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German Corporate Governance in International and European Context

Second Edition

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Preface

The Preface of the first edition of this book, which was published in 2007, included this opening sentence: ‘The global economy brings us into a new world of legal players and legal transactions’.¹ Since then, the actual significance of the ‘global economy’ has been illustrated in a cruel way by the so-called global financial crisis (GFC) of 2007–2008 and the ongoing European financial crisis of 2009–2011.² In fact, referring to this crisis as the global ‘financial’ crisis downplays the fact that it was a global ‘debt’ crisis with the USA at the epicentre. The aftershocks of that debt crisis and still is felt widely in other parts of the world.

Similar to the first edition of this book, we analyse the German corporate governance and corporate law in a rather comprehensive way. However, our analysis is again done in an international and European context. This we do because we are acutely aware of the fact that there are globally and internationally serious efforts to improve the way corporations are governed as the GFC illustrated countries’ interdependence on each other.

In this second edition we have not changed our basic approach. The book still aims at providing the reader with a thorough understanding of the German corporate governance system. It offers an overview of German corporations law and explains the interrelationship among the various organs required for German public corporations. We have taken particular care to update the first edition by including all significant developments in the area of German corporate law and corporate governance since 2007.

The German system of employee codetermination is focussed on and analysed in detail in Chaps. 5 and 6. Chapter 6 deals with European developments in the area of corporate governance and how these developments impact on perceptions regarding

¹Bernhard Großfeld, ‘Loss of Distance: Global Corporate Actors and Global Corporate Governance – ‘Internet v Geography’ (2000) 34 *The International Lawyer* 963; Bernhard Großfeld ‘CyberCorporation Law: Comparative Legal Semiotics/Comparative Legal Logistics’ (2001) 35 *The International Lawyer* 1405.

²We point out in 5.2, 5.3.2 and 5.3.6.4 that Germany recovered fast and thoroughly from the global financial crisis (GFC) of 2007–2008.

the German two-tier board system and codetermination. There were so many European developments and their potential impact on German corporate law and German corporate governance were so significant that Chap. 6 was virtually rewritten to reflect these important developments. We have also expanded Chap. 7, dealing with accounting as the documentary proof of good corporate governance.

In the first edition (Chap. 8) we have dealt with the dominant role played by the German banks in controlling some of the company organs of large corporations. Several significant developments took place in recent times, which required a considerable expansion of Chap. 8. The focus of that chapter is now wider, dealing generally with the German financial sector, global capital markets and corporate finance and governance. Chapter 9 is a new chapter written by Matthias Casper, a new co-(author), dealing with the very important question of corporate governance compliance in Germany. Finally we reveal corporate governance developments in the European Union (EU), the OECD Principles of Corporate Governance, and corporate governance in selected jurisdictions (the United States, the United Kingdom and Australia) in Chap. 10.

We are of the opinion that this second edition is even more relevant to managers and directors of companies who want to understand German corporate law and the German corporate governance model. The reason for this is that there were remarkable developments in the area of German corporate law and corporate governance since 2007. In addition, the European and international perspectives we bring are getting more and more important in a globalised and internationalised world. In particular, as markets open and German companies become increasingly more attractive to international investors, a proper understanding of German corporate law and corporate governance becomes almost indispensable to all entrepreneurs investing in global markets. This ongoing world wide debt crisis emphasises the importance of our approach even further. We are also of the opinion that especially postgraduate students studying European business will find the book an easy reference to German corporate law and corporate governance, discussed within a broader European and international context. The analytical and critical nature of the research undertaken for this book will be apparent to scholars and others interested in the areas of corporate law and corporate governance.

We are still confident to repeat the claim that we made in the first edition, namely that this book still provides one of the most comprehensive and in-depth discussions in English of the German corporate law and corporate governance system.

The Authors

Abbreviations

AAK	Arbeitskreis Aktien und Kapitalmarktrecht
AASB	Australian Accounting Standards Board
ABSs	asset-backed securities
AcP	Archiv für die civilistische Praxis
ADHGB	Allgemeines Deutsches Handelsgesetzbuch
AEUV	Vertrag über die Arbeitsweise der Europäischen Union
AG	Aktiengesellschaft (primarily in text)
AG	Die Aktiengesellschaft (Zeitschrift) (in footnotes)
AGs	Aktiengesellschaften
AICPA	American Institute of Certified Public Accountants
AIFRS	Australian Equivalents to IFRS
AIG	American International Group
AIMA	Australian Investment Managers' Association
AJCL	American Journal of Comparative Law
AktG	Aktiengesetz
ALI	American Law Institute
AMEX	American Stock Exchange
ArbRB	Arbeits-Rechts-Berater
ASIC	Australian Securities and Investments Commission
ASX	Australian Securities Exchange
BaFin	Bundesanstalt für Finanzdienstleistungsaufsicht
BB	Der Betriebs-Berater (Zeitschrift)
BeckRS	Beck-Rechtsprechung (Rechtsprechungssammlung in beck-online)
BetrVG	Betriebsverfassungsgesetz (1952)
BGB	Bürgerliches Gesetzbuch
BGBI.	Bundesgesetzblatt
BGH	Bundesgerichtshof
BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen

BilMoG	Gesetz zur Modernisierung des Bilanzrechts
BKR	Zeitschrift für Bank und Kapitalmarktrecht
BOFI	banks and other financial institutions
BVerfG	Bundesverfassungsgericht
BverfGE	Entscheidungen des Bundesverfassungsgerichts
CCO	company compliance officer
CCZ	Corporate Compliance Zeitschrift
CDOs	collateral debt obligations
CDSs	credit default swaps
CESR	Committee of European Securities Regulators
CGAA	Consultative Group on Audit and Accounting
CGC	Corporate Governance Council
CLERP	Corporate Law Economic Reform Programs
CNED	connected non-executive director
CRO	Chief Risk Officer
DAX	Deutscher Aktienindex
DB	Der Betrieb (Zeitschrift)
DGB	Deutscher Gewerkschaftsbund
DNotZ	Deutsche Notar-Zeitschrift
DPR	Deutsche Prüfstelle für Rechnungslegung
DStR	Deutsches Steuerrecht (Zeitschrift)
EBLR	European Business Law Review
EC	European Community
ECFG	European Corporate Governance Forum
ECJ	European Court of Justice
EC-Treaty	Treaty Establishing the European Community
EEA	European Economic Area
EEC	European Economic Community
EFG	Entscheidungen der Finanzgerichte
EFRAG	European Financial Reporting Advisory Group
EFTA	European Free Trade Agreement
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch
EGV	Vertrag zur Gründung der Europäischen Gemeinschaft
EMCA	European Model Company Act
EP	European Parliament
EU	European Union
EStG	Einkommensteuergesetz
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EWS	Europäisches Wirtschafts und Steuerrecht (Zeitschrift)
FASB	US Financial Accounting Standards Board
FAZ	Frankfurter Allgemeine Zeitung
Fed	Federal Reserve Bank, USA
FRC	Financial Reporting Council, UK
FSA	Financial Services Authority, UK

FTSE	Financial Times and London Stock Exchange index
GAAP	generally accepted accounting principles
GCGC	German Corporate Governance Code
GDP	gross domestic product
GDR	German Democratic Republic
GFC	global financial crisis
GmbH	Gesellschaft mit beschränkter Haftung
GmbHG	Gesetz betreffend die Gesellschaften mit beschränkter Haftung
GmbHR	GmbH-Rundschau (Zeitschrift)
GoB	Grundsätze ordnungsmäßiger Buchführung
HGB	Handelsgesetzbuch
HRefG	Handelsrechtsreformgesetz
IPRax	Praxis des internationalen Privat- und Verfahrensrechts (Zeitschrift)
IASC	International Accounting Standards Committee Foundation
IAS	International Accounting Standards
IASB	International Accounting Standards Board
ICB	Independent Commission on Banking, UK
ICCLR	International Company and Commercial Law Review
IFRS	International Financial Reporting Standards
IMF	International Monetary Fund
IStR	Internationales Steuerrecht (Zeitschrift)
JBl	Juristische Blätter
JZ	Juristenzeitung
KGaA	Kommanditgesellschaft auf Aktien
KGaAs	Kommanditgesellschaften auf Aktien
KonTraG	Gesetz zur Kontrolle und Transparenz im Unternehmensbereich
KSI	Krisen-Sanierungs- und Insolvenzberatung (Zeitschrift)
LQR	Law Quarterly Review
Ltd	Limited
Ltds	English private companies with limited liability
MaComp	Mindestanforderungen an die Compliance-Funktion und die weiteren Verhaltens-, Organisations- und Transparenzpflichten nach §§ 31 ff. WpHG für Wertpapierdienstleistungsunternehmen (MaComp) – BAFin-Rundschreiben 4/2010 (WA)
MiFID	EU Markets in Financial Instruments Directive / EU-Finanzmarkttrichtlinie
MitbestG	Mitbestimmungsgesetz (1976)
MoMiG	Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen
Montan-MitbestG	Montan-Mitbestimmungsgesetz (1951)
NASDAQ	National Association of Securities Dealers Automated Quotations

NCSC	National Companies and Securities Commission
NED	non-executive director
NJOZ	Neue Juristische Online Zeitschrift
NJW	Neue Juristische Wochenschrift
NYSE	New York Stock Exchange
NZA	Neue Zeitschrift für Arbeitsrecht
NZG	Neue Zeitschrift für Gesellschaftsrecht
ÖBA	Österreichisches Bankarchiv
OECD	Organisation for Economic Cooperation and Development
OJ	Official Journal
OwiG	Ordnungswidrigkeitengesetz
PLC	public limited company
Porsche SE	Porsche Societas Europaea
RabelsZ	Zeitschrift für ausländisches und internationales Privatrecht
RdA	Recht der Arbeit (Zeitschrift)
RGBl.	Reichsgesetzblatt
RIW	Recht der Internationalen Wirtschaft
RMBS	residential mortgage-backed securities
SBA	Small Business Act for Europe
SE	<i>Societas Europaea</i>
SEAG	Societas Europaea-Ausführungsgesetz-
SEBG	Gesetz über die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft
SEC	Securities and Exchange Commission, USA
SEEG	Gesetz zur Einführung der Europäischen Gesellschaft
SID	senior independent director
SIVs	structured investment vehicles
SMEs	small and medium-sized entities
SMPs	small and medium-sized practitioners
SOX	Sarbanes-Oxley Act 2002 (USA)
SPE	Societas Privata Europaea
SPVs	Special Purpose Vehicles – Zweckgesellschaften
StuW	Steuern und Wirtschaft (Zeitschrift)
TFEU	Treaty on the Functioning of the European Union
TSAR	Journal of South African Law
UK	United Kingdom
UMAG	Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts
USA	United States of America
VERDI	Vereinte Dienstleistungsgewerkschaft
VorstAG	Gesetz zur Angemessenheit der Vorstandsvergütung
VorstOG	Gesetz über die Offenlegung der Vorstandesvergütungen
VW	Volkswagen
VW AG	Volkswagenwerk Aktiengesellschaft

VW SE	Volkswagen Societas Europaea
WFBV	Statute on Formal Foreign Companies
WpDVerOV	Verordnung zur Konkretisierung der Verhaltensregeln und Organisationsanforderungen für Wertpapierdienstleistungsunternehmen
WPg	Die Wirtschaftsprüfung (Zeitschrift)
WpHG	Gesetz über den Wertpapierhandel – Wertpapierhandelsgesetz
WpÜG	Wertpapiererwerbs- und Übernahmegesetz
WM	Wertpapier-Mitteilungen, Zeitschrift für Wirtschafts und Bankrecht, Teil IV
XBRL	eXtensible Business Reporting Language
ZBB	Zeitschrift für Bankrecht und Bankwirtschaft
ZEuP	Zeitschrift für Europäisches Privatrecht
ZFA	Zeitschrift für Arbeitsrecht
ZGR	Zeitschrift für Unternehmens und Gesellschaftsrecht
ZHR	Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht
ZIP	Zeitschrift für Wirtschaftsrecht (früher: Zeitschrift für die gesamte Insolvenzpraxis)
ZPO	Zivilprozessordnung
ZRP	Zeitschrift für Rechtspolitik
ZVglRWiss	Zeitschrift für Vergleichende Rechtswissenschaft

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