1

Introduction

A. Creditor protection – a focal point of current developments

1. *The* Centros *case: from Denmark to Delaware*

In any future account of the history of European company law the *Centros* case[1] will take a pride of place as one of those cases that deserve the epithet 'seminal'. The case concerned a Danish couple who wanted to set up a business in Denmark, but did not want to use a Danish corporate vehicle. Instead they bought a shelf-company registered in England. When the Danish authorities refused to register their (single) place of business as the Danish branch office of the English company, the couple appealed successfully to the European Court of Justice. The Court accepted the argument that a company formed under the laws of one Member State with a view to carrying on its business exclusively in another Member State had a right to do so under the principle of freedom of establishment enshrined in Articles 43 and 48 of the EC Treaty.

The *Centros* decision came as a surprise to many lawyers in Germany, and for a short time it engendered an intense debate whether or not it would force them to abandon a doctrine of German domestic law known as the 'theory of the real seat'.[2] Its conformity with Community law had previously been widely assumed on the basis of an earlier decision by the European Court of Justice in *The Queen v HM Treasury, ex parte Daily Mail and General Trust plc*.[3] Against the seemingly unassailable authority of that case, even scholars who had previously

[1] *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459.

[2] Initial conclusions about the implications of the case on German law ranged from 'straightforward abolition of the theory of the real seat' (*Wienand Meilicke* in a case note on *Centros*, DB 1999, 627) to 'irrelevant for Germany, because Denmark's domestic law does not follow the theory of the real seat' (*Peter Kindler*, 'Niederlassungsfreiheit für Scheinauslandsgesellschaften? – Die 'Centros'-Entscheidung des EuGH und das internationale Privatrecht', NJW 1999, 1993). The German discussion is summed up by *Werner Ebke*, '*Centros* – Some Realities and Some Mysteries', 48 American Journal of Comparative Law 623 (2000).

[3] [1988] ECR 5483.

thought that the theory of the real seat was incompatible with Community law felt reluctantly that the European Court had decided otherwise.[4] Arguably, however, the near-universal German understanding of *Daily Mail* as confirming the theory of the real seat was coloured by a slightly misleading German translation of that judgment, and by the fact that German lawyers were all too willing to read the case through their specific doctrinal lens, which had been shaped by the previous debate in Germany.[5] Before *Centros*, German courts had been confronted with similar cases involving companies incorporated under English law, but carrying on business in Germany, and they had used these cases as opportunities to reinforce their doctrine of the real seat, while refusing to refer the issue to the European Court of Justice.[6] After *Centros*, a reference from a German court would only be a matter of time. It duly came with *Überseering BV v Nordic Construction Company Baumanagement GmbH*.[7] Although this decision did not outlaw the theory of the real seat as such, arguably allowing Member States to prevent the cross-border movement of companies formed under their own law,[8] the European Court of Justice put an end to all reasonable doubt that Member States cannot normally invoke the theory to stave off companies registered elsewhere within the European Union. Moreover, attempts to interpret *Überseering* restrictively as requiring only the recognition of the existence, status and capacity of the foreign company, but leaving the host Member State free to impose its own law on the

[4] Cf. in particular the article by *Peter Behrens*, 'Niederlassungsfreiheit und Internationales Gesellschaftsrecht', RabelsZ 52 (1988), 498, notably at 517 ff., with his later comment 'Sind Gesellschaften Niederlassungsberechtigte minderen Rechts?', EuZW 1991, 97; see also *Otto Sandrock*, 'Sitztheorie, Überlagerungstheorie und der EWG-Vertrag: Wasser, Öl und Feuer', RIW 1989, 505 at 511; *Brigitte Knobbe-Keuk*, 'Umzug von Gesellschaften in Europa', ZHR 154 (1990), 325 at 332.

[5] *Harald Halbhuber*, Limited Company statt GmbH? – Europarechtlicher Rahmen und deutscher Widerstand (2001), 29 ff.

[6] BayObLG 21.3.1986, NJW 1986, 3029 (denying an obligation to refer the case to the ECJ on the basis of *CILFIT Srl v Ministro della Sanità* [1982] ECR 3415); OLG Oldenburg 4.4.1989, NJW 1990, 1422; KG (OLG Berlin) 13.6.1989, NJW 1989, 3100.

[7] [2002] ECR I-9919.

[8] Cf. *Überseering* (fn. 7), para. 66–70 and 81, citing *Daily Mail* [1988] ECR 5483, para. 19–20 and 23. Reading the judgment to this effect was promoted by some German commentators, e.g. *Stefan Leible / Jochen Hoffmann*, '"Überseering" und das (vermeintliche) Ende der Sitztheorie', RIW 2002, 925 at 930 ff.; yet doubted by others, e.g. *Daniel Zimmer*, 'Wie es Euch gefällt? Offene Fragen nach dem Überseering-Urteil des EuGH', BB 2003, 1. The compatibility of such restrictions with the freedom of establishment is called into question in a case currently before the ECJ: C-210/06 (*Cartesio*).

internal and external relations of the company via its choice of law rules,[9] were hard to maintain after the subsequent decision of the European Court of Justice in *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd*,[10] where the Court held that a Dutch statute applying the domestic rules on minimum capital and directors' liability to a company registered in the United Kingdom, while recognising the legal personality granted by the law of incorporation, was nevertheless incompatible with the freedom of establishment guaranteed by Articles 43 and 48 of the EC Treaty.

What was it that German lawyers had found so appealing about the theory of the real seat? In essence, the theory is a rule of private international law that a company will be treated according to the law of its central place of management (the 'real seat'), notwithstanding that it may have been incorporated in a different jurisdiction. If the company has not complied with the formal requirements of registration in the jurisdiction of its real seat, it will normally lack the quality of a legal person there. The aim of the theory is to preserve national company law as a policy instrument in areas like creditor protection, by imposing a blanket ban on 'pseudo-foreign companies', i.e. companies doing business mainly or exclusively in one jurisdiction, but evading local regulation there by incorporating abroad. Hence, as long as Germany was allowed to shield behind the theory, German entrepreneurs wishing to set up a business in Germany had to accept whatever strings were attached to forming a company under German law.

Now, the freedom of establishment enshrined in the EC Treaty requires all Member States to accept as a rule of private international law what is known as the 'theory of incorporation', under which the law applicable to a company is the law of its (chosen) jurisdiction of incorporation. In many respects this new development within the European Union resembles a system which has long been in operation within the United States. It opens up the possibility of a 'market for incorporations', where entrepreneurs can shop around Europe to choose whatever legal regime they like best for setting up their company.[11]

9 *Kurt Lipstein*, 'The Law relating to the movement of companies in the European Community', in: Festschrift für Erik Jayme (2004), 527 at 530; *Peter Kindler*, 'Auf dem Weg zur Europäischen Briefkastengesellschaft?', NJW 2003, 1073 at 1077–1078.

10 [2003] ECR I-10155.

11 See already *Brian Cheffins*, Company Law (1997), 421 ff. (describing the situation in the US) and 426 ff. (pondering portability to the EU).

Consequently, 'regulatory competition' ('*Wettbewerb der Rechtsordnungen*', as it is put in German) has become a much debated topic.[12]

However, the choice element inherent in such a system has also made it the target of vocal criticism, which, as far as the American discourse is concerned, is indelibly associated with the name of William Cary. In a 1974 article,[13] which was to become one of the most-cited articles in the history of the Yale Law Journal[14] and said to have had 'the impact of a firecracker in a hornets' nest',[15] he coined the phrase 'Delaware syndrome' and called it a 'race for the bottom', arguing that state legislators were undercutting each other in a competition to please corporate decision-makers to the detriment of other interest groups. His article has sparked an ongoing debate in the United States about the virtue or vice of, respectively, uniform corporate law rules (advocated by Cary) and its opposite, federalism, where the states retain the power to legislate on matters of corporate law. Cary's argument and most of the American debate ever since has centred on the conflict of interest between shareholders and managers in large publicly quoted companies, and issues of creditor protection hardly come to the fore.[16] In the aftermath

[12] See generally *Daniel C. Esty / Damien Geradin* (eds.), Regulatory Competition and Economic Integration – Comparative Perspectives (2001), and more specifically the article in this volume by *Simon Deakin*, 'Regulatory Competition versus Harmonization in European Company Law', at p. 190; *Eva-Maria Kieninger*, Wettbewerb der Privatrechtsordnungen im Binnenmarkt (2002); *idem*, 'The Legal Framework of Regulatory Competition Based on Company Mobility: EU and US Compared', 6 German Law Journal 741 (2005), available at www.germanlawjournal.com/article.php?id=590; *John Armour*, 'Who Should Make Corporate Law? EU Legislation versus Regulatory Competition' (2005) 58 Current Legal Problems 369; *Robert Drury*, 'A European Look at the American Experience of the Delaware Syndrome' [2005] JCLS 1; *Martin Gelter*, 'The Structure of Regulatory Competition in European Corporate Law' [2005] JCLS 247; *Horst Eidenmüller*, 'Die GmbH im Wettbewerb der Rechtsformen', ZGR 2007, 168; for a German contribution before *Centros* see *Hanno Merkt*, 'Das Europäische Gesellschaftsrecht und die Idee des "Wettbewerbs der Gesetzgeber"', RabelsZ 59 (1995), 545, whose analysis is, however, severely criticised by *Halbhuber* (fn. 5.) 183 ff.

[13] 'Federalism and Corporate Law: Reflections Upon Delaware', 83 Yale Law Journal 663 (1974).

[14] *Fred R. Shapiro*, 'The Most-Cited Articles from *The Yale Law Journal*', 100 Yale Law Journal 1449 (1991), ranking the article as ninth in citations between January 1985 and August 1989 (at 1464), even though by then more than ten years had passed since its publication.

[15] Commentary by *John C. Coffee, Jr.* (fn. 14, at 1498).

[16] Some believe that there is no need at all for legislative protection of creditors, see *Frank Easterbrook / Daniel Fischel*, 'The Corporate Contract', 89 Columbia Law Review 1416 (1989): 'For debt investors . . . everything (literally) is open to contract' (at 1418). In contrast *Lucian Bebchuk*, 'Federalism and the Corporation: The Desirable Limits on State

of *Centros*, however, the powerful image of the 'race for the bottom' has been taken up in Europe, as fears about an erosion of standards of creditor protection, in particular, have been voiced – especially in Germany.

An obvious difference between English company law on the one hand and German company law on the other is that the former has never known a minimum capital requirement for private companies.[17] This appears to be attractive for some entrepreneurs, and in *Centros* the applicants left no doubt that their reason for choosing England as the jurisdiction of incorporation was to avoid Danish rules on minimum capital. In terms of policy, minimum capital rules may not be all that important as an instrument of creditor protection. It has been said that 'the symbolic significance of this issue for the (supposed) modernisation of corporate law far exceeds its economic relevance'.[18] Yet it seems that precisely this symbolic value of a 'headline figure', easy to grasp for lawyers, business people and politicians alike, has been the main driver behind the debate about competition among the Member States in the field of company law.

2. *The European regulation on insolvency proceedings*

In a curious twist of legal history, at around the same time as the European Court of Justice demolished the theory of the real seat, efforts were under way to adopt a new piece of EC legislation in a closely related field, viz. the Insolvency Regulation.[19] Nothing indicates that the contemporaneous development in the case law had any direct impact on the drafting of the Regulation. On the contrary, the Regulation took over, more or less without any substantive changes, the text of the failed

Competition in Corporate Law', 105 Harvard Law Review 1435 (1992) argues against state competition in respect of creditor protection (at 1489–1490) and points out that the federal Bankruptcy Act, i.e. corporate insolvency law, provides rules that protect the interests of creditors (at 1495).

17 The minimum capital requirement of £50,000 in s. 763 CA 2006 only relates to public companies; it is a requirement under Article 6 of the Second Company Law Directive (77/91/EEC), OJ L 26 of 31.1.1977, p. 1. This directive has never been extended to private companies, not least due to resistance from the UK: *Vanessa Edwards*, EC Company Law (1999), 53–55.

18 *Horst Eidenmüller / Barbara Grunewald / Ulrich Noack*, 'Minimum Capital in the System of Legal Capital', in: *Marcus Lutter* (ed.), Legal Capital in Europe (2006), 17 at 30.

19 Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160 of 30.6.2000, p. 1.

European Insolvency Convention,[20] which goes back to a time when it seems to have been unchallenged wisdom among European lawmakers that the theory of the real seat was here to stay. So entrenched was the defence of the theory in some Member States, and the belief in its compatibility with primary Community law, that even as late as April 1998 (less than a year before *Centros*), a senior official from the European Commission informed the audience at a conference in Bonn that the Commission had no plans to introduce legislation with a view to forcing Member States to relinquish it.[21]

Under the Insolvency Regulation, insolvency proceedings are governed by the law of the insolvency forum (Article 4), and the insolvency forum is determined according to the 'centre of a debtor's main interests' (Article 3). This 'centre of a debtor's main interests' or COMI (as it is known colloquially) represents a kind of re-incarnation of the old idea of the 'real seat',[22] albeit with a rebuttable presumption that the centre of a company's main interests is situated at its registered office. Concerns have been voiced about the ambiguity of the COMI standard.[23] Moreover, there appears to be some scope for forum shopping, notwithstanding that the Regulation aims at preventing it.[24]

Still, taken together, the case law under Articles 43 and 48 of the EC Treaty and the Insolvency Regulation create an intriguing bifurcation as regards the private international law framework for creditor protection. On the one hand, freedom of establishment, as interpreted by the European Court of Justice, requires all Member States to accept the law of the Member State of incorporation in matters properly characterised as company law, including, arguably, capital maintenance and directors' duties.[25] On the other hand, in all matters properly characterised as

[20] Convention on Insolvency Proceedings of 23 November 1995 (Council Document CONV/INSOL/X1), reprinted as Appendix 2 in *Paul Omar*, European Insolvency Law (2004).

[21] *Giuseppe Di Marco*, 'Der Vorschlag der Kommission für eine 14. Richtlinie', ZGR 1999, 3 at 4–6.

[22] Recital 13 of the Regulation; Virgos/Schmidt-Report on the Insolvency Convention para. 75 (with reference to the company's 'head office').

[23] *John Armour*, 'Who Should Make Corporate Law? EU Legislation versus Regulatory Competition' (2005) 58 Current Legal Problems 369, at 404.

[24] *Horst Eidenmüller*, 'Free Choice in International Company Insolvency Law in Europe' [2005] EBOR 423, at 428; *Luca Enriques / Martin Gelter*, 'Regulatory Competition in European Company Law and Creditor Protection' [2006] EBOR 417, at 436 ff.

[25] Cf. the ECJ's reference to the 'functioning' of the company in *Überseering* [2002] ECR I-9919, para. 81. For the position of English law see *Arab Bank Plc v Merchantile Holdings Ltd* [1994] Ch. 71, holding that s. 151 CA on the prohibition of financial assistance by a

insolvency law (of which Article 4 of the Regulation contains a non-exhaustive list), the Insolvency Regulation allows and indeed requires each Member State to apply its domestic law to all companies which have their 'centre of main interests' within its territory, even though a company may have been incorporated in another Member State. While, under EC rules, the distinction between company law and insolvency law has been elevated to a question of law, the substantive national rules on creditor protection have typically evolved in response to domestic fact situations, and as long as Member States could rely on the theory of the real seat, they did not have to worry about whether protection would be effected through mechanisms of company law or insolvency law. Thus, the newly established European framework for the conflict of laws may upset delicate balances between company law and insolvency law. Moreover, notwithstanding the list of insolvency law matters in Article 4 of the Insolvency Regulation, there remains a grey area with anything but general agreement among the Member States on where to draw the line between company law, insolvency law, and possibly other categories such as the law of delict: English-style wrongful trading and its German counterpart, *Insolvenzverschleppungshaftung* (liability for delayed filing for insolvency), present an excellent illustration, on which more will be said in chapter 5.

3. *The interconnectedness of company law and insolvency law*

Whereas the new European legal framework clearly creates some difficulties with respect to delineating the realms of company law and insolvency law, it is equally important to bear in mind that company law and insolvency law go hand in hand and complement each other with a view to protecting the creditors of limited liability companies.[26] Company law and insolvency law do not operate as two islands with no bridges between them. Yet if one takes a parallel look at the landscapes mapped out by the respective legal discourses in England and Germany, one cannot help but realise that the islands appear markedly different in size. As a preliminary point to this, it is pertinent to enquire into the

subsidiary company does not extend to a subsidiary company incorporated abroad; *Dan Prentice*, 'The Incorporation Theory – The United Kingdom' [2003] EBLR 631; *Harry Rajak*, 'The English Limited Company as an Alternative Legal Form for German Enterprise', EWS 2005, 539 at 544; *Dicey, Morris & Collins*, Conflict of Laws (14th edn 2006), ch. 30.

26 On 'unbundling' and 'packaging' company and insolvency law in the context of choice of forum see *Horst Eidenmüller*, 'Free Choice in International Company Insolvency Law in Europe' [2005] EBOR 423, at 434 ff.

respective usage of the notions of '**creditor protection**' and '**Gläubigerschutz**', and to reflect on whether the use of the English term 'creditor protection', as the literal translation of '*Gläubigerschutz*', provides a sufficiently neutral ground.

'*Gläubigerschutz*' has long been a standard topic in the analysis of company law in the literature of German-speaking countries. A search in two databases[27] reveals that within the present decade at least twenty-six monographs have been published in Germany which carry the word '*Gläubigerschutz*' in their main title and discuss the topic in the context of company law.[28] A German textbook refers to '*Gläubigerschutz*' as a 'classic task' of company law.[29]

[27] At www.buchhandel.de (a search engine provided by German publishing companies) and at www.obvsg.at/kataloge/verbundkataloge (the electronic catalogue of the Austrian university libraries).

[28] In chronological order: *Andreas Lenz*, Gesellschafter- und Gläubigerschutz bei dem Formwechsel einer OHG in eine GmbH (2000); *Miriam A. Parmentier*, Gläubigerschutz in öffentlichen Unternehmen (2000); *Lars Franken*, Gläubigerschutz durch Rechnungslegung nach US-GAAP (2001); *Krzysztof Oplustil*, Gläubigerschutz durch reale Kapitalaufbringung im deutschen und polnischen Recht der Kapitalgesellschaften (2001); *Jens Petersen*, Der Gläubigerschutz im Umwandlungsrecht (2001); *Thomas Theißen*, Gläubigerschutz bei der Spaltung von Gesellschaften nach dem Umwandlungsgesetz (2001); *Alexander Veith*, Der Gläubigerschutz beim Formwechsel nach dem Umwandlungsgesetz (2003); *Edward Renger*, Gläubigerschutz durch § 32a GmbH (2004); *Tobias Schönbeck*, Bankenrechnungslegung nach IAS/IFRS – Gläubigerschutz durch Information? (2004); *Tobias Böckmann*, Gläubigerschutz bei GmbH und close corporation (2005); *Helke Drenckhan*, Gläubigerschutz in der Krise der GmbH (2005); *Markus E. Krüger*, Mindestkapital und Gläubigerschutz (2005); *Alexander Müller*, Gläubigerschutzkonzepte bei Sachgründung und Umwandlungsgründung einer GmbH (2005); *Ellen Reinbach*, Gläubigerschutz gegen den Mißbrauch einer private limited company – Eine Darstellung anhand einer Gesellschaft des englischen Rechts mit Sitz in Deutschland nach Inspire Art (2005); *Oliver Böttcher*, Gesellschafter- und Gläubigerschutz beim Formwechsel aus der Personen- in die Kapitalgesellschaft (2006); *Truls Hebrant*, Beihilferechtswidrige Gesellschaftsbeteiligungen und Gläubigerschutz (2006); *George Jugeli*, Der Gläubigerschutz bei der Umwandlung juristischer Personen (2006); *Claus M. Mössle*, Gläubigerschutz beim Zuzug ausländischer Gesellschaften aus der Sicht des englischen Rechts (2006); *Eike Th. Bicker*, Gläubigerschutz in der grenzüberschreitenden Konzerngesellschaft (2007); *Christian Gloger*, Haftungsbeschränkung versus Gläubigerschutz in der GmbH (2007); *Tobias Nikoleyczik*, Gläubigerschutz zwischen Gesetz und Vertrag (2007); *Katharina Röpke*, Gläubigerschutzregime im europäischen Wettbewerb der Gesellschaftsrechte (2007); *Holger Seeberg*, Der Gläubigerschutz bei (Schein-)Auslandsgesellschaften mit Verwaltungssitz in Deutschland am Beispiel der Private Limited Company by Shares aus Irland (2007); *Beate Stirtz*, Gläubigerschutz bei der englischen Limited im Vergleich zur GmbH (2007); *Andreas Stoll*, Garantiekapital und konzernspezifischer Gläubigerschutz (2007); *Stefan Weiß*, Aktionärs- und Gläubigerschutz im System der echten nennwertlosen (Stück-)Aktie (2007).

[29] *Friedrich Kübler / Heinz-Dieter Assmann*, Gesellschaftsrecht (6th edn 2006) § 14 III 2 b (p. 179): '*klassische Aufgabe*'.

In contrast, the terms 'creditor protection' or 'protection of creditors' have been less prominent in England. A similar search in the on-line catalogue of the Squire Law Library at Cambridge University yielded not a single hit, and a search in the on-line catalogue of the Oxford Libraries Information System came up with a book published in the United States in 1912[30] and a recent Ph.D. thesis by a Greek scholar.[31] Most textbooks do not feature a separate chapter on the topic,[32] and many do not even carry the term in their subject index. Company lawyers tend to discuss the matter under various separate headings such as 'directors' duties owed to creditors',[33] 'maintenance of capital',[34] and 'company charges'[35] (an issue which German lawyers never discuss as part of company law, but as part of property law, the law being the same for companies and for individuals). Thus, for 'creditor protection' to be the core notion in this book might be seen as already tilting the scales slightly towards the German side. Recent scholarly writing in English has, however, accentuated the idea of 'creditor protection' as a subject worthy of inquiry in its own right,[36] although the term is still not used nearly as widely as in the German discourse. Nevertheless, the present study relies on this development to argue that creditor protection, which will be used from now on without giving the German word in brackets, can be seen as a sufficiently neutral term.

The prominent role that the topic of creditor protection has traditionally occupied in German company law scholarship goes hand in hand with a curious disregard for insolvency law. In retrospect, it is amazing how many volumes – quite literally – German company lawyers have managed to write on creditor protection without ever touching on the subject of insolvency law. Several observations are pertinent here.

30 *Arthur K. Kuhn*, A Comparative Study of the Law of Corporations: With Particular Reference to the Protection of Creditors and Shareholders (New York: Columbia University, 1912).

31 *Dimitrios Ph. Christodoulou*, The Single Ship Company: The Legal Consequences From Its Use and the Protection of its Creditors (Athens: Ant. N. Sakkoulas, 2000).

32 For an exception see *Paul Davies*, Gower's Principles of Modern Company Law in its 6th edition, Part Six of which was entitled 'Shareholder and Creditor Protection'; but this has disappeared since the 7th edition.

33 See, for instance, *Gower & Davies*' Company Law (7th edn 2003), 372–374. With the arrival of the Companies Act 2006, this discussion has moved into a slightly different context, viz. the directors' duty to promote the success of the company (s. 172); see now *Gower & Davies*' Company Law (8th edn 2008), 519–523.

34 Ibid. 8th edn 2008, ch. 13.

35 Ibid., ch. 32.

36 *Brian Cheffins*, Company Law (1997), ch. 11; *Paul Davies*, Introduction to Company Law (2002), ch. 3 and 4; *Kraakman et al.*, Anatomy of Corporate Law (2004), ch. 4.

In England, the connection between company law and corporate insolvency law has long been evident, not least in the legislative history. The 'Insolvency Act 1986', despite this being its official short title (s. 444 IA), does not only apply to insolvencies; it is an 'Act to consolidate the enactments relating to company insolvency and winding up (including the winding up of companies that are not insolvent, and of unregistered companies)'. The combination of the 'winding up' (compare the German term '*Abwicklung*') of both solvent and insolvent companies goes back to the earliest 'Companies Winding Up Acts' of the mid-nineteenth century,[37] which were consolidated, for the first time, in the Companies Act 1862. The provisions on company insolvency remained part of subsequent Companies Acts,[38] before the Insolvency Act 1986 took over all the provisions on company insolvency from the Companies Act 1985. At the same time, the insolvency of individuals, i.e. natural persons, was treated entirely separately.[39] This explains why, in contrast to the terminology in the United States, the term '**bankruptcy**' in English legal parlance is strictly limited to the insolvency of individuals. Unsurprisingly, the linkage of company law and insolvency law is reflected in the legal literature. Standard texts on company law invariably deal with wrongful trading (s. 214 IA),[40] and many carry chapters outlining corporate insolvency.[41] Numerous company lawyers have also written on insolvency law,[42] whereas recent

[37] The first such act was 7 & 8 Vict. c. 111, passed on the same day in 1844 as the famous act which introduced the incorporation of companies through registration.

[38] Companies (Consolidation) Act 1908; Companies Act 1929; Companies Act 1948; Companies Act 1985.

[39] Bankruptcy Act 1869; Bankruptcy Act 1883; Bankruptcy Act 1914. There were occasional cross-references from the company insolvency regime to the bankruptcy regime for individuals, notably s. 320 of the Companies Act 1948, whose effect it was to make the rules on fraudulent preferences laid down in s. 44 of the Bankruptcy Act 1914 applicable to company insolvencies as well.

[40] E.g. *Gower & Davies* (fn. 33, 8th edn 2008), 217–224; *Pettet*, Company Law (2nd edn 2005), 33–37.

[41] E.g. *Sealy / Worthington*, Cases and Materials in Company Law (2007), ch. 14; *Hannigan*, Company Law (2003), whose Part VII on 'Corporate Insolvency and Rescue' runs to five chapters with more than 160 pages.

[42] *Robert Pennington* has produced textbooks on both subjects: 'Pennington's Company Law' (8th edn 2001) and 'Pennington's Corporate Insolvency Law' (2nd edn 1997); *Len Sealy* is the author of 'Cases and Materials in Company Law' (7th edn 2001; 8th edn 2007, together with *Sarah Worthington*) and, together with *David Milman*, of an 'Annotated Guide to the Insolvency Legislation' (10th edn 2007); the title and location of *Dan Prentice's* article 'The Effect of Insolvency on Pre-Liquidation Transactions', in: *Ben Pettet* (ed.), Company Law in Change (1987) is in itself testimony to this cross-over thinking. Other writers with publications on both subjects include (without any claim to