A comparative assessment of the prohibition for shareholders to seek recovery for reflective loss in light of a new typology of remedies: *both ends burning*?

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Overview

- Reflective loss recovery: prohibition and rationales
- Comparative overview
- Comparative analysis
- Subjective and objective remedies
- Comparative assessment

Enforcement -> standing
Reflective loss recovery

- Prohibition for shareholders to recover for reflective losses
  - What is reflective loss?
  - Who is the proper plaintiff?
  - Rationales:
    - Double recovery → let’s concentrate
    - Governance (distribution of powers) → let’s make an exception
    - Creditor protection → derivative action (not personal action)
  - **Cogency** of the rationales
Comparative overview

• UK
  o Company loss -> company/derivative action
  o Personal loss -> personal action
    • BUT: bar to reflective loss
    • YET: unfair prejudice petition, with narrow scope
  o No distinction between remedies

• Belgium
  o Damages
    • Company loss -> company/derivative action
    • Personal loss -> personal action
  o Avoidance of board decisions: every interested party
Comparative overview

• Germany
  o Damages
    • Company loss -> company/derivative action
    • Personal loss -> personal action
  o Avoidance of board decisions
    • No analogy with general meeting decisions, so shareholder cannot sue individually
    • Exception: Holzmüller
Comparative analysis

- UK: no distinction between remedies
- Belgium: distinction between remedies, also in terms of standing
- Germany: distinction between remedies, however not in terms of standing

Can bar to reflective loss be disapplied with respect to certain remedies?
Typology of remedies

Objective remedies

Subjective remedies

Erga omnes

Bilateral
Subjective and objective remedies and the bar to reflective loss

• Rationales
  o Double recovery
  o Governance  \( \rightarrow \) un persuasive
  o Creditor protection

• Cogency

• Comparative assessment
Thank you!
Questions?

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