists are forced to use the term *Treuhänder* interchangeably, whereas their Anglo-American counterparts are able to differentiate between 'trustees' and 'fiduciaries'.[41] Substantially, it is generally agreed on that the duty of loyalty calls for a more demanding standard of conduct than the general obligation to act in good faith in contractual settings.[42] Commen-

34 Godon, Rev. soc. 2005, 140, 150.

35 See Fleischer, WM 2003, 1045 *et seq;* Hopt, in *Festschrift Mestmäcker* (1996) 909 at 921; Wiedemann, *Organverantwortung und Gesellschafterklagen in der Aktiengesellschaft* (1990) 12.

36 Pathbreaking Mestmäcker, *Verwaltung, Konzerngewalt und Rechte der Aktionäre* (1958) 152 *et seq*., 209 *et seq*.

37 For details and references see Fleischer, WM 2003, 1045 *et seq*.

38 See sec. 4.3 German Corporate Governance Codex: "Conflicts of interest"; Ringleb, in Ringleb/Kremer/Lutter/v. Werder, *Deutscher Corporate Governance* Kodex, 2nd ed. (2005) comments 801 *et seq*.

39 See BGHZ 129, 30, 34; Hopt, in *GroßKommentar AktG*, 4th ed. (1999) § 93 comments 12, 72, 144.

40 See Hüffer, *AktG*, 6th ed. (2004) § 93 comment 4.

41 For a detailed analysis Grundmann, *Der Treuhandvertrag* (1997) 27 *et seq*., 127 *et seq*.

42 See Hopt (n 39) § 93 comment 72; Hüffer (n 40) § 93 comment 5.

tators explain that the stricter standards mirror the far-reaching influence and power of directors.[43]

III. Legal transplants as a research programme in company law

Does our comparative sketch of directors' fiduciary duties allow us to make *universal* arguments about legal transplants in European company law? In this respect, sweeping generalisations are premature and a fair amount of caution is advisable.[44] One observation, however, seems to be uncontroversial: The practice of legal borrowing in European company law is a phenomenon of considerable importance requiring closer scholarly attention.[45] In this sense, the term legal transplant can be read as a shorthand term for a research programme in company law[46] that can only be unfolded in a concerted action of comparativists, legal sociologists and traditional legal scholars.[47] To this end, the widespread complaints about U.S. legal culture[48] (like those about U.S. fast food) and the popular lamentation about U.S. corporate law hegemony are not very helpful. Instead, we need a dispassionate analysis of the preconditions, variables and trajectories[49] of transformation processes in company law.

43 Pathbreaking Zöllner, *Die Schranken mitgliedschaftlicher Stimmrechtsmacht bei den privatrechtlichen Personenverbänden* (1963) 342 *et seq*.

44 Along the same lines Nelken (n 10) 3, 21 *et seq*: "But this raises the question how far starting from the particular will allow us to make universal arguments or prescriptions about legal transfers. How far will our arguments apply across different periods or different parts of the world. How far will they encompass the different agencies involved in legal transfers, or other relevant distinctions."

45 Similarly Kanda/Milhaupt (n 11) 4: "Despite the importance of transplants to legal development around the world, scholarly understanding of this ubiquitous form of legal development is still fairly rudimentary."; also Wiegand, in *Liber Amicorum Buxbaum* (2000) 601, 602: "Es handelt sich um einen epochalen Vorgang, der bisher nicht die nötige Beachtung gefunden hat."

46 See Dezalay/Garth (n 9) 241: "The terms 'legal culture' and 'legal transplant' which provide the setting for this collection of essays, seem to imply a research programme – even a political agenda."

47 To the point Nelken (n 10) 3 at 9: "It is likely therefore that both comparativists and sociologists of law would achieve more in partnership than in polemic."

48 See the polemic by Honsell, in *Festschrift Zäch* (1999) 39, 52 *et seq*.

49 More generally on the trajectory of corporate law scholarship Cheffins, 63 Cambridge L.J. 456 (2004) in his inaugural lecture at the Law Faculty at the University of Cambridge.

1. Framework of transplantations in company law

a) Common structures in company law

Ernst Levy once noted that not all areas of law are equally susceptible to legal transfers. As typical strongholds of traditional legal concepts he identified the law of the family and real estate law, whereas contract law, according to his analysis, is more controlled by economic interests rather than national customs or sentiments.[50] It is clear that company law belongs to *Levy's* second camp of the more fungible provinces of the law: Despite all the differences in the details, the structure of corporate law – its 'anatomy'[51] – is remarkably similar around the world. As a consequence, the danger of a "transplant shock"[52] when borrowing from foreign company law sources is less imminent than in many other fields of law. More generally, the "spirit of the people" (*Volksgeist*) which in 19th-century Germany *Friedrich Carl von Savigny* identified as the crucial basis for positive law[53] has only rarely influenced the shaping of modern stock corporations.[54]

50 See Levy, 25 Washington L. Rev. 233, 244 (1950): "Least inclined to give up its traditional feature is the law of the family including the rules on intestate succession. Second in order is the law of real property, especially as far as rural land is concerned. On the other hand, more loosely connected with a people's past and therefore more easily copied is the law of personal property, notably that of commercial goods, and consequently most of the law of contracts."

51 See recently Kraakman/Davies/Hansmann/Hertig/Hopt/Kanda/Rock, *The Anatomy of Corporate Law* (2004).

52 From an economic perspective Berkowitz/Pistor/Richard, 51 Am. J. Comp. L. 163 (2003); on a comparative basis using Japan as an illustration Milhaupt, 149 U. Penn. L. Rev. 2083, 2097 *et seq* (2003); also Stout, in Milhaupt (n 11) 46, 47 offering the following definition of a transplant shock: "[…] the possibility that legal rules that work well in one nation may not work well, and ultimately may be rejected, in a nation with a different historical, political, or cultural background."

53 See Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (1814): "Jener klare, naturgemäße Zustand bewährt sich vorzüglich auch im bürgerlichen Rechte, und so wie für jeden einzelnen Menschen seine Familienverhältnisse und sein Grundbesitz durch eigene Würdigung bedeutender werden, so ist aus gleichem Grunde möglich, daß die Regeln des Privatrechts selbst zu den Gegenständen des Volksglaubens gehören [...] Das Recht wächst also mit dem Volke fort, bildet sich aus mit diesem, und stirbt endlich ab, so wie das Volk seine Eigenthümlichkeit verliert."; alluding to Savigny's conception also Watson (n 1) 21 and Nelken (n 10) 7, 10: "There is a direct link between Savigny's discussion of lawyer's law and folk law and Friedman's ideas of 'external' and 'internal' legal culture."

54 For an instructive analysis of harmonisation barriers M. Ulmer, *Harmonisierungsschranken des Aktienrechts* (1998), passim, who identifies three particularities of German stock corporations: codetermination, two-tier board and real seat theory.

b) Globalisation of the economy and circulation of legal ideas

Moreover, the ever increasing globalisation in business and the economy offer a ready seed ground for corporate transplants: Globalisation is much more than a mere exchange of goods and money[55]; it also entails an intense circulation of legal ideas.[56] Over time, one can observe a process of approximation described by sociologists as *de-differentiation*[57] and by jurists as *convergence*[58]. This phenomenon has not gone unnoticed in the field of fiduciary duties; a recent French law review article encapsulates this tendency in its title: "La convergence du droit français avec les principes de la 'corporate governance' américaine."[59] The convergence process is further propelled by dual listings of French and German stock corporations which have to comply with both domestic and foreign legal rules and listing requirements.[60]

c) Corporate governance and institutional investors

Looking for complementary forces of harmonisation, one can confidently point out that international capital markets powerfully drive the homogenization of governance structures in company law.[61] Opinion leaders in this respect are, most often, institutional investors from the United States. Many countries borrow heavily from U.S. corporate law in an attempt to signal to those investors that they comply with U.S. domestic legal standards.[62] Against this background, it is not surprising that the German Corporate Governance Code (DCGK) provides a more elaborate account of the

55 See Nelken (n 10) 7, 22: "We still know little about the relation between the circulation of goods and money and the circulation of law."

56 Similarly Hildebrand, in Nelken/Feest (n 8) 117, 119 referring to Lawrence Friedman who has noted that "there is a tremendous amount of globalisation in business and the economy, and the law follows along."

57 See Hildebrand (n 56) 117, 123.

58 For a general argument that convergence in company law at the level of formal legal rules is already largely complete Cheffins, 10 Duke J. Comp. & Int'l L. 5 (1999); Hansmann/Kraakman, 89 Georgetown L. J. 439 (2001); Rock, 74 Wash. U. L. Q. 67 (1996); for an extensive treatment with respect to shareholders' rights Siems, *Die Konvergenz der Rechtssysteme im Recht der Aktionäre: Ein Beitrag zur vergleichenden Corporate Governance im Zeitalter der Globalisierung* (2005).

59 Peltier, JCP éd. E 1997, 245.

60 See Gruson, AG 2004, 358; Harrer/Fisher/Evans, RIW 2003, 81.

61 See Wymeersch, ZGR 2001, 294, 297 speaking of a "de facto-harmonization" due to the voluntary compliance with market standards.

62 See Berkowitz/Pistor/Richard, 51 Am. J. Comp. L. 163, 164 (2003).

directors' fiduciary duties than the German Stock Corporation Act: For example, sec. 4.3.4 DCGK stipulates that all members of the management board shall disclose conflicts of interest to the supervisory board – a disclosure duty not explicitly mentioned in the AktG. Similar developments have occurred in France, where the legislative branch and also companies increasingly feel the pressure of institutional investors to adapt their rules and articles of associations to the U.S. blueprint.[63] As one author has noted: "A l'origine de la transplantation, il y a une expression, le gouvernement d'entreprise."[64] When distinguishing *actively* initiated and *passively* tolerated transplantations it is fair to say that corporate transplants for the most part fall into the second category: National legislators are only occasionally the *driving force* of company law transfers; more often they are themselves *driven* by the mighty winds of globalisation: Capital markets make law![65]

d) Efficiency explanations and 'comparative company law and economics'

The victorious advance of fiduciary duties in European company law is enhanced by their efficiency-enhancing effects. Economists tend to analyse public companies through the lens of the principal-agent-model: Shareholders are regarded as principals who have delegated the management of the company to the directors as their agents.[66] Central to the principal-agent-relationship are three characteristics: (1) In conducting the company's affairs, the directors enjoy broad discretion; (2) the directors' duties cannot be precisely specified in advance; (3) direct monitoring of the directors by the shareholders is often prohibitively costly.[67] As a consequence, there are incentives for directors to take advantage of their superior information and to misappropriate corporate resources.[68] In economic parlance, the terms *hidden gains* and *hidden actions* are used to characterise the directors' disloyalty. At this point, the duty of loyalty sets in and serves a valuable func-

63 See Storck, ECFR 2004, 36; Freedman, Arch. phil. droit 45 (2001) 207: "Devant l'importance accrue des investisseurs institutionnels étrangers, entreprises et institutions financières adaptent leurs structures pour mieux répondre à leurs critères."

64 Magnier, Arch. phil. droit 45 (2001) 213, 214.

65 In this sense Ebke, in *Festschrift Lutter* (2000) 17.

66 See the seminal contribution by Jensen/Meckling, 3 J. Fin. Econ. 305 (1976); for a recent paper reviewing the progress in agency theory Gibbons, 51 Management Science 2 (2005).

67 See Richter/Furobotn, *Neue Institutionenökonomik*, 3rd ed. (2003) 173 *et seq*.

68 See Cooter/Freedman, 66 N.Y.U. L. Rev. 1045, 1048 (1991) speaking of an "appropriation-incentive model".

tion: It may be regarded as company law's attempt to ameliorate the agency problem and to establish an incentive structure in which the directors' self interest directs them to act in the interests of the shareholders.[69] Moreover, it helps to minimise transaction costs by stipulating a general principle that restricts the directors' opportunities to cheat without the costly drafting of elaborate rules, while leaving them free to make use of their special skills.[70] From a law and economics viewpoint, therefore the duty of loyalty has a double aim: *Ex ante*, it seeks to work as a deterrent against managerial misconduct[71]; *ex post*, it seeks to raise the enforcement probability in cases of misappropriation.[72] Moreover, the duty of loyalty underscores the more general theory that corporate legal transplants can in part be explained on efficiency grounds.[73] Conversely, efficiency may be used to evaluate legal transplants.[74] Beyond that, fiduciary duties are an excellent example of how the tools of law and economics together with those of comparative law shed new light on well-known company law problems.[75] The theoretical underpinnings of comparative company law and economics deserve further research.

2. Choice of foreign legal transplants

a) Richness and innovative nature of U.S. case law

Legal borrowing promises an efficient and expedient exploitation of juridical expertise collected elsewhere.[76] It is hardly surprising, therefore, that European company law legislators and courts direct their attention to that country which offers the greatest learning curve effects in company law: the United States of America and their leading corporate law jurisdictions Delaware, New York and California. The above-mentioned corporate opportunities

69 See Fleischer, ZGR 2001, 1, 7 *et seq*.

70 See Anderson, 25 UCLA L. Rev. 738, 760 (1978); Posner, *Economic Analysis of Law*, 5th ed. (1998) 452.

71 See Bainbridge, *Corporation Law and Economics* (2002) 305; Easterbrook/Fischel, *The Economic Structure of Corporate Law* (1991) 95.

72 See Cooter/Freedman, 66 N.Y.U. L. Rev. 1045, 1055 (1991).

73 See Fleischer (n 11) 373, 381.

74 See Mattei, *Comparative Law and Economics* (1997) 123 *et seq*.

75 For a more detailed analysis Fleischer, in *Festschrift Wiedemann* (2002) 827, 846 *et seq;* more generally Mattei/Cafaggi, in Newman (ed.) *The New Palgrave Dictionary of Economics and the Law* (1998) 346: 'Comparative Law and Economics'.

76 Similarly Friedman, in Nelken/Feest (n 8) 93 at 94; moreover Kanda/Milhaupt (n 11) 7: "[Legal transplants] are a cheap, quick and potentially fruitful source of new law."

doctrine provides a nice illustration. Its scope has been gradually developed and refined in the rich and colourful U.S. case law: The classic tests adopted by some American courts is the interest or expectancy test focusing on whether the company has an interest or tangible expectancy in a certain business opportunity.[77] Other courts have given primary weight to whether the opportunity is related to or in the company's line of business.[78] The ALI-Principles offer a comprehensive definition of a corporate opportunity combining elements of both traditional tests.[79] In Germany, leading comparativists as *Ernst-Joachim Mestmäcker* and *Ulrich Immenga* have successfully imported the American concept.[80] By now, there is a rich body of case law[81] and extensive academic writing.[82] In defining a corporate opportunity, similar tests have emerged as under U.S. law.[83] Under the heading *Geschäftschancenlehre* the corporate opportunities doctrine has become an integral part of Germany's company law culture.

Moreover, for those seeking new solutions to company law problems U.S. corporate law offers an additional advantage: Because most of its rules are default rather than mandatory rules it can easily accommodate legal innovation.[84] This is clearly observable in the area of corporate finance where recent research has identified the greatest divergence among English, U.S., French and German company law.[85]

b) Attraction and prestige of U.S. corporate law

Beyond that, U.S. corporate law profits from an additional asset: It is able to attract students and researchers from all over the world. There are several explanations for this power of attraction: The leading U.S. law schools firstly enjoy a high reputation among law firms and other potential employers.

77 See *Lagarde v. Anniston Lime & Store Co.*, 28 So. 199 (Ala. 1900).
78 See *Guth v. Loft*, 5 A. 2d 503 (Del. 1939).
79 See American Law Institute (n 24) § 5.05 (b).
80 See Mestmäcker (n 36) 166 *et seq;* Immenga, *Die personalistische Kapitalgesellschaft* (1970) 155 *et seq*.
81 Cases collected by Hopt (n 39) § 93 comments 166 *et seq*.
82 See Polley, *Wettbewerbsverbot und Geschäftschancenlehre* (1993); Weisser, *Corporate Opportunities* (1991).
83 Recently Fleischer, NZG 2003, 985, 986 *et seq* with many references.
84 For a correlation between default rules and innovative pace Fleischer, ZHR 168 (2004) 673, 691 *et seq;* from an economic perspective O'Sullivan, 24 Cambridge J. Econ. 393 (2000) and Pistor/Keinan/Kleinheisterkamp/West, 31 J. Comp. Econ. 676, 681 (2003).
85 See Pistor/Keinan/Kleinheisterkamp/West, 23 U. Pa. J. Int'l Econ. L. 771, 821 (2002).

Secondly, their strong competition for talented students and teachers leads to a highly productive innovation process in legal thinking.[86] Thirdly, their strength is fortified by the interdisciplinary scholarship around them giving birth to such fruitful areas of research as 'corporation law and economics' or 'behavioural finance and securities regulation'.[87] This academic infrastructure, in turn, offers a partial explanation for the success of U.S. legal transplants: The role of law students returning to their home countries after receiving an LL.M.-degree is in many respects comparable to their predecessors in the Middle Ages who received their formal legal education at the law faculties in Italy or France and thereafter contributed to the circulation of Roman law in Germany and elsewhere.[88]

In addition, it is the prestige of U.S. corporate law[89] that helps to explain its success rate as an international 'role model': All lawmaking needs authority, and legislators, courts and scholars who are determined to borrow will borrow from a highly esteemed foreign source and disclose this legal heritage.[90] One may call this calculation the "symbolic motivation"[91] of legal borrowing. The transplantation is further facilitated when one can refer to a consistent collection of company law rules, a "texte de reference"[92], as provided in our context by the influential 'Principles of Corporate Governance'.

86 See Dezalay/Garth (n 9) 241, 251.

87 See Dezalay/Garth (n 9) 241, 251; along the same lines *Baker*, Arch. phil. droit 45 (2001) 199, 204: "support intellectual des études et écrits réalisés, pour l'essentiel, par les économists de la Chicago School (beaucoup de Prix Nobel)."

88 Also stressing these parallels Stürner, in *Festschrift Rebmann* (1989) 839, 843 ("Bologna der Moderne"); Wiegand (n 45) 229, 232 ("frappierende Parallelen"); Nelken (n 10) 7, 24: "The role of students returning to their home countries after studying abroad has been of central importance ever since the invention of universities."

89 See generally Nelken (n 10) 7 at 41: "Much has been written about the variables which are especially relevant to the choice of society from which legal transfers are taken. It is often said that the main factor here has to do with the prestige of the nation or legal system from which the law is taken."; similarly Magnier, Arch. phil droit 45 (2001) 213: "Les comparatistes nous ont appris que la réception répondait à une double motivation: le prestige, d'une part, et la force."

90 See Watson, 44 Am. J. Comp. L. 335, 345 (1996): "Borrowing is creative (…) But this very creativity presents us with an apparent paradox. If one is going to change the rules around why bother to appear to borrow at all? The answer is that all law making, apart from legislating, desperately needs authority."

91 Kanda/Milhaupt (n 11) 7.

92 Magnier, Arch. phil. droit 45 (2001) 213, 217.

c) Economic power and company law

The great comparativist *Otto Kahn-Freund,* who was forced to leave Nazi Germany and then pursued an outstanding academic career in England[93], has repeatedly emphasised the influence of economic and political power for legal transfers.[94] Addressing the problem of transplantation in his Chorley Lectures delivered at the London School of Economics in 1973 he argued that the utility of transposing a foreign legal institution should be judged scientifically by reference to empirical factors, as *Montesquieu* had formerly elaborated in his famous "De l'Esprit des Lois".[95] While *Montesquieu* had focused on the environmental factors of "le climat, la religion, les lois, les maximes du gouvernement, les exemples des choses passées, les mœurs, les manières"[96] as characteristic features of a particular legal system, *Kahn-Freund* believed that the power factor had become more significant.[97] His thoughtful analysis is still valid, especially for the worldwide circulation of U.S. corporate law and securities regulation concepts. Their contemporary carriers are not only institutional investors and academics, but also businessmen and practicing lawyers[98], and, above all, multinational enterprises financed and advised by their Anglo-American investment banks. Therefore, one can safely say that U.S. economic power and U.S. commercial law go hand in hand – admired or condemned as a symbol of free entrepreneurship: "Le droit américain, très souvent, fait partie du modèle du système de la libre entreprise et semble avoir pour le moment la faveur d'un nombre significatif de pays développés malgré des faiblesses comme système social."[99]

3. Development stages of the national transformation process

a) Doctrinal adaptation

The success or failure of a legal transplant depends to a large extent on its smooth adaptation into the preexisting legal environment.[100] This adaptation

93 For a biographical note Freedland, in Beatson/Zimmermann (eds.), *Jurists Uprooted. German-speaking Émigré Lawyers in Twentieth-century Britain* (2004) 299 *et seq*.

94 See Kahn-Freund, 37 Mod. L. Rev. 1, 8 *et seq* (1974); concurring Cotterrell, in *Nelken/Feest* (n 8) 70 at 89; Rehbinder, *Rechtstheorie* 14 (1983) 305, 313; Wiegand (n 45) 229, at 241, 260.

95 See Montesquieu, *De l'Esprit des Lois* (1748).

96 Montesquieu (n 95), 1st book, 3rd chapter.

97 See Kahn-Freund, 37 Mod. L. Rev. 1, 8 *et seq*., 17 (1974).

98 See Heydebrand (n 56) 117, 119.

99 Baker, Arch. phil. droit 45 (2001) 199, 205.

100 Similarly Kanda/Milhaupt (n 11) 9: "We believe that 'fit' between the imported rule

is considerably facilitated when the host country disposes of flexible transformation mechanisms. In Germany, § 93 (1) AktG serves as a legal device which provides that the members of the management board, in conducting business, shall employ the care of a diligent and conscientious manager, leaving by its vague and open-ended standard ample room for judicial refinement. Courts and commentators have distilled two different sub-standards from the broad statutory wording: the duty of care (*Sorgfaltspflicht*) and the duty of loyalty (*Treuepflicht*).[101] In France, the courts have also taken recourse to traditional domestic concepts through which foreign legal ideas can trickle in. A commentator describes the infiltration process as follows: "Les 'fiduciary duties' américaines (*duty of loyalty, duty of care, business judgment rule*) […] se développent dans le droit des sociétés français sous la forme de concepts juridiques classiques, propres au droit français comme la bonne foi, la confiance, la loyauté."[102] Contrary to recent writing on this subject[103], one can therefore conclude that general concepts like fiduciary duties are especially suitable candidates for legal transformation since they are flexible enough to adapt to local particularities. To put it differently, legal transplants will have greater success insofar as they can be presented as a result of evolutionary legal development[104]: Jurists prefer incremental rather than radical reform steps.[105]

and the host environment is crucial to the success of a transplant […] Fit might be thought of as having two components – micro and macro. *Micro-fit* is how well the imported rule complements the preexisting legal infrastructure in the host country. *Macro-fit* is how well the imported rule complements the preexisting institutions of the political economy in the host country."

101 See Hopt (n 35) 907, 917; Raiser, *Recht der Kapitalgesellschaften*, 3rd ed. (2001) § 14 comment 62; Wiedemann (n 35) 12; for an economic explanation of the different treatment of care and loyalty in many jurisdictions Fleischer (n 11) 373, 380 with further references; also Paz-Ares, InDret 4 (2003) 11 *et seq*., 29 *et seq*.

102 Freedman, Arch. phil. droit 45 (2001) 207, 209.

103 See Pistor/Xu (n 11) 77, 99: "In sum, the Anglo-American concept of fiduciary duty may not be easily transplantable either to civil law systems or to transition economies."

104 See Cotterrell (n 94) 70, 81 *et seq*: "What is important, it seems, is that new developments need to be seen as consistent with tradition; they should, as far as possible, appear as organic developments appealing to traditional understandings of legal excellence, appropriateness, justice or practicality"; similarly Berkowitz/Pistor/Richard, 51 Am. J. Comp. L. 163, 179 (2003): "Our argument is that a voluntary transplant increases its own receptivity when it makes a significant adaptation of the foreign formal legal order to initial conditions, in particular to the preexisting formal and informal legal order."

105 For an argument that the legal academy's reward structure requires that elder scholars appreciate an innovative move as continuing a legal tradition with which they are associated Tushnat, 1998 Wis. L. Rev. 579, 581.

b) Autonomous development

Reception, writes *Franz Wieacker* in his influential treatise on legal history, is always assimilation, that is a specific development process, in which *external* legal ideas are adapted to the particularities of domestic doctrine and transformed into an element of the *internal* legal life and thinking.[106] This is valid for corporate legal transplants as well as for that transformation which is regarded as *the* reception in European legal history: the diffusion of Roman-canonical law as *ius commune* in Europe. With regard to the reception of fiduciary duties in France and Germany, one can conclude that they are *dissociated* from their Anglo-American roots and engrained in their new legal environment. This finding is of considerable importance for the construction of the 'naturalised' legal rule: Its interpretation through domestic courts may be intellectually stimulated by the comparative model, but it is not at all predetermined by the model jurisdiction. U.S. and English precedents on the subject are, at the most, persuasive authorities before French or German courts, leaving the domestic judges free to attach a different meaning to the 'naturalised' legal transplant. At this point, *Watson's* medical metaphor, alluding to hazardous surgical operations[107], is especially illuminating: "A successful legal transplant – like that of a human organ – will grow in its new body, and become part of that body just as the rule or institution would have continued to develop in its parent system."[108]

c) Remaining differences

The reception of directors' fiduciary duties in European company law is no reception *in complexu*. There are still differences in certain areas of law due to doctrinal particularities, statutory wording or normative divergences.[109] Four of them deserve closer attention:

– *Direction of directors' duties*: In all four jurisdictions at hand, we can observe an unsolved controversy as to the direction of directors' duties. In

106 See Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2nd ed. (1967) 128.

107 See Kahn-Freund, 37 Mod. L. Rev. 1, 5 (1974): "As soon as one mentions the word 'transplantation' one conjures up inevitably the image of those often complicated and sometimes hazardous surgical operations by which part of a human body is transferred from one human being to another."; similarly Nelken (n 10) 7, 18.

108 Watson (n 1) 27.

109 For an argument that political forces and path dependence limit the extent of convergence in company law Bebchuk/Roe, 52 Stanford L. Rev. 127, 132 *et seq* (1999); Branson, 34 Cornell Int'l L. J. 321, 325 *et seq* (2001).

England, there is a long-standing tradition that fiduciary duties are owed to the company and not to individual shareholders.[110] However, recent decisions have called into question whether this general (and severely criticised[111]) principle, which goes back to the seminal case of *Percival v. Wright*[112], still stands.[113] In U.S. corporate law, no consensus has emerged as to whether the fiduciary duties are owed to the company alone. At least in certain circumstances, courts have recognised fiduciary relationships between directors and individual shareholders: The classic case is *Strong v. Repide*[114], decided by the U.S. Supreme Court at the beginning of the 20th century. Recent French cases recognise fiduciary duties in both directions: the *obligation de loyauté envers l'entreprise* and its counterpart, the *obligation de loyauté envers les associés*.[115] In Germany, directors owe fiduciary duties to the company and to the company only.[116]

– *Directors' duty not to compete:* English courts do not recognise a general duty not to compete for directors.[117] Indeed, there appears to be a definite decision dating back to 1891 that a director cannot be restrained from acting as a director of a rival company.[118] And it has been said by *Lord Blanesburgh* in 1932 in the landmark case *Bell v. Lever Brothers* that "what he could do for a rival company, he could, of course, do for himself."[119] Nevertheless, directors are restrained from competing with the company by the adjacent concepts of the no-conflict rule and the no-profit rule which serve to some extent as a substitute for a strict no-competition rule.[120] In U.S. jurisdictions, the no competition-rule plays at most a marginal role, one which has been pushed into the background by the broad

110 See Gower/Davies (n 13) 374 *et seq;* Mayson/French/Ryan (n 15) 387 *et seq*.

111 Sharp criticism was voiced by the Cohen Committee, Cmnd 6659, comments 86 *et seq*, and by the Jenkins Committee, Cmnd 1749, comments 89 and 99 (b).

112 [1902] 2 Ch. 421.

113 See *Brunninghausen v. Glavanics* (1999) 32 A.C.S.R. 294; noted by Goddard, 116 L.Q.R. 197 (2000).

114 213 U.S. 119 (1909); see also *Goodwin v. Agassiz*, 186 N.E. 659 (1933); for a detailed discussion Bauman/Weiss/Palmiter (n 22) 989 *et seq;* for a comparative overview Fleischer, AG 2000, 309, 313 *et seq*.

115 See Cozian/Viandier/Deboissy (n 31) n° 290.

116 See BGHZ 83, 122, 134; 110, 323, 334; Hopt (n 39), § 93 para. 469.

117 See Gower/Davies (n 13) 414 *et seq*, adding that "[t]his view is becoming increasingly difficult to support."

118 See *London and Mashonaland Exploration Co. v. New Mashonaland Exploration Co*. [1891] WN 165; contra *Christie*, 55 Mod. L. Rev. 506 (1992).

119 *Bell v. Lever Brothers* [1932] A.C. 161, 195.

120 See generally Hannigan (n 17) 245 *et seq*.

scope of the corporate opportunities doctrine.[121] The German Stock Corporation Act, on the other hand, contains a strict no-competition rule in § 88 AktG according to which the members of the management board may not engage in any trade or enter into any dealing in the same branch as the company without first obtaining the consent of the supervisory board.[122] Nor may they without consent become a member of the management board, a managing director or a personally liable partner of another commercial company.[123] In France, the *Cour de cassation* has recently established a judge-made duty not to compete even in the absence of contractual no-competition clauses.[124]

– *Indemnification of directors:* The comparative picture as to corporate indemnification is far from uniform.[125] In England, sec. 310 of the Companies Act 1985, the successor to sec. 205 of the 1948 Act bans provisions in a company's articles or in any contract with the company which purport to exempt directors from liability to the company.[126] Prior thereto, it has been generally accepted that provisions in articles might effectively insulate directors from liability. The leading case was *In Re City Equitable Fire Insurance*[127] which inspired the English author *John Galsworthy* to write the famous novel "The White Monkey", winning him the Nobel price for literature in 1928. A converse development is to be found in the United States: In the aftermath of the spectacular liability case *Smith v. van Gorkum*[128], decided by the Delaware Supreme Court in 1985, the Delaware legislator has introduced a far-reaching indemnification regime, allowing corporations to include a provision eliminating or limiting the personal liability of a director to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director.[129] Such provisions, however, shall neither eliminate the liability for breach of the duty of loyalty nor for intentional misconduct or knowing violation of the law.[130] In Germany, § 93 AktG is unanimously regarded as a mandatory

121 See Weisser (n 82) 30.
122 See Fleischer, AG 2005, 336, 340 *et seq;* Hüffer (n 40) § 88 para. 3.
123 See Fleischer, AG 2005, 336, 344; Hüffer (n 40) § 88 para. 4.
124 See Cass. com., 12.2.2002, Rev. soc. 2002, 617; Le Cannu, Droit des sociétés (2002), n° 740; Godon, Bull. Joly 1999, 5.
125 For a comparative account Fleischer, WM 2005, 909 with many references.
126 See Gower/Davies (n 13) 396 *et seq;* Hannigan (n 17) 196 *et seq*.
127 [1925] Ch. 407.
128 488 A.2d 858 (1985).
129 See DeMott, 66 Wash. U.L.Q. 295 (1988); Gelb, Temple L. Rev. 13 (1988); Lee, 136 U. Pa. L. Rev. 239 (1987).
130 See sec. 102 (b) (7) Delaware General Corporation Law.

provision leaving no room for indemnification clauses in the articles of association or in the directors' management contract.[131]

– *Sanctions for breach of fiduciary duties:* In all four jurisdictions under investigation the company may claim for damages if the director violates his fiduciary duty. Beyond that, English company law has developed a powerful remedy, the *account for profit*, which neither requires damages on the part of the company nor fault on the part of the director.[132] As put by *Lord Russell of Killowen* in a leading case: "The liability arises from the mere fact of a profit having in the stated circumstances been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account."[133] The German Stock Corporation Act also provides for a gain-based remedy in § 88 (2), but insists on an element of fault.[134] This traditional view has recently come under attack by scholars who, relying on comparative insights, seek to establish a general rule that profits from a breach of loyalty have to be accounted for, even outside any fault.[135]

IV. Legal transplants: outlook

More than twenty years after the first edition of his influential monograph on legal transplants, *Alan Watson* conceded in a law review article: "The act of borrowing is usually simple. To build up a theory of borrowing on the other hand, seems to be an extremely complex matter."[136] It is submitted that it is worthwhile continuing this intellectual and interdisciplinary endeavour, especially in the field of European company law.

131 See Fleischer, WM 2005, 909, 914; Hopt (n 39) § 93 para. 29; Hüffer (n 40) § 93 para. 1.

132 See Lowry/Edwards, 61 Mod. L. Rev. 515, 517 (1998): "The rule operates as an absolute proscription taking as its premise that nothing less than absolutism will satisfy the deterrent effect that equity requires."

133 *Regal (Hastings) Ltd. v. Gulliver* [1942] 1 All ER 348, 356.

134 See MünchKommAktG/Hefermehl/Spindler, 2nd ed. (2004) § 88 para. 29 with many references.

135 See Fleischer, in *Gedächtnisschrift Heinze* (2004) 177, 1992; Hopt, ZGR 2004, 1, 48 *et seq;* Rusch, *Gewinnhaftung bei Verletzung von Treuepflichten* (2003) 229 *et seq*. This may however raise constitutional issues (e.g. confiscation, *nulla poena sine culpa*), cf. as to general law of restitution Schall, *Leistungskondiktion und die Sonstige Kondiktion auf der Grundlage des einheitlichen gesetzlichen Bereicherungsprinzips* (2003) 69.

136 *Watson*, 44 Am. J. Comp. L. 335 (1996).