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THE NEW GERMAN STOCK CORPORATION LAW*

Ernest C. Steefel† and Bernhard von Falkenhausen‡

In the first of two articles on the new German Stock Corporation Law, the authors discuss the basic structure of the "Aktiengesellschaft" (AG), the German equivalent of the American publicly owned business corporation. They emphasize the impact of the new law on the AG, especially in relation to its formation and the structure of its management. In addition, the authors explore the similarities and dissimilarities between the AG and its American counterpart.

I

INTRODUCTION

German law recognizes two kinds of business corporations, the *Aktiengesellschaft* (Stock Corporation—AG) and the *Gesellschaft mit beschränkter Haftung* (Company with Limited Liability—GmbH). The prototype of the AG in the United States is the publicly owned corporation, whereas the GmbH is comparable to the American close corporation. Its corporate structure is more flexible and thus cheaper to manage than that of an AG, it leaves the incorporators more discretion in the regulation of the relative rights and duties of officers and shareholders, and it does not require the publication of financial statements. Originally, the GmbH was introduced into German law as a means for the incorporation of small businesses. There is, however, no legal limitation as to size (as there is, for example, in Switzerland).

The decision by a promoter as to whether he should incorporate in the form of the AG or the GmbH is thus generally determined by his needs for public financing. As long as the necessary capital can be received without resort to the market, the GmbH will be preferred. The great majority of German subsidiaries of American corporations are GmbHs. The shares of a GmbH cannot be publicly traded, however, so if the promoters contemplate offering shares of their corporation to the public, they must use the legal form of an AG. From the standpoint of a prudent investor who wants a market for his securities, the AG-share (*Aktie*) is the only possible form of stock ownership in a German corporation.

* This is the first of two articles by the authors on the new German Stock Corporation Law. In a future article they will explore the impact of the new law on "capital increases," mergers, "combined enterprises," and corporate finance.

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The AG was originally regulated in the German Commercial Code (*Handelsgesetzbuch*—HGB). In 1937 it became the subject of a special corporation statute, the *Aktiengesetz* (Stock Corporation Law). After the Second World War and the emergence of a free market economy, the *Aktiengesetz* of 1937 was criticized as favoring management to the disadvantage of the shareholders. The soundness of this criticism was debatable.¹ The question, however, became moot in 1965 with the enactment of the new *Aktiengesetz*² (AktG), which became effective on January 1, 1966. The new statute has the express purpose of making corporate stock more attractive as an investment to the general public and therefore endeavors to improve the shareholders' position.

Since the protection of shareholders largely depends on the effectiveness of minority rights, the statute emphasizes the protection of minority shareholders. It considerably increases the duties of management to inform the shareholders,³ it makes existing remedies more attractive and less expensive, and it introduces some new remedies which had been unknown in the old statute.⁴

The enactment of the new AktG by the legislature was preceded by a careful study of foreign corporation laws. It is thus not surprising that some of the new rules are clearly influenced by principles of American corporation law and practice. For example, management is bound to help opposing shareholders with the distribution of their proposals among fellow-shareholders in a way similar to that under the "proposal rule"⁵ of the American Securities and Exchange Commission, dissenting shareholders now enjoy appraisal rights in case of certain organic changes in their corporation,⁶ and corporations may distribute interim dividends.⁷ By and large, however, the new statute does not radically depart from the established principles of German corporation law. Thus court deci-

¹ For American lawyers this criticism is not very convincing, for the position of the managerial officers in a German AG under the *Aktiengesetz* of 1937 was in many respects weaker than that of their American colleagues. See, von Falkenhausen & Steefel, "Shareholders' Rights in German Corporations (AG and GmbH)," 10 Am. J. Comp. L. 407 (1961). See also Vagts, "Book Review," 75 Harv. L. Rev. 1046, 1050 (1962).

² *Aktiengesetz 1965* [hereinafter cited as AktG]. An English translation of the statute is available. *Aktiengesetz 1965: The German Stock Corporation Law* (Mueller & Galbraith transl. 1966). For German commentary on the new statute, see Obermüller, Werner & Winden, *Das Aktiengesetz 65* (1965); von Godin & Wilhelmi, *Kommentar zum Aktien-Gesetz* (2d ed. 1966).

³ See text accompanying notes 217-26 *infra*.

⁴ See, e.g., text accompanying note 210 *infra*.

⁵ SEC Rule X-14A-8, 17 C.F.R. § 240.14a-8 (1964); see text accompanying notes 196-202 *infra*.

⁶ See AktG §§ 320 (retiring shareholders' rights to "indemnity" upon "integration" into another stock corporation) and 375 (dissenting shareholders' right to indemnity upon "transformation" into GmbH).

⁷ See AktG § 59; Kropff, *Textausgabe zum Aktiengesetz* § 59, at 79 (1965) [hereinafter cited as Kropff].

sions rendered under the *Aktiengesetz* of 1937 or even under its predecessor, the HGB, are in many instances still valid authorities for the interpretation of the new statute. The same can be said with regard to old textbooks and commentaries.

II

THE FORMATION OF AN AG

An AG receives its corporate existence upon registration in the *Handelsregister* (Commercial Register) at its domicile. The Register is kept with the *Amtsgericht*, the lowest German court of original jurisdiction. But before applying for registration, the promoters must complete a number of "preincorporation" steps.

A. *Articles of Association*

The first step toward forming a corporation is the drafting of its articles of association (*Satzung*) by the promoters. The articles of association fulfill the functions of both the certificate of incorporation and the bylaws of an American corporation. They spell out the prospective activities of the corporation and the relative rights and duties of its officers and shareholders. However, since statutes regulate these matters in detail and the statutory provisions cannot, in general, be abrogated by the articles of association,⁸ the promoters have little discretion.

Section 23(3) of the AktG requires that the following matters be clearly set forth in the articles:

- (1) The name and domicile⁹ of the company.
- (2) The subject of its business, in particular, the goods and products which the company is to produce or trade in.¹⁰
- (3) The amount of its legal capital (*Grundkapital*).¹¹
- (4) The number of shares issued with the par value of each share,

⁸ AktG § 23(4).

⁹ The promoters may choose as domicile the place where the top administration of their company is to be installed or any other place where the company is to operate a plant or another business establishment. AktG § 5.

¹⁰ The subject of the corporation's business—as stated in the articles of association—does not in any way limit the power of a German corporation. There is no *ultra vires* doctrine in German law. The shareholders, in particular, have no right to enjoin their corporation from doing acts which are outside of the scope of, or even prohibited by, the articles of association. See, e.g., *S. D. v. Gusstahlwerk*, Reichsgericht (II Zivilsenat), Nov. 19, 1926, 115 *Entscheidungen des Reichsgerichts in Zivilsachen* 246, 249 (1927). [Decisions of the Reichsgericht in Civil Matters—hereinafter cited as RGZ] (the Reichsgericht was the highest German court in civil and criminal cases until 1945). See also Eckert, "Shareholder and Management: A Comparative View on Some Corporate Problems in the United States and Germany," 46 *Iowa L. Rev.* 12, 13 n.5 (1960).

¹¹ The "Grundkapital" of a German AG roughly corresponds to the legal or stated capital of an American corporation. It is the aggregate par value of all the issued shares, including treasury shares, of the corporation.

and, if there are several classes of shares, the relative rights and privileges of each class.¹²

- (5) The number and qualifications of the members of the managing board (*Vorstand*).¹³
- (6) The form in which notices and other announcements of the corporation are to be communicated to the shareholders and the public.¹⁴

The articles of association may have, and usually do have, additional provisions which are permitted as long as they are in harmony with the statutes. Such additional provisions may, for example, refer to the supervisory board (*Aufsichtsrat*),¹⁵ the procedure to be followed at shareholders' meetings,¹⁶ restrictions in the transfer of shares,¹⁷ or the duration of the company's existence.

The articles of association must be executed before a court or a *notar*¹⁸ and be signed by at least five persons,¹⁹ all of whom must have subscribed to at least one share of the company.²⁰ The articles must also certify that all the shares of the company have been subscribed and spell out the participation of each subscriber.²¹

B. Election and Appointment of the Initial Corporate Officers

After the corporate capital has been subscribed, the shareholders elect the supervisory board (*Aufsichtsrat*—SB) of the company, which in

¹² See text accompanying notes 24-30 *infra*. AG shares are bearer shares, transferable by delivery, unless the articles of association provide otherwise. AktG § 24(1). Shares issued before they are fully paid must be registered. AktG § 10(2).

¹³ See text accompanying notes 64-111 *infra*.

¹⁴ See text accompanying notes 169-73 *infra*.

¹⁵ See text accompanying notes 112-45 *infra*.

¹⁶ See text accompanying notes 174-214 *infra*.

¹⁷ A corporation may, in its articles of association, restrict the transfer of its shares by making such transfers subject to the approval of the corporation or one of its organs. AktG § 68(2). Restrictions of this kind cannot be imposed on the transferability of bearer shares, nor can they be adopted by amendment to the articles of association, unless they are assented to by all the shareholders affected thereby. AktG § 180(2).

¹⁸ AktG § 23(1). The position of a German "notar" is not comparable with that of an American notary public. A "notar" in Germany must be a lawyer. He usually acquires his status only after years of practical experience as an attorney. His functions go much beyond the authentication of signatures. Many of the more important business transactions like the transfer of real property or the setting-up of a corporate charter are validly conducted only when they are put into a written instrument drawn up by a "notar" or by a court. The German "notar" is responsible for the validity of the documents executed in his office, and he must give advice to parties regarding the legal effects of their transactions. See Schlesinger, *Comparative Law* 12-13, 83-84 (2d ed. 1959).

¹⁹ The statutory minimum of five shareholders must be met at the time of the formation of the AG only. Once the corporation is established its legal existence is not affected by a decrease in the number of shareholders below five persons. Thus AGs can be, and frequently are, founded with the assistance of four dummies who subscribe to one share of stock each, under the express stipulation that they will transfer their shares to the fifth incorporator immediately after the AG has acquired legal existence.

²⁰ See AktG §§ 2, 23(2).

²¹ AktG § 23(2).

turn appoints the board of managers (*Vorstand*—BM).²² The election of the members of the supervisory board must take place in the presence of a *notar* or before a court.²³

C. *Subscription and Payment of the Corporate Capital*

The legal institution of an "authorized capital," under which the promoters of an American company may incorporate first and raise the necessary working capital later, is not recognized in Germany. A German AG will not be registered unless the promoters can show that the corporate capital provided in the articles of association has been fully subscribed.²⁴ The legal minimum capital of an AG is *DM* 100,000 (about \$25,000).²⁵ The shares must have a par value of at least *DM* 50 (about \$12.50).²⁶ Par values above this sum must amount to at least *DM* 100 or a multiple of *DM* 100.²⁷ Shares without par value are not permitted.

At the time registration is sought, at least twenty-five per cent of the par value of all shares exchanged for cash must be paid. If the shares were issued at a price above their par value, the difference between the par value and the subscription price must also be paid.²⁸ The issue of shares below their par value is prohibited.²⁹ No such down payment is required with regard to shares issued for a consideration other than cash (*e.g.*, real property or machinery). The transfer of this kind of consideration to the company can be delayed until after its registration. The articles of association must, however, specify the kind of property, the amount of shares to be issued in exchange therefor, and the name of the subscriber concerned.³⁰

D. *The Promoters' Duty of Disclosure*

The promoters must report to the BM and SB of their company the steps they have taken with regard to the formation of the company.³¹ This "promoters' report" (*Gründungsbericht*) must be in writing and must disclose all the facts and circumstances which are material in deciding whether the consideration paid or promised for the shares has been adequate. If shares have been issued in exchange for an existing business

²² AktG §§ 30, 31.

²³ AktG § 30(1).

²⁴ AktG § 29.

²⁵ AktG § 7.

²⁶ AktG § 8(1).

²⁷ AktG § 8(2).

²⁸ AktG § 36(2).

²⁹ AktG § 9(1).

³⁰ AktG § 27(1).

³¹ AktG § 32.

enterprise, the report must, for example, state the net profits of the business in its two preceding fiscal years.³² The promoters must also disclose the profits derived in the course of the promotion. If they have transferred property to the corporation in exchange for shares or for cash which they acquired within two years preceding the promotion, they must set forth their own costs of acquiring that property.³³

The BM and SB must examine the correctness of the promoters' report. They must, in particular, investigate whether the shares stated in the articles of association have been fully subscribed and whether the consideration paid and promised therefor has been adequate.³⁴ In all cases where shares have been issued for a consideration other than cash, as well as in all cases where members of the BM or SB were personally interested in the promotion of the company, the statute requires an additional examination by independent auditors.³⁵ Both the BM and SB and the auditors must set forth the results of their examinations in a written report.³⁶ Copies of the auditors' report are to be filed with the Commercial Register and the local chamber of commerce. At both places the report is open to inspection by any interested person.³⁷

E. *Registration of the Company*

The application for registration of the company must be signed by all the shareholders as well as by all the members of the BM and SB.³⁸ The application must set forth that the steps outlined above have been completed pursuant to the statute. Further, it must be proven that the down payments for subscriptions have been made and are at the free disposition of the BM.³⁹ Together with the application, the following documents must be submitted to the registration court:

- (1) A copy of the articles of association.
- (2) Copies of the documents referring to the election of the SB and the appointment of the BM.
- (3) A copy of the promoters' report as well as copies of the reports regarding its examination by the BM and SB and by the auditors. If there has been an examination by auditors, there must also

³² AktG § 32(2)3. The two-year period is calculated from the date at which the articles of association were executed. Fischer, in *Grosskommentar zum Aktiengesetz* (1937) § 24, comment 3 (2d ed. 1961).

³³ AktG § 32(2)2.

³⁴ AktG § 34.

³⁵ AktG § 33(2).

³⁶ AktG § 34(2).

³⁷ AktG § 34(3). See also *Handelsgesetzbuch* § 9 [German Commercial Code—hereinafter cited as *HGB*].

³⁸ AktG § 36(1).

³⁹ AktG § 37(1).

be a confirmation of the chamber of commerce acknowledging the receipt of this report.⁴⁰

The court may deny registration of a company when the application does not comply with the above-described formalities. Furthermore, it can reject an application when it is convinced that the statements by the promoters or by the BM and SB of the company are untrue or incomplete, or when, in its opinion, the property which the company is to receive in exchange for shares or for cash has been grossly over-valued.⁴¹

F. *Pre-Incorporation Agreements*

As a general rule, contracts made in behalf of the company before its registration must be set forth in its articles of association. The theory is that prospective creditors and shareholders of a newly formed corporation should have an opportunity to inform themselves as to whether and to what extent the corporate property is encumbered by such "preconceived" obligations. This rule applies with particular force to contracts binding the company to grant special privileges to some of its shareholders or to pay for services rendered in the process of its incorporation or the purchase of property of any kind.⁴² Contracts of this kind which are not included in the articles of association are void as to the company and cannot be ratified by it even after its registration.⁴³ Other contracts (*e.g.*, employment contracts) which are not included in the articles of association will not bind the company unless they are assumed by it after registration.

The above rule probably does not apply to contracts necessary for carrying on the corporate business (if there had been a corporate business before the company was registered).⁴⁴ The scope of this exception, however, is not clear. It is thus advisable for the promoters to include any contracts which the company is expected to make before its registration in the articles of association. Contracts which, according to these principles, do not bind the company may be enforced against the persons who acted in its behalf.⁴⁵ In this respect the German law is comparable to the usual American rules for promoters' liability on pre-incorporation agreements.

G. *Liability of Persons Responsible for the Formation of an AG*

The statute imposes a strict duty of good faith and due care on all persons connected with the formation of an AG, such as the promoters,

⁴⁰ AktG § 37(2).

⁴¹ AktG § 38(2).

⁴² AktG §§ 26, 27.

⁴³ AktG §§ 26(3), 41(3).

⁴⁴ Fischer, *supra* note 32, § 24, comment 28.

⁴⁵ AktG § 41(1).

the members of the BM and SB, and other persons acting on their behalf. For example, if a company has been damaged by incorrect or incomplete statements in its application for registration, or in its accompanying reports, the promoters are jointly liable unless they can prove that they used the care of prudent businessmen. The same liability exists in cases where the company has been damaged by business transactions prior to its incorporation which were grossly unfair to it.⁴⁶ Furthermore, promoters under certain circumstances, must answer for the obligations of their fellow-promoters. If, for example, a promoter turns out to be insolvent and unable to pay his subscription price, the other promoters must assume the loss if they knew of his financial irresponsibility at the time they accepted his subscription.⁴⁷ These rules apply not only to promoters but also to those persons on whose behalf and under whose direction the shares were subscribed by the promoters.⁴⁸ Thus the promoters' liability cannot be evaded by using a financially irresponsible dummy. The same liability applies to all persons who have improperly enriched themselves in the process of incorporation.⁴⁹ In addition, the BM and SB owe to their company diligence and efficiency, not only after it has been formed, but also during the process of its formation.⁵⁰

The above claims against the promoters, the members of the management, and other persons connected with the incorporation belong to the company and not to the individual shareholders.⁵¹ Individual shareholders or creditors may, however, have separate causes of action in tort if they were induced to deal with the corporation by false pretenses.⁵²

H. *Liability of Shareholders on Their Subscriptions*

It has been pointed out that subscriptions for shares against cash must have been paid up to at least twenty-five per cent when the corporation is registered. After the company has been formed, it is the duty of the BM to call in unpaid subscriptions.⁵³ Shareholders who fail to pay their assessments forfeit their membership rights.⁵⁴ It should be noted that the only defenses available to shareholders in an action for the subscription price are insanity and minority. In order to protect corporate creditors, courts generally exclude the application of the ordinary rules applying

⁴⁶ AktG § 46.

⁴⁷ AktG § 46(4).

⁴⁸ AktG § 46(5).

⁴⁹ AktG § 47.

⁵⁰ AktG § 48; see text accompanying notes 101-04, 140-41 *infra*.

⁵¹ For the rights of individual shareholders to compel the enforcement of such a corporate claim, see text accompanying notes 227-34 *infra*.

⁵² Bürgerliches Gesetzbuch § 826 [German Civil Code—hereinafter cited as BGB].

⁵³ AktG § 63(1).

⁵⁴ AktG § 64(3).

to the rescission of contracts. Shareholders thus will not be heard when they contend that their subscriptions had been obtained by fraud, duress, or some other kind of improper dealing.⁵⁵ The law further specifies that the company may not waive its claims for unpaid subscriptions nor permit them to be set off against debts owed by it to the shareholders concerned.⁵⁶

I. *Foreign Aspects*

An AG must have its domicile in Germany.⁵⁷ This, in turn, necessitates that the company have either a plant or another kind of permanent establishment, its head office, or its top management in Germany.⁵⁸ But there is no restriction upon the nationality of promoters and shareholders. Thus foreign individuals and corporations can establish an AG or acquire its shares on the same footing as German citizens.

Foreign corporations not domiciled in one of the member states of the European Economic Community need a license for doing business in Germany.⁵⁹ Owning or acquiring stock in a German corporation (even if it is 100 per cent), however, does not by itself amount to doing business in Germany.⁶⁰

III

THE MANAGEMENT STRUCTURE OF AN AG

A board of directors in the British and American sense, that is, a body which directs the affairs of a corporation and consists of both top managers as well as persons with consulting and supervisory functions only, is unknown in Germany. The *Aktiengesetz*, following the old tradition of German corporation law, divides the functions of the board of directors between the board of management (BM) and the supervisory board (SB).⁶¹ The power to manage the business of an AG and to represent it, in and out of court, in its dealings with third parties is exclusively vested in the BM. The functions of the SB are, as the name indicates, restricted to the supervision of the BM. The supervisory board, or at least the majority of its members, are in turn dependent on the

⁵⁵ Baumbach & Hueck, *Kommentar zum Aktiengesetz* (1937) § 16, comment 1 (10th ed. 1961) [hereinafter cited as Baumbach & Hueck]; *Neuergasthoff GmbH v. K.*, Reichsgericht (II Zivilsenat), Dec. 14, 1928, 123 RGZ 102, reprinted in part in Schlesinger, *supra* note 18, at 301-05; von Falkenhausen & Steefel, "Shareholders, Rights in German Corporations (AG and GmbH)," 10 Am. J. Comp. L. 407, 425 (1961).

⁵⁶ AktG § 66(1).

⁵⁷ Schmidt & Meyer-Landrut in *Grosskommentar zum Aktiengesetz* § 5, comment 2a (2d ed. 1961) [hereinafter cited as Schmidt & Meyer-Landrut].

⁵⁸ AktG § 5(2).

⁵⁹ *Gewerbeordnung* § 12 (1869) (Trade Law).

⁶⁰ Harvard University Law School, *International Program in Taxation, Taxation in the Federal Republic of Germany* 595 (1963).

⁶¹ The term "Direktor" always designates, contrary to the American practice, a person who holds a leading managerial position. He may, but need not, belong to the BM.

shareholders, who usually act through resolutions passed at the shareholders' meeting (*Hauptversammlung*). Members of the BM may not simultaneously sit in the SB and vice versa.⁶² The supervisory board may appoint one or more of its members to the BM if necessary to fill a vacancy there. However, such appointment may not last longer than one year.⁶³ Though members of the BM and the SB are usually shareholders of their corporation, this is not required.

A. *The Board of Management*

(1) *Internal Organization.* The board of management normally may consist of one person only. But corporations with a stated capital of more than *DM* 3 million (\$750,000) must have a BM of at least 2 persons, unless the articles of association provide otherwise.⁶⁴ Larger corporations usually have a BM of three or more persons. The internal organization of the BM is regulated, at least in the larger corporations, in its rules of business (*Geschäftsordnung*). These rules usually spell out the functions of the individual members of the BM and the departments of which they are in charge (e.g., finance, production, or sale). If the articles of association do not provide otherwise, the primary responsibility for the construction of such rules is with the SB. As long as the SB does not act in this matter, the members of the BM may, by unanimous vote, establish their own rules of business.⁶⁵

Resolutions of the BM must be adopted unanimously, unless the articles of association or the rules of business of the BM provide for a majority vote.⁶⁶ They may also provide for the creation of the office of chairman. If they do, the chairman is appointed and removed by the SB.⁶⁷ Under the old statute the chairman of the BM held the position of general manager. He ran the company and was the superior of all its employees, including his colleagues in the BM. Under the new *Aktien-gesetz*, the articles of association may still provide that the chairman's vote may break a tie;⁶⁸ however, they may not provide that he can disregard a majority decision of his colleagues.⁶⁹

(2) *Appointment and Removal.* The members of the BM are appointed by the SB for a maximum period of five years.⁷⁰ This appointment can

⁶² AktG § 105(1).

⁶³ AktG § 105(2).

⁶⁴ AktG § 76(2).

⁶⁵ AktG § 77(2).

⁶⁶ AktG § 77(1).

⁶⁷ AktG §§ 84(2)-(3).

⁶⁸ Kropff § 77, at 99; Obermüller, Werner & Winden, 1 Aktiengesetz 1965, at 42 (1965).

⁶⁹ AktG § 77(1).

⁷⁰ AktG § 84(1).

be renewed for unlimited, successive five-year periods.⁷¹ The articles of association of most large corporations, however, have a mandatory retirement clause for BM members, effective after they have reached their sixty-fifth birthday.

The SB may remove a BM member before the expiration of his five-year term only for cause.⁷² Thus the position of the BM member is more secure in some ways than his counterpart, the American corporate officer, who is usually removable with or without cause by the board of directors.⁷³ For the BM member, sufficient cause exists, for example, in cases of incapacity, incompetence, or gross violation of his duties toward the corporation. Furthermore, the SB may remove a BM member for cause in case of a vote of no confidence at the shareholders' meeting. Such a vote empowers, but does not compel, the SB to remove the BM member concerned. The SB must disregard the vote of no confidence if the reasons behind it are obviously arbitrary.

The tenure of a person as BM member must be distinguished from his employment contract with the corporation, a distinction which is made by American law in regard to corporate officers.⁷⁴ Employment contracts with BM members may not be concluded for a longer period than five years. Renewals for additional five-year periods are possible and customary. According to a wide-spread corporate practice, BM members whose terms have been repeatedly renewed are granted pension rights. Removal of a BM member from his position for cause does not automatically terminate his rights under the employment contract. The requirements for the cancellation of an employment contract are stricter than those for the removal from a BM position. If a BM member has been removed for reasons concerning which he is not personally at fault (*e.g.*, long illness), or if he is guilty only of a minor infraction of his duties, he may still retain his rights to compensation for the unexpired term of his office and to a pension.⁷⁵

(3) *Authority of the BM To Bind the Corporation.* The power of the BM to represent the corporation is practically unlimited. Unlike many American corporation laws, the *Aktiengesetz* has no provision making the validity of certain transactions, such as the execution of mortgages and

⁷¹ *Ibid.*

⁷² AktG § 84(3).

⁷³ See, *e.g.*, ABA-ALI Model Bus. Corp. Act § 45 (1960); N.Y. Bus. Corp. Law § 716 (McKinney 1963) (applicable to stock corporations, Sept. 1, 1967).

⁷⁴ See, *e.g.*, *United Producers & Consumers Co-op. v. Held*, 225 F.2d 615 (9th Cir. 1955); ABA-ALI Model Bus. Corp. Act § 45 (1960).

⁷⁵ See the decision of the Bundesgerichtshof [highest German court in civil and criminal matters after the foundation of the Federal Republic of Germany—hereinafter cited as BGH] in [1966] Wertpapiermitteilungen 968; Baumbach & Hueck § 75, comment 6A; Meyer-Landrut in Grosskommentar zum Aktiengesetz § 75, comment 16 (2d ed. 1961).

guarantees, subject to shareholder approval. There is only one exception: The so-called "enterprise contract" (*Unternehmensvertrag*), by which a corporation, in effect, renounces its independence and submits itself to the domination of another enterprise, must be approved by seventy-five per cent of the share capital represented at a shareholders' meeting.⁷⁶ Another limitation on the authority of the BM applies to transactions between the corporation and individual BM members. In such transactions, as well as in civil litigation between BM members and their corporation, the latter can be represented only by its SB.⁷⁷

The authority of the BM to represent the corporation cannot be restricted in the articles of association. In particular, this authority is not limited by the statement of the purpose of a corporate enterprise in the articles of association, or by the scope of the corporate business. The BM may bind the corporation to contracts which have nothing to do with the corporate business. In other words, there is no *ultra vires* doctrine in German law.⁷⁸ Furthermore, shareholders may not restrict the authority of the managing board by providing in the articles of association that certain transactions require the consent of the SB or shareholders. Provisions in the articles of association which make business transactions of the BM subject to an approval of the shareholders are invalid.⁷⁹ Such questions can be passed upon by the shareholders' meeting only if the board expressly so requests.⁸⁰ The articles of association may, and usually do, provide that transactions of a certain magnitude (like the grant of powers of "procurator"⁸¹ or the grant or the acceptance of loans beyond a certain sum) should be executed only with the approval of the SB. Restrictions of this kind are valid.⁸² They bind the BM, however, only with regard to the corporation, and they are unenforceable against third persons.⁸³

If the BM consists of more than one person, it must act jointly in

⁷⁶ AktG § 293(1).

⁷⁷ AktG § 112. This limitation was introduced into German corporate law by the Aktiengesetz of 1965. Under the old rule, which still applies to GmbHs, the BM could represent its corporation with regard to contracts and civil proceedings with BM members. See, e.g., Kropff § 112; von Falkenhausen & Steefel, *supra* note 55, at 416.

⁷⁸ See note 10 *supra*.

⁷⁹ Schmidt & Meyer-Landrut § 103, comment 4.

⁸⁰ AktG § 119(2).

⁸¹ The power of procurator (*Prokura*) is a very broad authority created by the German Commercial Code. In effect, the holder of a power of procurator can perform any kind of legal act, binding on his principal, as long as he does not transfer or encumber real property or sell the principal's business as a whole; see HGB § 49.

⁸² AktG § 82(2).

⁸³ This is true even in cases where the other party knew of the restrictions, unless the corporation can prove that the BM member and the other party to the contract were guilty of collusion with intent to damage the corporation. Schmidt & Meyer-Landrut § 74, comment 12; Eckert, "Shareholder and Management: A Comparative View on Some Corporate Problems in the United States and Germany," 46 *Iowa L. Rev.* 12, 18-19 (1960).

order to bind the corporation.⁸⁴ The articles of association may, and normally do, delegate this authority by providing that the corporation may be represented by one or two members of the BM, or by one BM member together with a holder of procuration.⁸⁵ The BM, in turn, may appoint agents and determine their authority.

(4) *Duties of BM Members to the Corporation.* Members of the BM owe their corporation obedience, loyalty, and care, in different degrees.⁸⁶

(a) *The Duty of Obedience.* Least developed of the three duties is that of obedience. The statute requires the BM to run the corporate business according to its own independent judgment.⁸⁷ Neither the SB nor the shareholders can give BM members binding directions in matters of business management.⁸⁸ The BM may, however, submit management questions at the shareholders' meeting and request a ruling.⁸⁹ In such case (and only in such case) a shareholders' resolution relating to management questions is binding on the BM.⁹⁰ Some commentators contend that business transactions which basically affect the corporate business and involve special risks must always be submitted by the BM to the shareholders' meeting.⁹¹ Whether the BM is legally required to do this is an open question. But apart from legal necessity, such a procedure is often good business policy, and since a BM member cannot be held responsible for the consequences of business transactions which have been submitted to and approved at the shareholders' meeting,⁹² the procedure will often protect the BM members themselves.⁹³

Apart from the above, the BM's duty of obedience exists only with regard to the articles of association and the rules of business of the BM and the SB.⁹⁴ These documents may internally restrict the management power of the BM by requiring SB approval for the more important business transactions.⁹⁵ As has been pointed out, restrictions of this kind

⁸⁴ AktG-§ 78(2).

⁸⁵ AktG § 78(3).

⁸⁶ Rough comparison may be made to the duties owed by corporate managers in most American jurisdictions; that is, the duty to act *intra vires* and within authority, the various fiduciary duties, and the duty of due care.

⁸⁷ AktG § 76(1).

⁸⁸ Schmidt & Meyer-Landrut § 70, comments 7-8.

⁸⁹ AktG § 119(2).

⁹⁰ Kropff § 118, at 165.

⁹¹ Schmidt & Meyer-Landrut § 103, comment 4.

⁹² AktG § 93(4).

⁹³ Compare the American law of "shareholder ratification or approval." Gottlieb v. Heyden Chemical Corp., 33 Del. Ch. 177, 91 A.2d 57 (Sup. Ct. 1952); Eisen v. Post 3 N.Y.2d 518, 146 N.E.2d 779, 169 N.Y.S.2d 15 (1957).

⁹⁴ AktG § 82(2).

⁹⁵ AktG § 111(4). Restrictions of this kind may not go so far as to make independent management by the BM impossible. They are invalid if they impede the discretion of BM members with regard to ordinary management questions. Baumbach & Hueck § 95, comment 7; Schmidt & Meyer-Landrut § 95, comment 20.

cannot be enforced against third persons.⁹⁶ Nevertheless, they are an effective means for control and supervision, since BM members who disregard them can be instantly removed for cause.

(b) *The Duty of Loyalty.* BM members must devote all their time and energy to the corporate business. They may not, without the consent of the SB, run a business of their own or occupy a leading position in the management of another business.⁹⁷ Whether the other business is in competition with the corporation is immaterial. Furthermore, the consent of the SB is required for any business transaction which BM members conclude in the corporate line of business for their own accounts. BM members who disregard this rule are liable to the corporation in damages. However, instead of suing for damages, the corporation may consider the business transaction as having been made for its benefit and, consequently, claim the proceeds thereof.⁹⁸ This is similar to the results reached by American courts under the doctrine of "usurpation of corporate opportunity."⁹⁹

By and large, the fiduciary duty of BM members falls short of the standards set in American case law and statutes. For example, German law does not compel corporate executives to account for profits obtained through self-dealing, insider trading, or the sale of control. Transactions of this kind are actionable by the corporation only in case of fraud.¹⁰⁰

(c) *The Duty of Diligence and Care.* The members of the BM must fulfill their management functions with due care, and they are jointly and severally liable to the corporation for any damage resulting from violations of these duties. In cases of doubt, the BM member concerned has the burden of proving that he, in the particular case, acted with the necessary care.¹⁰¹ The standard which he must meet is determined by the competence and diligence of an average prudent business manager in a comparable position.¹⁰² It is an objective standard and does not take into account the individual competence of a BM member. Unlike some American authorities, the German courts universally reject defenses brought on subjective grounds like unfitness or inexperience.¹⁰³ A person who accepts a position in the BM of a German corporation in effect warrants that he possesses the knowledge and skill required to run the business of the corporation concerned.¹⁰⁴

⁹⁶ See note 83 *supra* and accompanying text.

⁹⁷ AktG § 88(1).

⁹⁸ AktG § 88(2).

⁹⁹ See Henn, *Corporations and Other Business Enterprises* § 238 (1961).

¹⁰⁰ See Eckert, *supra* note 83, at 58-59.

¹⁰¹ AktG § 93(2).

¹⁰² AktG § 93(1).

¹⁰³ See Eckert, *supra* note 83, at 39.

¹⁰⁴ See Schilling, in *Grosskommentar zum Aktiengesetz* § 84, comment 9 (2d ed. 1961) [hereinafter cited as Schilling].

In practice there are only rare instances where a BM member has been held liable in damages for negligent mismanagement. The reason for this is probably economic necessity. Corporate management, like every kind of business management, includes the necessity of taking risks. If a corporation is to be run profitably, its managers must be permitted to take risks without the danger of personal liability whenever things go wrong. Thus German courts and commentators grant corporate managers a wide range of discretion in their choice of means and methods. Even though something like the American "business judgment" rule has never been expressly recognized in Germany, the practical result is more or less the same as if such a rule existed.

(5) *Compensation of BM Members.* The compensation of BM members usually consists of a fixed salary, a share in the corporate profits, and, after a certain length of service, pension rights for themselves and their dependents. The compensation is determined by the SB. There are no fixed standards for the adequacy of executive compensation. The old statute of 1937 expressly provided that corporations which granted members of their management boards a share in profits had to make adequate contributions for the benefit of their employees or for charitable purposes.¹⁰⁵ Although the primary responsibility for compliance with this rule rested in the SB, the district attorney at the domicile of the corporation was also empowered to bring a special action for its enforcement. This legislative attempt to make executive profit sharing dependent on corresponding donations for social or charitable purposes was not successful. Lacking definite standards for the determination of a "reasonable relationship" between these two items, the rule proved to be unworkable and was rarely invoked.

The new *Aktiengesetz* has no such provisions. It merely provides that a reasonable relationship must exist between the amount of compensation which a BM member receives and his functions and duties within the corporate hierarchy.¹⁰⁶ This rule does not limit the authority of the BM to employ BM members and to fix their compensation, although the grant of excessive compensation in an employment contract may make the responsible SB members liable to the corporation in damages. The contract itself, however, is binding on the corporation.¹⁰⁷

The SB may reduce the compensation of BM members whenever the economic situation of the company seriously deteriorates. It makes no difference whether the compensation was adequate or excessive at the

¹⁰⁵ AktG 37 § 77(3).

¹⁰⁶ AktG § 87(1).

¹⁰⁷ Schmidt & Meyer-Landrut § 74, comment 5.

time the employment contract was executed. However, such reduction may take place only in exceptional circumstances, where the financial distress is so serious that payment of the agreed compensation would be gravely inequitable to the corporation.¹⁰⁸ The BM members affected by such reduction may in turn leave the corporation, with six weeks' notice, as of the end of the next calendar quarter-year.

Executive compensation is not as openly discussed in Germany as it is in the United States. The annual report of the corporation must state the aggregate amount of compensation paid to all the BM members during the fiscal year.¹⁰⁹ The compensation of an individual member, however, has generally been considered to be a private matter which neither the public nor the shareholders have a right to know.¹¹⁰ Thus the recent decision by a lower court which ordered a corporation to disclose to the shareholders the contents of a pension contract with a former BM member¹¹¹ has caused considerable surprise in the corporate world. This decision has been appealed by the corporation, so whether it will stand as authority remains to be seen.

B. *The Supervisory Board*

(1) *Internal Organization.* The SB consists of three members or of a multiple thereof.¹¹² Under the old statute there was, in effect, no limitation as to the number of SB positions an individual could hold. However, the new *Aktiengesetz* drastically limits the number which a person may legally accept. No person may be an SB member of more than ten corporations.¹¹³ Two other groups of persons are disqualified from serving on the SB of a corporation: (a) persons who are "legal representatives"¹¹⁴ of a subsidiary of the corporation concerned¹¹⁵ and (b) persons who are legal representatives of another corporation, in the SB of which is already a member of the BM of the corporation concerned.¹¹⁶

¹⁰⁸ AktG § 87(2).

¹⁰⁹ AktG § 160(3)3. Under the old statute this figure included the pension payments made to former BM members or their dependents. Now pension payments must be listed as a separate item. AktG § 160(3)9.

¹¹⁰ Deuss, *Das Auskunftsrecht des Aktionärs* 90 (1962); Obermüller, Werner & Winden, *supra* note 68, at 89.

¹¹¹ Decision of the Landgericht in Mainz, July 1, 1966, published in 11 *Die Aktiengesellschaft* [hereinafter cited as *Die AG*] 327 (1966).

¹¹² AktG § 95.

¹¹³ AktG § 100(2)1. There is an exception for subsidiaries. Persons who are "legal representatives" of business enterprises, i.e., BM members of a corporation, general partners of a partnership, or proprietors of a business, may serve in the SBs of up to five subsidiaries of their enterprises in addition to their quota of ten SB mandates. AktG § 100(2).

¹¹⁴ See note 113 *supra* for a definition of "legal representative."

¹¹⁵ AktG § 100(2)2.

¹¹⁶ AktG § 100(2)3. If, for example, A is a member of the BM of X corporation and a member of the SB of Y corporation, the members of the BM of Y corporation are disqualified from serving in the SB of X. The theory behind this rule is that a person cannot discharge his duty properly if he is dependent in one corporation on members of a BM he is to control in another.

The SB members elect their own chairman and deputy chairman.¹¹⁷ The chairman usually presides not only at the SB meetings but also at the annual meeting of the shareholders.¹¹⁸ SB meetings must take place at least once in each calendar half-year,¹¹⁹ and the chairman is also required to call additional meetings whenever one SB member so requests.¹²⁰ The members of the BM are entitled to attend the SB meetings,¹²¹ and they nearly always do.

Contrary to traditional American practice, SB resolutions need not be adopted at a meeting. They may be passed in writing, by telegraph, or by telephone as long as none of the SB members objects to this procedure.¹²² Resolutions of this kind are very common and, in many corporations, outnumber those passed at a meeting. Resolutions of the SB are adopted by a majority vote of the SB members participating.¹²³

The SB may organize its members into one or more committees. But the more important questions, such as the appointment and removal of BM members, cannot be left to a committee and must be decided by all the SB members.¹²⁴

(2) *Appointment and Removal of SB Members.* Except for the labor representatives, the members of the SB are, in principle, elected at the shareholders' meeting.¹²⁵ The election is governed by the straight-line voting system; fifty-one per cent of the votes cast may elect all the shareholders' representatives in the SB. The *Aktiengesetz* does not mention the possibility of cumulative voting, and according to the weight of authority, it cannot be provided for in the articles of association.¹²⁶ However, the articles of association may give certain shareholders (or shareholders of a certain class of shares) a special right to appoint up to one-third of the shareholders' representatives in the SB.¹²⁷

SB members may not be elected or appointed for a period longer than four years.¹²⁸ Renewals are both possible and customary. Even before the expiration of his term, an SB member elected by the shareholders

¹¹⁷ AktG § 107(1).

¹¹⁸ See text accompanying notes 174-75 *infra*.

¹¹⁹ AktG § 110(3).

¹²⁰ AktG § 110(1).

¹²¹ AktG § 109(1).

¹²² AktG § 108(4). For a catalogue of jurisdictions in the United States which have adopted a similar practice, see Henn, *supra* note 99, at 339 n.5.

¹²³ Baumbach & Hueck § 92, comment 3B; Eckert, *supra* note 83, at 26; Schmidt & Meyer-Landrut § 92, comment 16.

¹²⁴ AktG § 107(3). Baumbach & Hueck § 87, comment 2; Kropff § 107, to 148; Schmidt & Meyer-Landrut § 113, comment 11.

¹²⁵ AktG § 101(1).

¹²⁶ See Janberg, "Aufsichtsratsausschüsse nach altem und neuem Aktienrecht," 11 Die AG 1 (1966).

¹²⁷ AktG § 101(2).

¹²⁸ AktG § 102(1).

may be removed by this body with or without cause. The statute provides for a vote of at least seventy-five per cent of the shares represented at the meeting. This percentage can be increased or decreased (down to a simple majority) in the articles of association.¹²⁹ A minority delegate may be removed at the pleasure of the shareholders who appointed him.¹³⁰

The SB has no right to appoint or remove any of its members. Such a right may not even be conferred by the articles of association. By a majority vote of its members, however, the SB may apply for a court order removing one or more members for cause. Removal proceedings of this kind can be brought against any SB member, whether he has been elected at the shareholders' meeting, by a group of shareholders, or by the employees of the corporation. Additionally, shareholders owning ten per cent or more of the stated capital of the corporation may initiate removal proceedings for cause against SB members appointed by a group of shareholders.¹³¹

(3) *Powers and Functions of the SB.* The SB is not permitted to participate actively in the management of the corporation.¹³² Its two main functions are the appointment and removal of BM members¹³³ and the supervision of the BM.¹³⁴

The duty of the SB to supervise the activities of the BM corresponds to the duty of the BM to supply the SB with complete and correct information. In particular, the BM must regularly report on projected business policies and the economic situation of the corporation, as well as on the more important business transactions both before and after their execution.¹³⁵ The SB, in discharging its supervisory duties, need not depend on the proffered reports of the BM. It may demand additional reports at any time. This right need not be exercised by the SB as a body, and even individual SB members may ask the BM for additional reports to the SB. The BM must obey such requests if the demand by the SB member is supported by one or more of his colleagues.¹³⁶

The reports of the BM to the SB are open to inspection by every member of the SB. Contrary to the American practice, however, individual SB members have no right to inspect the corporate books and records.¹³⁷ This right exists only in favor of the SB as a body. Additionally, the SB

¹²⁹ AktG § 103(1).

¹³⁰ AktG § 103(2).

¹³¹ AktG § 103(3).

¹³² AktG § 111(4).

¹³³ See text accompanying notes 70-75 supra.

¹³⁴ AktG § 111(1).

¹³⁵ AktG §§ 90(1)-(2).

¹³⁶ AktG § 90(3).

¹³⁷ Schmidt & Meyer-Landrut § 95, comment 10.

may inspect the assets of the corporation, in particular its cash position and its inventory of merchandise and securities.¹³⁸ The SB may delegate this right to one or more of its members or may conduct investigations through independent experts.¹³⁹

The standard of care which SB members owe the corporation is similar to that owed by BM members.¹⁴⁰ SB members must act with the same diligence which the average prudent businessman in the position of an SB member would employ.¹⁴¹ As in the case of BM members, an SB member accused of negligence has the burden of proving that he used the required skill and care. But, again as in the case of BM members, there are only rare cases in which an SB member has been held personally liable to his corporation for negligent violations of his duties.

(4) *Compensation of SB Members.* SB members have no right to compensation for their services, unless compensation is expressly provided for in the articles of association or granted at a shareholders' meeting.¹⁴² The German law in this respect closely parallels the usual American rule that directors are expected to attend to corporate affairs without compensation absent a valid prearrangement with the corporation.¹⁴³ Neither the SB nor the BM is empowered to provide compensation for SB members.¹⁴⁴ In practice, corporations do grant the SB members compensation, consisting usually of a fixed fee and a share in the corporate profits.

The statute does not set up definite standards for determining the proper amount of compensation to SB members. It merely provides that the amount of compensation must be reasonably adjusted to the duties of the particular SB member and to the financial situation of the corporation.¹⁴⁵ The amount of the compensation is always within the control of the shareholders' meeting. If compensation is fixed in the articles of association, the shareholders may, by simple majority, vote to amend the articles and reduce the compensation provided therein.

¹³⁸ AktG § 111(2).

¹³⁹ Additional duties of the SB are: (1) to call special shareholders' meetings whenever it considers this to be necessary for the welfare of the corporation (AktG § 111(3)); (2) to examine the annual financial statements of the corporation, i.e. its balance sheet and profit-and-loss statement, and the management's report (AktG §§ 170, 171); and (3) to represent the corporation in its dealings, in and out of court, with the members of its BM (AktG § 112).

¹⁴⁰ AktG § 116.

¹⁴¹ Baumbach & Hueck § 99, comment; Schilling § 99, comment 1.

¹⁴² AktG § 113(1).

¹⁴³ See *Loffand v. Cahall*, 13 Del. Ch. 384, 118 Atl. 1 (Sup. Ct. 1922); Henn, *Corporations and Other Business Enterprises* § 244 (1961); 1 Washington & Rothschild, *Compensating the Corporate Executive* 203-04 (3d ed. 1962).

¹⁴⁴ This rule applies only to the compensation which SB members receive in this capacity. SB members giving their corporation additional services (like legal or financial advice) are entitled to the compensation usually paid for services of this kind, and the BM may validly make contracts in this respect. However, such contracts are binding on the corporation only after they have been approved by the SB (AktG § 114).

¹⁴⁵ AktG § 113(1).

C. Participation of Labor in the Management of an AG

The principle of co-determination (*Mitbestimmung*) was introduced into German law in the early 1950's. Before that time, all the members of the SB were elected or appointed by the shareholders. Now this is true only as to so-called "family corporations," whose shares are exclusively held by one natural person or the members of the same family, and which have fewer than 500 employees.¹⁴⁶ In addition, no labor representation is required in the admittedly rare case where a corporation has fewer than five employees.

In other corporations one-third of the SB members must consist of labor representatives¹⁴⁷ who are elected by the employees of the corporation.¹⁴⁸ If the SB has only one or two labor representatives, they must all be in the employment of the corporation. In bigger corporations with more than two labor representatives in the SB, at least two of them must be corporate employees. Employees with managerial functions (*Leitende Angestellte*) are disqualified from serving as labor representatives in the SB.¹⁴⁹

The labor representation is even greater in the SBs of corporations with more than 1,000 employees which are engaged in coal mining or iron and steel production. The SBs of such corporations consist of an equal number of shareholder and labor representatives, and one "additional member" mutually agreed upon by the two groups. If the shareholder and labor representatives cannot agree upon a mutually acceptable person, the additional member is elected by the shareholders' meeting. Thus the shareholders may still have a slight majority in the SB.¹⁵⁰ The SB must have at least 11 members. Companies with a stated capital of *DM* 20 million or more may provide, in their articles of association, for an SB of fifteen persons; companies with a stated capital of *DM* 50 million or more may provide for an SB of twenty-one members. The employees designate only part of their representatives, while others are appointed by the labor unions representing employees of the company. Only a minority of the labor representatives must be employees of the corporation. It is customary for big corporations in the coal or iron and

¹⁴⁶ Betriebsverfassungsgesetz § 76(6) (Oct. 11, 1952) (Enterprise Constitution Law) [hereinafter cited as BVG].

¹⁴⁷ BVG § 76(1).

¹⁴⁸ BVG § 76(2).

¹⁴⁹ BVG § 4(2)c. The question as to whether a certain employee does exercise managerial functions is often rather complicated. For a collection of applicable court decisions, see Haberkorn, "Können Leitende Angestellte in den Aufsichtsrat gewählt werden?" 9 Die AG 231 (1964).

¹⁵⁰ For general discussions of the problems of co-determination, see Baumbach & Hueck, at 303; Hueck, *Gesellschaftsrecht* 136 (1954); Schmidt & Meyer-Landrut § 86, comments 4(a)-(c); Eckert, "Shareholders and Management: A Comparative View on Some Corporate Problems in the United States and Germany," 46 Iowa L. Rev. 12, 25-26 (1960).

steel industries to have at least one professional labor leader in the SB, who often acts as one of the deputy chairmen. Since the SB usually reaches its decisions by a majority vote of its members,¹⁵¹ the additional member (the 11th, 15th or 21st man, as the case may be) has the key position.

Labor representatives in the SB can be removed without cause at any time by the body which designated them. Further, they can be removed for cause by a court order, upon application by the SB. The decision as to whether such an application should be filed is taken by simple majority vote of the SB members.¹⁵² Thus the shareholder representatives may possibly compel the removal of labor members who, by grave misconduct, have become unbearable for their corporation, even though this removal is contrary to the will of their electorate and their colleagues in the SB.¹⁵³ Employees who are members of the SB do not, however, automatically lose their positions on the supervisory board with their dismissal (even for cause) from the services of the corporation, as long as the SB of the corporation still has the legally required number of corporate employees.¹⁵⁴

Labor representatives in the SB have, in principle, the same rights and duties as the SB members elected or appointed by the shareholders. They receive the same compensation and are bound by the same duties of diligence and loyalty. They thus may become personally liable if they put the interests of their electorate, or of their union, above those of the company.¹⁵⁵ The question as to whether and to what extent a labor SB member may participate in a strike without violating his duties is not yet finally determined. According to the weight of authority a labor SB member may safely quit work in case of a "legal strike" (*i.e.*, a strike called by the competent labor union in conformity with the statutory procedure of labor negotiations). However, he probably may not actively participate in the preparation or organization of such a strike. Any participation in a wild-cat strike is, in any event, not consistent with his duties as an SB member.¹⁵⁶

The company may not in any way impede the work of an employee representative in the SB. It must give him the necessary time for the

¹⁵¹ Schmidt & Meyer-Landrut § 86, comment 4(b).

¹⁵² AktG § 103(3).

¹⁵³ See Kropff § 103, at 142.

¹⁵⁴ See Judgment of the BGH, Feb. 21, 1963, reported in 8 Die AG 245 (1963). See also Leo, "Die Fristlose Entlassung eines Arbeitnehmervertreters in Aufsichtsrat," 8 Die AG 234 (1963).

¹⁵⁵ Baumbach & Hueck § 86, comment 7(A); Schmidt & Meyer-Landrut § 86, comment 4(d).

¹⁵⁶ See Schmidt & Meyer-Landrut § 86, comment 4(d).

discharge of his duties without loss of pay.¹⁵⁷ On the other hand, labor representatives have no privileges in comparison with other SB members. They have, in particular, no right to sit in a certain committee.¹⁵⁸

As to companies engaged in coal mining and iron and steel production with more than 1,000 employees, labor representation is required not only in the SB but also in the BM. The BM of such companies must have one member in charge of personnel and social affairs (*Arbeitsdirektor*), whose appointment and removal require the consent of the majority of the labor representatives in the SB.¹⁵⁹

D. The Shareholders' Meeting

(1) *Powers and Functions.* The most important function of the shareholders' meeting, as in American law, is the appointment and removal of the shareholders' representatives in the SB.¹⁶⁰ Other matters covered at the shareholders' meeting are: (a) the declaration of dividends, (b) the annual decision as to whether the SB and BM should be given a vote of confidence (*Entlastung*),¹⁶¹ (c) the amendment of the articles of association,¹⁶² and (d) the appointment of auditors for the preparation of the annual report or for a special investigation. Questions of business management are outside the jurisdiction of the shareholders' meeting and may be decided by it only upon the special request of the BM.¹⁶³

There are both regular and special shareholders' meetings. Regular meetings take place once a year. The agenda of a regular meeting is normally within the discretion of the BM. Two items are, however, a "must" on the agenda of a regular meeting—the disposition of the final profit (*Bilanzgewinn*) of the financial year concerned,¹⁶⁴ and the vote of confidence (or denial of such vote) for the BM and SB.¹⁶⁵ In addition, shareholders representing five per cent or more of the stated capital of the corporation, or shares with an aggregate par value of DM 1 million or

¹⁵⁷ Baumbach & Hueck § 86, comment 7(B); Schmidt & Meyer-Landrut § 86, comment 4(d).

¹⁵⁸ Kropff § 107, at 150. This principle must, however, be considered in connection with AktG § 107(3), which prohibits the delegation of the more important SB functions to a committee.

¹⁵⁹ von Falkenhausen & Steefel, "Shareholders' Rights in German Corporations (AG and GmbH)," 10 Am. J. Comp. L. 407, 413 (1961); see the authorities cited in note 150 supra.

¹⁶⁰ AktG § 119(1).

¹⁶¹ See text accompanying notes 235-37 infra.

¹⁶² See text accompanying notes 176-79 infra.

¹⁶³ AktG § 119(2).

¹⁶⁴ The final profit of an AG is the amount which may be distributed as dividends by the shareholders' meeting. This figure corresponds to the net profit of the fiscal year concerned, plus eventual withdrawals from, and less eventual transfers to, the surplus account.

¹⁶⁵ AktG § 120.

more, may compel the BM to put additional items on the agenda and to submit them to the shareholders' meeting.¹⁶⁶

Special meetings are called by the BM or by the SB whenever the body concerned, in its discretion, considers such a meeting necessary for the benefit of the corporation.¹⁶⁷ Shareholders representing five per cent or more of the corporate capital may also demand the call of a special meeting at any time.¹⁶⁸

(2) *Notice to the Shareholders.* Shares of a German AG are generally bearer shares, transferable by delivery. Thus the management of an AG cannot directly communicate with its shareholders. Invitations to the shareholders' meeting are not sent directly to the shareholders but are communicated through publications in the newspapers.¹⁶⁹ The publications to be used for such purposes are listed in the articles of association.¹⁷⁰ Invitations to the meeting, as well as any other communications which an AG is legally required to make, must, additionally, be published in the Federal Gazette (*Bundesanzeiger*), the official publication medium in the Federal Republic.¹⁷¹

Most shareholders, in practice, receive their invitations to the shareholders' meeting through the bank in which they have deposited their shares. The BM sends a copy of the invitation with the agenda to all the banks who, in the preceding meeting, had acted as representatives of shareholders of the corporation.¹⁷² The banks, in turn, must send invitations and the agenda, without delay, to all their customers who have entrusted shares of the corporation to them for safekeeping.¹⁷³

(3) *The Conduct of a Shareholders' Meeting.* A chairman, designated by the articles of association,¹⁷⁴ presides at the shareholders' meeting. In general, the chairman of the SB is also the chairman of the shareholders' meeting. He has the right, and duty, to preserve the proper function of the meeting, and he may exclude shareholders from the meeting who disturb it by improper conduct.¹⁷⁵

Contrary to American practice, there are no quorum requirements, unless the articles of association expressly provide for them. A duly

¹⁶⁶ AktG § 122(2).

¹⁶⁷ AktG §§ 121(1)-(2), 111(3).

¹⁶⁸ AktG § 122.

¹⁶⁹ AktG § 121(3).

¹⁷⁰ AktG § 23(3)6.

¹⁷¹ AktG § 25.

¹⁷² AktG § 125(1).

¹⁷³ AktG § 128(1).

¹⁷⁴ Schmidt & Meyer-Landrut § 113, comment 13; von Godin & Wilhelmi, Kommentar zum Aktiengesetz § 110, comment I (1950).

¹⁷⁵ Schmidt & Meyer-Landrut § 103, comment 16; Judgment of the BGH, Nov. 11, 1965, reported in 11 Die AG 28 (1966); Barz, Die Grosse Hauptversammlung, 7 Die AG 1, 5 (Sonderbeilage I, 1962).

convened meeting may thus pass binding resolutions, even if only a minority of the shares are represented therein.¹⁷⁶ Generally, resolutions are passed by a majority vote of the shares represented at the meeting.¹⁷⁷ The exceptions, however, overshadow the rule, since all the more important resolutions, especially the resolutions involving amendments to the articles of association, require, in most instances, a qualified three-fourths majority.

With regard to amendments, the articles of association may increase the required majority and even demand a unanimous vote.¹⁷⁸ Clauses in the articles of association permitting amendments by a majority of less than seventy-five per cent are, in principle, valid. With regard to amendments of any serious nature—as in the case of changes of the corporate purpose, restrictions in the shareholders' preemptive rights, capital reductions, mergers, and dissolutions—a majority of at least seventy-five per cent is compulsory.¹⁷⁹

Shareholders' resolutions must be set forth in a record certified by a judge or a *notar*.¹⁸⁰ The record must state the location and the date of the meeting and the name of the judge or *notar*.¹⁸¹ Shareholders' resolutions which are not certified in this way are void.¹⁸² After the meeting the BM must file a certified copy of such record with the Commercial Register.¹⁸³

(4) *The Shareholders' Right To Vote.* In principle, each share confers the right to vote at the shareholders' meeting.¹⁸⁴ The voting power of one share is determined by its par value.¹⁸⁵ Neither treasury shares nor shares directly or indirectly owned by an enterprise which is under the control of the corporation have any voting rights.¹⁸⁶ The articles of association may create shares without voting rights only in the case of preferred shares.¹⁸⁷ The articles of association, however, may limit the voting power of any shareholder to a specified number of shares.¹⁸⁸ Contracts between shareholders to vote in a certain way are valid,¹⁸⁹ but, contrary

¹⁷⁶ Baumbach & Hueck § 113, comment 2; Schmidt & Meyer-Landrut § 113, comment 7.

¹⁷⁷ AktG § 133(1).

¹⁷⁸ Baumbach & Hueck § 113, comment 3(A); Schmidt & Meyer-Landrut § 113, comments 5, 6.

¹⁷⁹ von Falkenhausen & Steefel, *supra* note 159, at 414.

¹⁸⁰ For a definition of "notar," see note 18 *supra*.

¹⁸¹ AktG § 130.

¹⁸² AktG § 241.

¹⁸³ AktG § 130(4).

¹⁸⁴ AktG § 12(1).

¹⁸⁵ AktG § 134(1).

¹⁸⁶ AktG § 136(2).

¹⁸⁷ AktG § 12(1).

¹⁸⁸ AktG § 134(1).

¹⁸⁹ Schmidt & Meyer-Landrut § 114, comment 43. This does not apply to contracts obligating a shareholder to exercise his voting rights according to instructions by the SB or

to the American rule,¹⁹⁰ contracts of this kind cannot be specifically enforced. The party injured by a breach of such contract is relegated to a claim for damages.¹⁹¹

Generally, shares with multiple voting rights are prohibited. They may be issued only with governmental permission, and only to the extent necessary to safeguard vital interests of the general economy.¹⁹² The public authority responsible for the granting of multiple voting rights is the government of the state in which the corporation has its domicile.

Voting rights can be exercised in person or by proxy. The proxy must be in writing and signed by the shareholder concerned.¹⁹³ The most important proxy holders in shareholders' meetings are banks. As in the United States, only a minority of the shareholders personally attend the meetings of their corporations. Most of the shareholders in Germany leave their representation at the meeting to the banks with which their shares are deposited. It is customary for a shareholder to give his bank every year a written power of attorney authorizing the bank to represent him at the shareholders' meeting of any corporation which is (or will be) represented in his portfolio. In order to prevent abuses of this power of attorney, the new statute subjects banks who make use of their customers' voting power to strict and rather detailed regulations. Proxies are revocable at any time and may not be granted for a longer period than fifteen months.¹⁹⁴ However, renewals are permitted and are usually granted as a matter of course. Even with this power of attorney, a bank is not automatically entitled to vote the shares of its principal. First, it must submit to the customer a specific proposal as to the way it intends to exercise the voting right and ask him for specific instructions as to all the items on the agenda. The customer's instructions must be followed. If the customer fails to give instructions, the bank may vote his shares according to the proposal submitted.¹⁹⁵

(5) *Rights of Opponents to Management at the Shareholders' Meeting.* It has already been pointed out that the widespread use of bearer shares in German corporate practice makes direct communication from the management of an AG to its shareholders virtually impossible. The same difficulty, of course, exists for shareholders who want to get in touch

the BM. Such contracts are void and have no binding effect whatsoever. AktG § 136(3). See Kropff § 136, at 201.

¹⁹⁰ See Henn, supra note 143, §§ 200, 267.

¹⁹¹ Schmidt & Meyer-Landrut § 114, comment 43; Edman, "Zwangweise Durchsetzung von Ansprüchen aus einem Stimmbindungsvertrag im Aktienrecht," 4 Die AG 267, 300 (1959); 119 RGZ 386 (1928); Eckert, supra note 151, at 33.

¹⁹² AktG § 12(2).

¹⁹³ AktG § 134(3); BGB § 126(1).

¹⁹⁴ AktG § 135(2).

¹⁹⁵ AktG § 128(2).

with their fellow-shareholders on corporate matters. The statute overcomes this difficulty by compelling the banks to act as messengers.

Shareholders who disagree with the propositions of management may submit, within a week after the invitation to the shareholders' meeting is published, their counterproposals to the main office of the corporation. The BM must communicate such proposals to the banks in the same manner as the invitations to the shareholders' meetings.¹⁹⁶ The banks in turn are bound to send these counterproposals to their customers.¹⁹⁷ This rule has been modeled after the "proposal rule" of the American Securities and Exchange Commission.¹⁹⁸ There are thus quite a few similarities. The counterproposal may not consist of more than one hundred words,¹⁹⁹ and counterproposals which are intended to harass the corporation or which have no chance whatever of adoption by the shareholders need not be communicated to banks and bank customers at all.²⁰⁰ However, contrary to the American "proposal rule," the German rule can be invoked to propose an opposition slate of SB candidates.²⁰¹ Another difference between the German and the American rule is that German shareholders can utilize this procedure without incurring any financial risk. The expenses are borne exclusively by the banks and the corporation.²⁰²

(6) *Defective Shareholders' Resolutions.* Shareholders' resolutions which are legally defective may be either void (*nichtig*) or voidable (*anfechtbar*). A void shareholders' resolution has no legal significance, and its invalidity can be asserted by any one and at any time. A voidable shareholders' resolution is, on the other hand, to be considered as valid as long as it has not been annulled in a special "contesting action" (*Anfechtungsklage*).

(a) *Void Shareholders' Resolutions.* In order to protect the corporation and the general public (who rely on the validity of resolutions duly passed and filed with the Commercial Register), shareholders' resolutions are void only in exceptional circumstances. Examples of such circumstances are (1) the lack of proper recording, (2) the lack of proper

¹⁹⁶ AktG §§ 125(1), 126(1).

¹⁹⁷ AktG § 128(1).

¹⁹⁸ SEC Rule X-14A-8, 17 C.F.R. § 240.14a-8 (1964).

¹⁹⁹ AktG § 126(2).

²⁰⁰ *Ibid.*

²⁰¹ AktG § 127.

²⁰² AktG § 128(6). The "right" of banks to vote the shares of customers has been one of the most disputed subjects in connection with the enactment of the new statute. For thorough studies of the problems connected with the "Despotstimmrecht," see Consruch, "Das Neue Aktiengesetz und die Kreditinstitute," 18 *Zeitschrift für das gesamte Kreditwesen* 1155 (1965); Vallenthin, "Die Neuregelung des Bankenstimmrechts im Aktiengesetz von 1965," [1965] *Bankbetrieb* 242; von Falkenhausen, "Das Bankenstimmrecht im neuen Aktienrecht," 11 *Die AG* 69 (1966).

notice to the shareholders in connection with the call of the shareholders' meeting, (3) the incompatibility of the resolution with basic principles of the legal concept of a stock corporation, (4) the violation of laws enacted exclusively or predominantly for the protection of creditors or the public, and (5) the violation of basic concepts of good morals.²⁰³ The invalidation of a shareholders' resolution for any of the reasons stated can be asserted by bringing an action for a declaratory judgment. An action of this kind can be brought, not only by shareholders of the corporation or by members of its BM or SB, but also by any person who has a legitimate interest in ascertaining the validity or invalidity of the resolution.²⁰⁴

In certain instances private litigants are barred from asserting the invalidity of a shareholders' resolution, if this resolution has, by oversight of the registration court, been entered in the Commercial Register, and has remained unchallenged for three years after the registration. The registration court may, however, always correct its mistake and strike the void shareholders' resolution from its records.²⁰⁵

(b) Voidable Shareholders' Resolutions. Any other violation of a statute or of a provision in the articles of association renders a shareholders' resolution voidable only. Resolutions of this kind become unassailable and binding on the corporation unless a contesting action is brought against the corporation within a month after the resolution is passed.²⁰⁶ Contesting actions can be brought by shareholders as well as by the BM. Individual members of the BM and the SB may bring such an action only if compliance with the resolution concerned would make the plaintiff or other members of the BM or the SB criminally or civilly liable.²⁰⁷

In order to prevent a multiplicity of suits, the statute provides that a contesting action can be brought only at the *Landgericht* (the highest court with original jurisdiction in civil cases) which has jurisdiction over the corporation at its domicile; that, where several contesting actions are brought against the same resolution, these actions must be joined for simultaneous hearing and decision; and that the court may not commence the trial of a contesting action until after the one-month period for bringing such an action has elapsed.²⁰⁸ There can thus be only one court decision with regard to all of the contesting actions instituted against a

²⁰³ See AktG § 241.

²⁰⁴ Baumbach & Hueck § 201, comment 1; Schilling § 201, comment 1.

²⁰⁵ AktG §§ 242(2)-(3).

²⁰⁶ AktG § 246.

²⁰⁷ AktG § 245.

²⁰⁸ AktG § 246(3).

particular shareholders' resolution. If the court dismisses the action the resolution becomes unassailable, since the one-month period within which contesting actions can be brought will have expired at the time of judgment. A judgment for the plaintiff retroactively destroys the resolution, which is then considered as having been void from the beginning.²⁰⁹

Under the old statute contesting actions were prohibitively expensive. The new statute gives the courts a wide discretion to determine court costs and counsel's fees such that they will have a reasonable relationship with the economic circumstances of the plaintiff.²¹⁰

(c) Duties of the Majority Shareholders to the Minority in Connection With the Exercise of Voting Power. Shareholders' resolutions may be subject to a contesting action even though, by their terms, they do not violate any statute or any provision of the articles of association. Thus a contesting action may be brought against any resolution which tends to grant special advantages to any shareholder or to third persons, or is detrimental to the corporation or the other shareholders. The plaintiff in this case must, however, allege and prove that one or more shareholders have deliberately exercised their voting rights in order to achieve such special advantages for themselves or for others. Resolutions of this kind are safe from attack if they grant the unfavored shareholders "equitable compensation" for their injury.²¹¹

This rule grants minority shareholders a certain amount of protection from the abusive exercise of majority voting power. However, it cannot be compared with the concept of fiduciary duties under American law, which has grown out of the general principles of trust law. The German rule, on the other hand, has its basis in the law of torts.²¹² Many principles of trust law which were used by American judges to implement the fiduciary duties of majority shareholders have thus not entered into the interpretation of the German rule. German majority shareholders are thus free from limitations arising out of the law of trusts, such as the various safeguards against self-dealing or the prohibition against the purchase of corporate property.²¹³ The German rule, as it is presently interpreted

²⁰⁹ Baumbach & Hueck § 200, comment 2(B); Schilling § 200, comment 4.

²¹⁰ AktG § 247; see Kropff § 247, at 334.

²¹¹ AktG § 243(2).

²¹² According to German tort law, any person who intentionally injures another person by acting contrary to recognized principles of good morals, is liable to that person in damages. BGB § 826. Contracts which by their express terms violate such principles of good morals are void. BGB § 138. These rules were the basis upon which German courts developed a considerable body of case law for the protection of minority shareholders. The Aktiengesetz of 1937 distilled some general principles out of this case law and incorporated them in the statute. AktG 37 §§ 101, 197(2). These rules, with some additional refinements developed by courts and commentators, were subsequently incorporated in the present Aktiengesetz. See, e.g., Rasch, *Deutsches Konzernrecht* 120 (3d ed. 1966).

²¹³ See von Falkenhausen & Steefel, "Shareholders' Rights in German Corporations (AG and GmbH)," 10 *Am. J. Comp. L.* 407, 408 (1961).

by courts and text writers, can probably be broken down into two components: (1) shareholders' resolutions which serve the interests of the corporation (whatever that may be) cannot be contested even if they favor the majority to the detriment of the minority; (2) shareholders' resolutions which favor majority shareholders and do not serve the interests of the corporation are subject to contesting actions unless they grant the minority a fair equivalent for any resulting damages.²¹⁴ It remains to be seen whether the first component will withstand future consideration in judicial and academic discussion.

E. *Enforcement of Corporate Claims Against Members of the BM and SB, and Majority Shareholders*

It has been pointed out above that members of the BM and the SB are liable to the corporation for intentional or negligent violations of their duties. Shareholders, too, may become liable to the corporation if they abuse their influence to injure the corporation. In general terms, any person who by use of his influence over the corporation induces a corporate officer to act to the detriment of the corporation or its shareholders is liable for the damages resulting therefrom.²¹⁵

The corporation thus has ample courses of action to protect it from mismanagement. The problem is the corporate willingness to pursue them. Shareholders of German corporations have considerably greater problems in overcoming this difficulty than do shareholders of American corporations, since German law does not recognize a right of individual shareholders to inspect corporate books and records or to bring actions on behalf of the corporation.²¹⁶

(1) *Shareholders' Rights to Information and Inspection.* Shareholders attending corporate meetings are entitled to ask questions, and receive answers thereto, to the extent necessary for obtaining an informed opinion on the issues to be decided at the meeting.²¹⁷ The BM may withhold the desired information in exceptional circumstances only. The most im-

²¹⁴ See, e.g., 33 BGHZ 175 (1960), 5 Die AG 329 (1960); Mestmäcker, Verwaltung, Konzerngewalt und Rechte der Aktionäre 340 (1958); Rasch, supra note 212, at 122; Schilling § 97, comment 15(b); von Falkenhausen, "Verfassungsrechtliche Grenzen der Mehrheitsherrschaft im Aktienrecht," 6 Die AG 122, 123 (1961). These authorities concern specifically the Aktiengesetz of 1937, in which the applicable provisions had a slightly different wording. Since the changes in wording have not altered the substance of the rules, however, the old authorities should retain their vitality. See 1 Obermüller, Werner & Winden, Aktiengesetz 1965, at 138 (1966); Rasch, supra note 212, at 119.

²¹⁵ AktG § 117. There is no liability where the shareholder has induced the harmful action merely by the use of his voting power. In such a case, however, the resolution is voidable and subject to a contesting action. AktG § 243(2).

²¹⁶ A right of action similar to the derivative suit in American law exists only in the law of combined enterprises.

²¹⁷ AktG § 131.

portant of such exceptions justifying a refusal of information is the fear of the BM that divulging the information may, in the opinion of prudent businessmen, cause considerable harm to the corporation or to an enterprise connected therewith.²¹⁸ The courts will probably tend to a narrow interpretation of this rule.²¹⁹ Shareholders may enforce their right to information by a special proceeding,²²⁰ or by bringing a contesting action against resolutions the contents of which might have been affected by the denial of the information.²²¹

Shareholders suspecting mismanagement or improper practices may ask the shareholders' meeting for the appointment of special auditors (*Sonderprüfer*) in order to conduct an investigation. Officers who would be personally involved in the investigation may not vote their shares in connection with this resolution.²²² If the request is denied at the shareholders' meeting, shareholders representing ten per cent or more of the corporate capital, or shares with an aggregate par value of *DM* 2 million or more may make the same application to the competent court. The application must be granted when the petitioners allege acts of mismanagement involving grave violations of fiduciary duties, or of the statute or the articles of association. The applicants must prove to the satisfaction of the court that they were shareholders of the corporation for at least three months prior to the shareholders' meeting concerned.²²³ The auditors must make a written report on the results of their investigation. The report is filed with the registration court at the domicile of the corporation where it can be studied by any interested person.²²⁴ Furthermore, the BM is bound to furnish copies of the report to any shareholder on demand.²²⁵

Shareholders have no right to inspect the plant or other physical assets of the corporation.²²⁶ Many corporations, however, consider it good public relations to show their shareholders around and to make them thereby more familiar with their work and their products.

(2) *Shareholders' Rights of Action.* Contrary to the American law,²²⁷

²¹⁸ AktG § 131(3)1.

²¹⁹ See Judgment of the BGH, Nov. 23, 1961, reported in 7 Die AG 51 (1962), 15 Neue Juristische Wochenschrift 104 (1962); Judgment of the BGH, April 7, 1960, reported in 5 Die AG 195 (1960); Decision of the Landgericht in Mainz, July 1, 1966, published in 11 Die AG 327 (1966), discussed in text accompanying note 111 supra.

²²⁰ AktG § 132.

²²¹ AktG § 243(4).

²²² AktG § 142(1).

²²³ AktG § 142(2).

²²⁴ See HGB § 9(1); Kropff § 145, at 212.

²²⁵ AktG § 145(4).

²²⁶ Decision of the Landgericht, Kassel, published in 6 Die AG 239 (1961); Janberg, "Das Recht auf Betriebsbesichtigung," 10 Die AG 1 (1965).

²²⁷ See generally Henn, Corporations and Other Business Enterprises §§ 352-83 (1961).

shareholders, in general, have no right to sue in behalf of their corporations.²²⁸ The enforcement of corporate claims is within the competence of the shareholders' meeting only. This body decides by majority vote whether claims of this kind are to be pressed or not.²²⁹ Persons against whom the proposed action is to be directed may not vote their shares.²³⁰ Shareholders representing ten per cent or more of the corporate capital may compel the corporation to enforce a claim, even if the shareholders' meeting has decided against it. This right exists, however, only in favor of shareholders who can show that they acquired their shares at least three months prior to the shareholders' meeting concerned.²³¹ Upon application of the ten-per-cent minority, the court may appoint special guardians to bring the action.²³² In general, the minority shareholders have no power to supervise or remove the guardians. This is the prerogative of the court which appointed them.²³³ The guardians have access to all the corporate records which they consider necessary for a successful prosecution of the action.²³⁴

(3) *Waiver and Settlement of Corporate Claims.* An indispensable item on the agenda of a regular shareholders' meeting is the approval (or disapproval) of management by the BM and SB for the preceding fiscal year.²³⁵ The vote is taken after the annual report and the financial statements (balance sheet and profit-and-loss statement) have been explained to and discussed by the meeting. A vote of confidence (*Entlastung*) for the BM and SB does not operate as a waiver by the corporation of eventual damage claims for mismanagement. It merely operates as a general approval of the business policy which in no way impedes the right of the corporation to press damage claims at a later date.²³⁶ The only exception to this rule is a vote of confidence assented to by all the shareholders of the corporation. In such case the corporation is estopped from asserting damage claims which were known to the shareholders when the vote of confidence was passed.²³⁷

The corporation may waive or settle damage claims against members of the SB and the BM, as well as damage claims against shareholders

²²⁸ See text accompanying note 216 supra.

²²⁹ AktG § 147(1).

²³⁰ AktG § 136(1).

²³¹ AktG § 147(1).

²³² AktG § 147(3).

²³³ von Godin & Wilhelmi, Kommentar zum Aktiengesetz § 122, comment 8 (1950).

²³⁴ 83 RGZ 248 (1913).

²³⁵ AktG § 120(1).

²³⁶ AktG § 120(2); see Kropff § 135, at 197; 1 Obermüller, Werner & Winden, supra note 214, at 72.

²³⁷ Judgment of the BGH, March 12, 1959, published in 4 Die AG 225 (1959).

and third persons, only after a three years' waiting period. This waiting period need not be complied with if the obligor of the damage claim is insolvent and enters into a composition with his creditors in order to avoid or terminate bankruptcy proceedings. Any waiver or settlement requires the consent of the shareholders' meeting which, in turn, can be blocked by the veto of shareholders holding ten per cent or more of the corporate capital.²³⁸

Corporate resolutions for the vote of confidence, as well as for a waiver and settlement of corporate claims, must be adopted by a disinterested majority. Persons to be benefited by such resolutions may not vote their shares.²³⁹

F. *Foreign Aspects*

It is not required that shareholders or members of the BM or SB be citizens or even residents of Germany.²⁴⁰ Members of the BM, of course, must live reasonably close to the place of the corporate business if they want to discharge properly their duties toward the corporation. But nationality and residence in no way affect the duties of the SB and the BM members to their corporation. The same is true as to corporate damage claims against shareholders who have participated in acts of mismanagement or who have exercised an improper influence upon corporate officers. According to the German conflict-of-laws rule, all those matters are exclusively governed by the law of the domicile of the corporation, which, in case of a German AG, is always German law.²⁴¹

The statute does not indicate whether shareholders' meetings may take place outside Germany. The weight of authority answers this question in the negative.²⁴² The theory is that shareholders would be unduly harassed if they were forced to go abroad to attend a meeting of their corporation. This reasoning does not apply to cases where all the shareholders consent to a foreign meeting place.²⁴³ In the case of a corporation which is a subsidiary of a foreign corporation or which is completely owned by foreign shareholders, the best interest of all shareholders might be served by holding the meeting outside of Germany.

Since the meetings have to be recorded in a formal instrument certified

²³⁸ AktG §§ 93(4), 116, 117(4).

²³⁹ AktG § 136(1).

²⁴⁰ Schmidt & Meyer-Landrut § 75, comment 7.

²⁴¹ Kegel, Internationales Privatrecht 207 (2d ed. 1964); Schmidt & Meyer-Landrut § 5, comment 7.

²⁴² Baumbach & Hueck § 105, comment 4; Schmidt & Meyer-Landrut § 105, comment 10; von Godin & Wilhelm, supra note 224, § 105, comment 7.

²⁴³ Schmidt & Meyer-Landrut § 105, comment 10.

by a judge or a *notar*,²⁴⁴ a meeting held in the United States would have to be certified by a German Consul qualified by the German Consular Laws to exercise judicial functions abroad or, perhaps, by an admitted German attorney abroad provided his qualifications are equivalent to a German *notar* and the "notarial" formalities are followed.

²⁴⁴ See note 18 *supra*.