permitted to have been cast in this manner and is therefore invalid. This then affects the resolution adopted if the objected-to votes were relevant for reaching majority support for the resolution.

Of course, the scope of this solution is difficult to define in general terms. A prime example of this, for which there are precedents in cases from both the U.S. and Germany,[90] is represented by so-called **starving out the minority** where the majority, who is able to protect its financial interests in another manner, stops dividends from being paid out for a longer period of time. If the individual shareholder is protected against a formal abandonment of the company's interest in profits (see I 2 a, p. 116 above), then the shareholders cannot be deprived of this right through the back door. However, German corporate law provides special rules for this purpose intended to ensure the shareholder a reasonable dividend both in relation to the net income for the year as well as to the common rate of return (sections 58 (2), 245 (1) AktG and in particular corporate group related equalisation measures for the benefit of external shareholders). A violation of these rules likewise represents grounds for a challenge.

A second characteristic example is the exploitation of company business opportunities (**corporate opportunities**) by (primarily: managing) majority shareholders for their own benefit and through competition with the company as well.[91]

However, on the whole when seeking to define the duty of loyalty more precisely, one must rely on case law history which does not readily lend itself to making generalities. Because the ground for a challenge is a breach of the duty of loyalty, the shareholder asserting the challenge must present the justification for such and fundamentally must prove this as well. This disadvantage in the assignment of roles before the court is made worse because the concept of a breach of the duty of loyalty is to a certain extent accompanied by a subjective analysis. This means that the corresponding subjective characteristics on the part of the person who owes the duty, such person's intent or motives, are also potentially part of the elements of the act or at least clarify it. This applies all the more in the case of fraud or the criminal law related offences of fraud or abuse of power of the majority (see, e. g. French law at 2, above). These types of self-serving or prejudicial motives may be present in relevant cases, however proving this is another matter altogether.

bb) Justification requirement. In light of this, it would amount to a quantum leap in the theoretical approach to substantive control of resolutions if one demands substantive justification for purposes of positively supporting the resolution. A special application for this – related to the **exclusion of subscription rights** on the part of existing shareholders in connection with a capital increase – may be derived from the law, namely from the norms set out in domestic corporate laws which in turn are based on the Capital Directive. Art. 29 (4) third sentence of the Directive provides that "a written report indicating the reasons for restriction or withdrawal of the right of pre-emption" must be presented to the general meeting (implemented for example in sections 186 (4) second sentence dAktG, 153 (4) second sentence öAktG). If one assumes that the explanation required for such purposes may not

[90] Dodge v. Ford Motor Co. 170 N.W. 668 (1919); OLG Nürnberg NZG 2008, 948; OLG Brandenburg ZIP 2009, 1955; for limited partnership BGHZ 132, 263. Additional citations in Fleischer, in: Bachmann et al. (eds.), Rechtsregeln für die geschlossene Kapitalgesellschaft, p. 33 fn. 49.

[91] Roth/Weller, Handels- und Gesellschaftsrecht, marginal no. 294 et seq.; Fleischer, NZG 2013, 361.

merely be empty phrasing, but rather must be substantively supported and correct, this must also be subject to external review in the case of a challenge to the resolution. In other words: The resolution needs a substantive justification ex ante and this must be reasserted and proved to be valid when the resolution is reviewed.[92] According to prevailing opinion in **Germany**, this is the case with regard to public limited companies[93] even if the CJEU has not held that the Capital Directive requires this but rather viewed this as merely a permissible tightening of the rules.[94] The same applies in the case of the private limited company.[95]

Swiss law – not bound by the Capital Directive – from the outset only permits the suspension of subscription rights on important grounds and directly subjects such an exclusion to the limitation that no one may be improperly benefitted or disadvantaged as a result (Art. 652 b (2) OR, applied to the private limited company via Art. 781).[96] As a result, by means of a challenge to the resolution, the outvoted minority may in any event have the question of whether there is an important ground and whether their subscription rights were excluded without a proper reason reviewed,[97] although the issue of the allocation of roles in the challenge is hereby not yet resolved. Based on general principles, the company and/or the majority supporting the resolution at the least should have to substantiate the important grounds.

On the whole, the decisive differences between the requirement of justification and the breach of the duty of loyalty include that substantive control is targeted directly at the contents of the resolution, not first via the roundabout way of looking at individual votes. Secondly, it allows for a broader evaluation of the correctness of the decision made whereas the duty of loyalty provides a rather coarse-mesh framework for evaluation. Finally the burden of substantiation and burden of proof lie with the company and/or the majority[98] and subjective characteristics, even the awareness or perceptibility of a deficit in justification, do not matter.

The determinative question is now the extent to which this control instrument is subject to being **cautiously expanded** absent a statutory basis to apply in cases other than the specific circumstances referred to above. Even before the Capital Directive, and independent of the express reporting requirement, German corporate law saw the basis for the more stringent requirements needed to exclude subscription rights in the fact that this represents an especially serious encroachment on membership rights.[99] Accordingly, this may only involve measures that have a similarly high degree of relevance for membership. **Structural changes** are primarily mentioned in

[92] Roth/Altmeppen, GmbHG, § 47 marginal no. 127.

[93] BGHZ 71, 40; 83, 319; Hüffer, AktG, § 186 marginal no. 25; for Austria, see Doralt/Nowotny/Kalss, AktG, § 153 marginal no. 114.

[94] CJEU Case C-42/95, *Siemens/Nold*, (1996) ECR I 6017 = NJW 1997, 721; for a critical view, see Kindler, ZHR 158 (1994), 339.

[95] Roth/Altmeppen, GmbHG, § 55 marginal no. 24; Lutter, in: Lutter/Hommelhoff, GmbHG, § 55 marginal no. 17; Zöllner, in: Baumbach/Hueck, GmbHG, § 55 marginal no. 20.

[96] For details see Zindel/Isler, in: Basler Komm, 2012, Art. 652 b marginal no. 11 et seqq.; Meier-Hayoz/Forstmoser, Schweizerisches Gesellschaftsrecht, § 16 N 232.

[97] Art 706 Abs 2 Z 2 OR; Zindel/Isler, in: Basler Komm, 2012, Art 652 b marginal no. 25.

[98] See generally, Roth/Altmeppen, GmbHG, § 47 marginal no. 129; specifically regarding section 186 dAktG, see Hüffer, in: MüKoAktG, § 243 marginal no. 140; Lutter, in: Kölner Komm, AktG, § 186 marginal no. 99; Hirte, Bezugsrechtsausschluss und Konzernbildung, p. 221.

[99] Hüffer, AktG, § 186 marginal no. 25; Zöllner, AG 2002, 585.

this context.[100] For example it is no coincidence that French law requires the consent of all shareholders in order to change the nationality of the company (Art. L223-30 (1) CCom).

If on the other hand German law subjects the most drastic structural change for shareholders in the minority, the so-called squeeze out, to the discretion of an exceptionally **high majority requirement** of 95 % (section 327 a AktG, Austria 90 %), this suggests that such majority need not provide a substantive justification for this step. However, this does not apply to the same degree to other structural changes for which a qualified majority of only 75 % is likewise required (in German and in Austrian law). One could take the position that in the case of a transformation, merger or creation of corporate groups, the minority shareholder who opposes these measures can demand a substantive justification as is similarly the case for the delisting of a listed public limited company[101] for which the resolution of the shareholders needs only a simple majority according to prevailing opinion.[102] However, this is rejected by the prevailing opinion[103] in Germany which appears to be the pioneer in developing this form of substantive control of resolutions, whereby it also plays a role that the applicable statutory rules often offer the shareholder the alternative of leaving the company in exchange for reasonable compensation or other financial payments. The topic of tension between minority protection in the company and in the form of withdrawing from the company has thus been broached, see 4, below.

On the other hand, there are serious – and therefore subject to a qualified majority requirement – decisions below the level of structural changes which potentially encroach more deeply on the membership interest of the individual shareholder than such changes, for example a capital increase in exchange for a contribution with the grant of subscription rights in which the minority shareholder cannot participate due to a lack of funds. If one takes this into consideration, the potential scope of substantive control of resolutions expands further and its boundaries become fuzzier. However, tight limits are essential for the reasons indicated at the outset.

cc) Evaluation of interests. The justification required within this scope is, as stated in most of the literature, to be provided in the **interests of the company**.[104] However, this is an oversimplification in two regards. First, the interest of "the company" is nothing other than the aggregated interest of all parties with a stake in the company (shareholders and stakeholders) and thus is primarily that of (all) shareholders so that the conflict between majority and minority is simply not solvable by these means. Second, an interest being pursued by the majority may also be legitimate, for example if the majority in a private limited company wants to convert it into a public limited company so that the shares may be traded in the capital markets and in so doing not only procure additional equity for the company but also potentially permits shares to be sold on favourable terms. Accordingly, the

[100] Previously, Wiedemann, ZGR 1980, 147, 157; Martens, GmbHR 1984, 265.

[101] On the latter, see Hofmann, Minderheitsschutz im Gesellschaftsrecht, p. 559 et seq.; for a contrary opinion, see BGH ZIP 2003, 387; Klöhn, NZG 2012, 1041.

[102] BGH ZIP 2003, 387; subject to dispute.

[103] Lutter, ZGR 1981, 171; Hüffer, in: FS Fleck, 1988, p. 717; Henze, in: FS Boujong, 1996, p. 242.

[104] Hüffer, AktG, § 186 marginal no. 25; Arzt-Mergemeier, Der gesellschaftsrechtliche Minderheitenschutz, p. 190.

concept of a justification requires a comprehensive weighing of the interests as part of which fundamental decisions for the benefit of the business being conducted, its existence and future, perhaps frequently tip the scales, but are not necessarily decisive.

In German law there is a line of cases for justifying the exclusion of subscription rights which focuses on business goals related to financing, investment and strategic orientation.[105] This may be the need to gain a large investor for restructuring or expansion purposes or to convert debt to equity, to place shares in the capital markets, to enter into co-operations with other enterprises, to acquire certain assets as part of an in-kind capital increase,[106] however by contrast not to defend against or reduce disruptive equity holdings.[107] An illustrative example from Swiss law: "Important grounds include, in particular, the take-over of enterprises …. or equity holdings as well as offering equity holdings to employees." (Art. 652 b (2,2) OR).

At the same time, limitations of the judicial reexamination become clear in the accentuation on company politics: To the extent **business decisions** are involved here, company management, which regularly employs the exclusion of subscription rights in the pursuit of its goals, and the majority of the shareholders, which approves it, must be given a certain degree of discretion.[108] This is also subject to generalisation as a ground rule of substantive resolution control.

The complexity of the evaluation thus required here, just as is the case with the fundamental concerns regarding an over-expanded juridification of business decisions, in turn shows that an external substantive control of resolutions, as essential as it is as the final mechanism of effective minority protection, must remain limited in scope.

c) Excursus: Abusive action for avoidance. Facing a suit for avoiding a resolution may represent a large burden to the relevant company because it will delay implementing the resolution until the process has concluded due to the associated legal uncertainty or if it does so, implementation may be associated with significant liability risks. In the most important cases of an amendment to the company's statutes or structural changes, implementing the resolution is not even possible for an indefinite period because the **registry court** will refuse entry until the pending legal proceedings have been concluded. This may be associated with significant delays which are detrimental to the company in most cases or even defeat subsequent implementation entirely. For these reasons, the company itself may be inclined to end the proceedings quickly and quietly by attempting to achieve a withdrawal of the claim or a settlement even in cases where the company believes the chances of success for plaintiff to be low. **Professional claimants** may in turn take advantage of this to obtain a financial benefit by filing illegitimate actions and placing pressure on the company. This "business model" presents itself especially in the case of listed public limited companies where it is easy for the potential plaintiff to acquire a few shares at low cost ahead of the general meeting thereby obtaining the right to file suit.

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[105] Schockenhoff, Gesellschaftsinteresse und Gleichbehandlung beim Bezugsrechtsausschluss; Lutter, in: Kölner Komm, AktG, § 186 marginal no. 61; BGHZ 71, 40.

[106] See Hüffer, AktG, § 186 marginal no. 29 et seq., 34.

[107] See Hüffer, AktG, § 186 marginal no. 32; Lutter, in: Kölner Komm, AktG, § 186 marginal no. 71; Wiedemann, in: GroßkommAktG, § 186 marginal no. 161; BGHZ 33, 175.

[108] Hüffer, AktG, 186 marginal no. 36.

On the other hand, the company has the same or an even stronger incentive to shorten the process if it wants to eliminate a potentially legitimate suit for avoidance.

The potential for threat described here exists not only in the case of a substantive challenge to a resolution, but rather in the case of every challenge to a resolution for which there are enough opportunities to take advantage of procedural violations, or even potentially to induce them, within the thoroughly-regulated field of corporate law. However allowing substantive control of a resolution expands this spectrum and the associated legal uncertainty to a not insignificant degree.

A body of case law on the **abusive avoidance suit** has developed under German corporate law for purposes of preventing this tactic and protecting the company. According to these cases, a challenge is rendered invalid when the plaintiff is pursuing unrelated goals by means of the challenge, namely he wants to allow his right to sue to be "bought"[109] for personal financial gain regardless of whether the suit as such had merit. Apart from collateral liability to pay damages to the company, the legal consequence is that the suit is unfounded due to its abusive character and the objection to the resolution as such will not be subject to further review even if its justification could quickly and easily be determined and confirmed. This illustrates the dilemma that legitimate challenges whose success, for the sake of legitimacy, would be in the best interests of the company or at least that of the minority may be fended off with an accusation of abuse of rights.[110]

If one recognises that the discovery of existing defects in a resolution is principally a legitimate concern of minority protection regardless of the motive of the challenger, but also that the company should be protected against unfounded or wanton delays, the solution should more likely be sought on the path last taken by German lawmakers. For special cases, namely in section 246 a AktG for increases and decreases in capital as well as inter-company affiliation agreements, the German legislature introduced an **approval procedure** for purposes of advance entry in the registry in which the higher instance court suspends the blocking effect of the challenge suit following a cursory review and at the same time immunises it against a later positive assessment of the challenge to the extent the challenge appears to be obviously unfounded during the initial review or the disadvantages "to the company and its shareholders" so clearly outweigh the seriousness of the legal violation that a weighing of the interests commands approval. In effect, this practically introduced an expedited process in order to keep the delays associated with the challenge to a resolution as short as possible; at the same time the potential for abuse of the challenge suit is significantly reduced.

4. Withdrawal and exclusion of the minority

a) Purpose. The right of the minority shareholder to **separate himself** from the company and thereby from the superior strength of the majority is, as has been said,

[109] BGHZ 107, 296; BGH AG 2007, 625; KG ZIP 2011, 123; Hüffer, AktG, § 245 marginal no. 22 speaks of a "current wave of abuse"; contrary view in Baums/Drinhausen/Keinath, ZIP 2011, 2329; most recently Bayer/Fiebelkorn, ZIP 2012, 2181; Bayer/Hoffmann, ZIP 2013, 1193; Keinath, ZIP 2013, 1205.

[110] Critical for this reason, Roth/Altmeppen, GmbHG, § 47 marginal no. 143; Slabschi, Die sog. rechtsmissbräuchliche Anfechtungsklage; previously Mestmäcker, DB 1961, 951; Bokelmann, Rechtsmissbrauch des Anfechtungsrechts durch den Aktionär?; Roth, ZGR-Sonderheft 12, 1994, pp. 167, 181. See also, Seibert/Böttcher, ZIP 2012, 12, 14.

the ultima ratio and as such is indispensable in many constellations. However on the other hand it frequently represents a less than satisfactory radical solution for the affected shareholder. The termination of membership can in principle be effected as a transfer of the shareholding and a withdrawal from the company. The problem with the first option is that it is prototypically only possible in the case of the listed public limited company. Otherwise, this method runs into limitations on grounds of legal structure (shares subject to restrictions on transfer) or the lack of a market. On the other hand, the dissolution or termination of the membership would be, in any event based on an important reason, nothing other than the application of a principle which applies to on-going legal relationships in general. However, withdrawal from the company in exchange for reasonable **compensation** is not readily acceptable to the company because it received the capital contribution on an indefinite basis and it is entitled to rely on retaining the contribution as part of its corporate assets and, last but not least, because the legal hurdles imposed by capital commitment could preclude the payment of compensation from corporate assets (see previous discussion in Ch. 2). For this reason, the principle referred to above has only limited applicability in corporate law.

To the extent withdrawal is even made possible, it is as a matter of law not subject to the free will of the shareholder but rather is tied to the existence of **important grounds** which may trigger a judicial review and potentially a legal settlement. For this reason, withdrawal is included as substantive minority protection. In the case of a transfer of shares subject to a restriction on transfer, the same applies at least where the restriction on transfer may (only) be overcome on important grounds.

Apart from the fact that it may likewise face the same barriers faced by the withdrawal in light of the capital commitment, the **exclusion** of unwanted shareholders on the other hand should generally be tied to important grounds for purposes of protecting such shareholders. If however a legal system permits groundless exclusion to be placed at the will of the majority (even if subject to reasonable compensation) in the company statutes, this represents a problem in and of itself in the tension between private autonomy and minority protection.

b) Implementation. In principle, shares are freely transferable as a matter of law so that, as a means of dissolving his ties to the company, a **sale** becomes a problem of the available market and the price which may be obtained there. For the typical small shareholder in a listed public limited company, a sale to a segment of the **capital market** is normally possible at any time so that he must merely come to terms with the development of the price on the market – which will frequently not disappoint him less than the decisions of the majority of the shareholders in the public limited company with whom he is dissatisfied.

However, one must not be deceived by this picture of the listed public limited company; all across Europe, the vast majority of public limited companies are not traded on an exchange or other liquid segment of the market. And these companies have also likely taken advantage of the option also open to public limited companies to subject their shares (registered shares) to restrictions on transfer, i. e. to place limits on transferability (cf. sections 68 (2) dAktG, 62 (2) 2 öAktG).

This latter, **limited transferability** subject to a requirement of consent, is the distinguishing characteristic of the private limited company. The transfer requires

the consent of the company or, which practically has the same meaning, that of the (majority) of the other (or all) shareholders, and this consent requirement may be included in the articles of association under some legal systems (sections 15 (5) dGmbHG, 77 öGmbHG). This is done in the vast majority of person-driven private limited companies. Elsewhere, the law provides this as the standard, which is the case in most of the Latin countries (Art. L223-14 (1) CCom, 107.2 b Spanish LSC, mandatory law in both countries;[111] Art. 229 (2) Portuguese CSC[112]) with the exception of Italy[113] and in Switzerland (Art. 786 (1) OR).

However, on balance the minority shareholder is placed in an even better position in the last-named countries because consent may only be refused under the condition that the shareholder desiring to sell is offered another purchaser on the same or reasonable conditions (Art. L223-14 (3) CCom; 107.2 e LSC) or the law reserves for him a right of withdrawal in such cases (Art. 786 (3) OR, in abridged form Art. 229 (1) Portuguese CSC[114]). The öGmbHG contains a similar provision (section 77)[115] related to restrictions on transfer in the articles of association. German law does not contain an analogous provision.

If a **right of withdrawal** is granted in the cases described above where a sale is impossible, this represents an application of withdrawal on important grounds. In some legal systems, such a right of withdrawal results as a less drastic remedy than the prescribed dissolution of the company through judicial decision. The latter is the case under section 61 dGmbHG; however where a minority shareholder can demonstrate that remaining part of the company may no longer be reasonably expected from him (due to the decisions and/or company policy of the majority), this represents the less disruptive measure compared to dissolution of the company. The right to withdraw from the German GmbH on important grounds is recognised for this reason. It is exercised via a private declaration of withdrawal, however this in turn only if a less drastic solution is not available.[116] A sale of the shares presents itself as a primary alternative so that viewed from this starting point an interrelationship is again established between an ability to sell the shares and a right of withdrawal.[117]

French law recognises the **dissolution of the company** based on important grounds (des justes motifs) as a general remedy under corporate law which, however, in keeping with the seriousness of the consequences, is only granted in exceptional cases and not readily in the case of unacceptability on the part of minority.[118] The Swiss OR expressly searches for means of avoiding dissolution through less drastic remedies (Art. 821 (1) third sentence). Art. 2473 Codice civile

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[111] For France, Art. L 223-14 (7) CCom, for Spain see Löber/Lozano/Steinmetz, in: Süß/Wachter, Hdb. des internationalen GmbH-Rechts, country report Spain marginal no. 142.

[112] According to Stieb, in: Süß/Wachter, Hdb. des internationalen GmbH-Rechts, country report Portugal marginal no. 80 with fn. 123.

[113] Fasciani, in: Süß/Wachter, Hdb. des internationalen GmbH-Rechts, country report Italy marginal no. 111.

[114] According to Stieb, in: Süß/Wachter, Hdb. des internationalen GmbH-Rechts, marginal no. 81.

[115] Fasciani makes a similar report in the case of Italy, in: Süß/Wachter, Hdb. des internationalen GmbH-Rechts, marginal no. 111.

[116] Roth/Altmeppen, GmbHG, § 60 marginal no. 107 et seqq.; Ulmer, GmbHG, Anh § 34 marginal no. 46; Hülsmann, GmbHR 2003, 198.

[117] Ulmer, GmbHG, Anhang § 34 marginal no. 55.

[118] Arzt-Mergemeier, Der gesellschaftsrechtliche Minderheitenschutz, p. 216; cf. also Karst, in: Süß/Wachter, Hdb. des internationalen GmbH-Rechts, country report France marginal no. 150.

enables withdrawal to a large extent, however makes this optional in some instances.[119]

If based on the foregoing, a right of withdrawal is to be recognised in the case of a private limited company, the payment of **compensation** presents the main hurdle because this is subject to the rules of capital commitment without exception. Accordingly, if someone else cannot purchase the shares for consideration they may only be purchased by the company from its non-committed assets. This is more likely to be feasible in the case of the German GmbH because the statutory capital commitment is limited in the manner described (Ch. 2 V 1).[120] However, even where capital commitment levels are higher, as provided under Austrian laws on private and public limited companies, payment of compensation should still be possible to the extent distributable assets are on hand.

Nevertheless, rights of withdrawal are fundamentally not provided in most countries in the case of the **public limited company**. Withdrawal appears to be incompatible with the essence of the corporate form.[121] Exceptions are provided only in the case of structural changes such as transformations, mergers, also certain consolidations, by which a reluctant and/or so-called "outside" shareholder minority may withdraw in exchange for compensation (sections 305 (1) dAktG, 29 dUmwG). In most cases, the settlement or consideration, as applicable, is also not paid from the assets of the company but rather from persons acquiring the shares. A special right to tender on the part of shareholders desiring to withdraw is granted in the case of take-over offers by Art. 16 of the EC Directive of 2004 on this topic; they may demand that a bidder who has reached the 90 % threshold purchase their remaining shares. In this case, compensation likewise does not come from company assets. German jurisprudence has likewise recognised a right of withdrawal on the part of minority shareholders in the case of delisting, whereby the consideration may only be paid by the public limited company as part of a permissible redemption (Ch. 2 V 5) and otherwise from the majority shareholder.[122]

By contrast, **Italy and Spain** have determinedly introduced the withdrawal right (Art. 2437 et seq., Art. 346 et seq. LSC) for the public limited company as a minority protection mechanism if the shareholder has been outvoted on far-reaching resolutions (Art. 2437, 2437 quinquies Codice civ., Art. 346, 348 a LSC). In doing so, Italy makes further distinction based on the fungibility of the shares on the capital market and attempts to create equilibrium with capital protection in this manner so that the shares are first offered to the other shareholders, otherwise only non-committed funds or funds made available via a reduction in capital may be used.[123]

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[119] See Fleischer, in: Bachmann et al. (eds.), Rechtsregeln für die geschlossene Kapitalgesellschaft, pp. 60, 72.

[120] Roth/Altmeppen, GmbHG, § 60 marginal no. 119.

[121] Cf. Baums, Ausschluss von Minderheitsaktionären; Hofmann, Minderheitsschutz im Gesellschaftsrecht, p. 523 et seq. advocates for additional withdrawal rights as a minority protection mechanism.

[122] BGH ZIP 2003, 387 with comments from Streit; BVerfG ZIP 2012, 1402; Klöhn, NZG 2012, 1041; see also section 29 (1) dUmwG regarding delisting following a merger.

[123] Italy protects minority shareholders in addition by means of a consolidated group related withdrawal right, Art. 2497 quater Codice civ., see Stein, in: FS Hommelhoff, 2012, pp. 1149, 1161. Pursuant to Art. 500 LSC, the Spanish public limited company may issue shares with a redemption obligation (redeemable shares) on a limited scale the redemption of which may not be charged against committed assets, Art. 501.