A Guide to German Company Law for International Lawyers

Distinctive Features, Particularities, Idiosyncrasies*

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Legal comparativists know only too well how hard it is to break into a foreign jurisdiction. Much of what seems completely obvious to local jurists, remains shrouded in mystery for the external observer. This is particularly the case

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when dealing with circumstances not covered in a standard textbook: the practical significance of individual legal institutions, the interplay between legislation and case law or the unspoken preconceptions in legal thinking and methodology.[1] Alleviating these difficulties is not easy, even for a local expert: it is hard to overcome the imprinting of one's own legal education and to judge what is worth telling or explaining to a foreign lawyer. Assuming this risk with open eyes, the following presentation seeks to provide the foreign traveller with a short guide through the German company law neighbourhood.

I. Legal Sources and Types of Business Organisations in Germany

1. No Code Unique, no Comprehensive Company Code, no Unitary Capital Company

To get an overview of the corporate landscape in Germany is difficult for newcomers. The local legal horticulture needs getting used to and the garden of company law is not easily accessible. It is not constructed as a symmetrical *jardin à la française,* but rather presents itself as a thicket of wild growth.

With regard to the general organisation of legal material, German Private Law does not have a *Code unique*[2] at its disposal, i.e. no unity of civil and business law as found in the Italian *Codice civile,* the Dutch *Burgerlijk Wetboek* or the Brasilian *Código civil,* nor does it integrate civil and commercial companies into the law of obligations, as does the Suisse *Obligationenrecht.* Instead, there is a coexistence of a Civil Code and a Commercial Code which has been somewhat pretentiously characterised in the legal literature as a "system of dualistic full codification"[3].

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[1] See the contributions recently collected in Helland/Koch (eds.), Nordic and Germanic Legal Methods (Tübingen 2014).

[2] Explaining the concept of a 'code unique', P. SCHMIDT, catchword "Code Unique" in: Basedow et al. (eds.), Max Planck Encyclopedia of European Private Law, vol. I (Oxford 2012) 210 et seq.; E. A. KRAMER, Handelsgeschäfte – eine rechtsvergleichende Skizze zur rechtsgeschäftlichen Sonderbehandlung unternehmerischer Kontrahenten, in: Aicher/Koppensteiner (eds.), Beiträge zum Zivil- und Handelsrecht: Festschrift für Rolf Ostheim zum 65. Geburtstag (Vienna 1990) 306 et seq.; for a detailed account of the historical development of special commercial codes and the counter-movement of incorporating commercial law in a civil code W. MÜLLER-FREIENFELS, The Problem of Including Commercial Law and Family Law in a Civil Code, in: Stoljar (ed.), Problems of Codification (Canberra 1977) 95 et seq.; for a comparative overview over jurisdictions which separate or, by contrast, integrate civil and commercial law F. GALGANO, Diritto civile e diritto commerciale, in: Galgano/Ferrari (eds.), Atlante di diritto privato comparato (Bologna 1992) 35 et seq.

[3] C. M. SCHMITTHOFF, Das neue Recht des Welthandels, RabelsZ 28 (1964) 50: "System der dualistischen Vollkodifizierung".

German company law has a rugged landscape as well. There is no welcoming harbour or smooth mountain pass in the form of a comprehensive or coherent Company Code and no compilation of company laws comparable to the French *Code de commerce* of 2000[4] or the Belgian *Code des Sociétés* of 1999 to make company law at least more accessible.[5]

It comes therefore as no surprise that there is no General Part of company law, i.e. a set of common company law principles comparable to those codified in Arts. 1–124 of the Argentine *Ley de Sociedades Comerciales*[6], Arts. 1822–1844-7 of the French *Code civil*[7] or, at least partially, in Arts. 1–12 of the Polish Commercial Code. Thus, it was left to company law doctrine to develop a corpus of common principles from the scattered rules in the law of civil partnerships, the law of registered associations and various other legal sources.[8]

Regarding capital companies, Germany – as many other jurisdictions on the European continent, but in contrast to the unitary UK model[9] – provides for two distinct forms of business organisations: the stock corporation *(Aktiengesellschaft)* and the private limited liability company *(Gesellschaft mit*

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[4] For more details on the new *Code de commerce* "à droit constant" Y. GUYON, Le Nouveau code de commerce et le droit des sociétés, Revue des sociétés (2000) 647.

[5] Discussing the pros and cons of "codifications à droit constant" Y GUYON, Le Nouveau code de commerce et le droit des sociétés, Revue des sociétés 2000, 648: "The principle advantage is that it puts a collection in the hands of the users of the law, be they French or foreign, a that brings together, or at least attempts to bring together all of the relevant texts in one place. This makes it easier to gain a knowledge of the law while saving the time otherwise lost and reducing the risks associated with conducting legal research from a range of scattered texts […]. The main inconvenience is that it requires transposing the jurisprudence that interprets older texts into the articles of the new code." (author's translation).

[6] See A. V. VERÓN, Ley de Sociedades Comerciales comentada (Buenos Aires 2010) 1–336.

[7] Explaining these "règles communes à toutes les sociétés commerciales" P. MERLE, Sociétés commerciales (17th ed. Paris 2013) nos. 25 et seq.

[8] Trail blazing H. WIEDEMANN, Gesellschaftsrecht, vol. I (Munich 1980); K. SCHMIDT, Gesellschaftsrecht (1st ed. Cologne et al. 1986, 4th ed. Cologne et al. 2002).

[9] The pros and cons of both solutions have been discussed in Company Law Review Steering Group, The Strategic Framework, February 1999, paras. 5.2.25 et seq.: "The main advantage of a stand-alone small companies vehicle is said to be that it would be tailored more closely to the needs of those companies, unlike the existing Act. The legislation might be relatively concise and designed specifically for a limited class of users. On the other hand, the consequence of being tailored in this way is that legislation would not provide an integrated regime within which a company which ceased to satisfy the criteria could continue to operate." Earlier proposals to introduce a separate legal form for small companies received little support in the UK; see A New Form of Incorporation for Small Firms: a Consultative Document (Cmnd. 8171), 1981; summarising the discussion S. W. MAYSON/D. FRENCH/C. RYAN, Company Law (21th ed. Oxford 2013) 27 et seq.

beschränkter Haftung). Unlike the Spanish *Ley de Sociedades de Capital,* the German legislator has not yet envisaged merging the Stock Corporation Act *(*Aktiengesetz*)* and the Limited Liability Companies Act (*GmbH-Gesetz*) into one single Act.

2. Multitude of Company Law Acts

Given this lack of a comprehensive Company Code, lawyers and business people alike have had to grapple with various Acts scattered all over the field: The general commercial partnership (*offene Handelsgesellschaft,* OHG), the limited partnership (*Kommanditgesellschaft,* KG) and the silent partnership *(stille Gesellschaft)* are still to be found in the Commercial Code (*Handelsgesetzbuch,* HGB) whose tradition dates back to the General German Commercial Code (*Allgemeines Handelsgesetzbuch,* ADHGB) of 1861 and which was enacted on 1 January 1900 – together with the German Civil Code (*Bürgerliches Gesetzbuch,* BGB).

The cooperative (*eingetragene Genossenschaft,* eG) became the first business form codified outside the Commercial Code in the Cooperative Societies Act of 1889 (*Genossenschaftsgesetz,* GenG). Its intellectual father, HERMANN SCHULZE-DELITZSCH, had hoped in vain for an integration of this newly created business organisation into the ADHGB.[10]

Three years later, the German legislator 'invented'[11] the limited liability company (*Gesellschaft mit beschränkter Haftung,* GmbH) under a separate Act, the Limited Liability Companies Act of 1892 (*GmbH-Gesetz,* GmbHG). This turned out to be the final blow for the formal unity of German company law: Until then, most business organisations with the exception of the cooperative had found their lodgings safely within the Commercial Code.

The stock corporation (*Aktiengesellschaft,* AG), long rooted in the Commercial Code, was transplanted in 1937 to the newly formed Stock Corporation Act (*Aktiengesetz,* AktG). What appeared to be a shameful dismantling of the Commercial Code in those days is viewed more favourably today, with the Stock Corporation Act now operating as stand-alone codification.[12]

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[10] See W. SCHUBERT, Zur Entstehung der Genossenschaftsgesetze Preußens und des Norddeutschen Bundes (1863–1868), ZRG Germ. Abt. 105 (1988), 97, 102 et seq.

[11] For more on 'inventions' and 'discoveries' in German company law H. FLEISCHER, Juristische Entdeckungen im Gesellschaftsrecht, in: Bitter et al. (eds.), Festschrift für Karsten Schmidt zum 70. Geburtstag (Cologne 2009) 375.

[12] In this sense K. SCHMIDT, Die Zukunft der Kodifikationsidee (Heidelberg 1985) 50: "You could, for example, see the Stock Corporation Acts of 1937 and 1965 as a dismantling of the Commercial Code, but it arguably represents a greater understanding of the legal system to see these pieces of legislation themselves as codifications." (author's translation).

The civil partnership (*Gesellschaft bürgerlichen Rechts,* GbR), i.e. a non-registered, non-commercial partnership, has been governed by the German Civil Code since 1900.

For the sake of completeness, the range of business organisations in Germany also includes the registered and unregistered association (*rechtsfähiger und nichtrechtsfähiger Verein,* §§ 21 et seq. BGB), the partnership limited by shares (*Kommanditgesellschaft auf Aktien,* KGaA, §§ 278 et seq. AktG), the partnership for the liberal professions (*Partnerschaftsgesellschaft*) governed by a separate Act (*Partnerschaftsgesellschaftsgesetz,* PartG) and the mutual insurance association (*Versicherungsverein auf Gegenseitigkeit,* VVaG). In addition, there are supranational business organisations, i.e. the European Economic Interest Grouping (*Europäische Wirtschaftliche Interessenvereinigung,* EWIV), the European Company (*Europäische Aktiengesellschaft,* SE) and the European Cooperative (*Europäische Genossenschaft,* SCE).[13]

3. No Single Dominant Organisational Form

This multitude of business organisations, coupled with the permissibility of hybrid forms[14], comes second in Europe only to the complex ingenuity of the Principality of Liechtenstein.[15] The great variety is not confined to company law textbooks, but can also be found in daily business use. Unlike in the UK where the public and private "company" dominates the scene[16], the law and the life of business organisations in Germany are much more diverse. There is no one dominant organisational form, but different types of business organisations for different purposes. This is reflected in current statistics[17]:

a) Statistical Data

Types of business organisation	Status, 1 January 2014
Limited Liability Company *(Gesellschaft mit beschränkter Haftung, GmbH)*	1,127,620
Entrepreneurial Company *(Unternehmergesellschaft, UG)*	92,904

[13] See H. FLEISCHER, Supranational corporate forms in the European Union: Prolegomena to a theory on supranational forms of association, CMLR 47 (2010) 1671 et seq.

[14] For more details on hybrid business organisations in Germany *infra* I.4.

[15] For further detail on company law in Liechtenstein M. SCHAUER, Das neue liechtensteinische Stiftungsrecht, ZEuP 2010, 340 et seq., explaining that the Liechtenstein Company Law Code by 1926 already contained a General Part and specific provisions for 23 types of legal persons, bodies corporate and unincorporated associations.

[16] See L. C. B. GOWER/P. L. DAVIES, Principles of Modern Company Law (9th ed. London 2012) marg. no. 1.

[17] Figures taken from U. KORNBLUM, Bundesweite Rechtstatsachen zum Unternehmens- und Gesellschaftsrecht (Stand 1.1.2014), GmbHR 2014, 694 et seq.

Stock Corporation *(Aktiengesellschaft, AG)*	16,005
Partnership Limited by Shares *(Kommanditgesellschaft auf Aktien, KGaA)*	287
Commercial Partnership *(Offene Handelsgesellschaft, OHG)*	24,991
Limited Partnership *(Kommanditgesellschaft, KG)*	249,372
Civil Partnership *(Gesellschaft bürgerlichen Rechts, GbR, BGB-G)*	figures not available, not registered in the commercial register
European Company *(Europäische Aktiengesellschaft, SE)*	297
European Economic Interest Grouping *(Europäische Wirtschaftliche Interessenvereinigung, EWIV)*	274

b) Additional Explanations

While bare statistics are useful in forming an outline, some additional detail may help getting a more precise picture of German company law.

Private Limited Liability Company: The numbers listed above clearly show that the GmbH is by far the most popular business vehicle in Germany with more than 1 million units. Its popularity stems largely from three factors: its flexible organisational framework (§ 45 para. 1 GmbHG), the legal shield it provides against personal liability of shareholders (§ 13 para. 2 GmbHG), and the relatively low cost of its formation compared to the AG (§ 5 para. 1 GmbHG: 25,000 EUR; § 7 AktG: 50,000 EUR). In business practice, the German GmbH is most often used and treated as "incorporated partnership"[18] – a doctrinal concept also well-known in the US[19] and the UK[20]. According to statistical surveys, the bulk of GmbH companies is formed by a small number of shareholders who know each other well and often participate in the company's management.[21] Of these, two-member companies and single-member companies are most widespread.[22] The small number of share-

[18] Coining this term U. IMMENGA, Die personalistische Kapitalgesellschaft (Bad Homburg v.d.H. 1970) 17: "inkorporierte Personengesellschaft".

[19] See, e.g., R. A. KESSLER, The Statutory Requirement of a Board of Directors: A Corporate Anachronism, 27 U. Chi. L. Rev. (1960) 717: "incorporated partnership". Even more graphic E.R. LATTY, The Close Corporation and the New North Carolina Business Corporation Act, 34 N.C.L. Rev. (1956) 453: "incorporated hot dog stand".

[20] The leading case is: *Ebrahimi v. Westbourne Galleries* [1973] AC 360 [HL]: "quasi partnership".

[21] See F. WEDEMANN, Gesellschafterkonflikte in geschlossenen Kapitalgesellschaften (Tübingen 2013) 11 et seq., 24 (final result); most recently W. BAYER/T. HOFFMANN, Gesellschafterstrukturen deutscher GmbH, GmbHR 2014, 13 et seq.

[22] See W. BAYER/T. HOFFMANN, *supra* note 21, 12 et seq.

holders often correlates with the rather modest size of the GmbH, with the vast majority being small or medium-sized enterprises. Legally, the GmbH is an "all purpose vehicle":[23] It can be used for commercial or non-profit purposes, it is particularly suitable for joint venture enterprises, it can serve as a subsidiary in a group of companies, and it can be employed by the state and municipalities as a legal vessel for public utilities as well as for private-public-partnerships.[24]

Entrepreneurial Company: A fairly recent company law innovation, the Entrepreneurial Company, has increasingly attracted those looking to found a business organisation. From its debut in 2008, it has grown to number almost 93,000 units today. Conceptually, the Entrepreneurial Company is a subtype of the GmbH, requiring only a minimum capital of one euro. Like the GmbH at the beginning of the 20th century,[25] the Entrepreneurial Company seems to have captured the spirit of the 21st century: In 2013, the Danish legislator chose to 'copy' the German concept by introducing a Danish version of the *Unternehmergesellschaft* (*ivaersaetterselskab,* IVS).[26] In 2012, Belgium introduced a private limited liability company "starter" (SPRL-S), which has been characterised in the legal literature as a "half sister" of the German *Unternehmergesellschaft.*[27] Finally, Italy joined their ranks by establishing a simplified version of its private limited liability company *(società a responsabilità limitata semplificata).*[28]

Stock Corporation: Compared to some neighbouring jurisdictions, the number of stock corporations in Germany is relatively low. Switzerland has 198,000 *Aktiengesellschaften* and 141,000 *Gesellschaften mit beschränkter Haftung;* in France, there are 114,000 *sociétés anonymes,* 128,000 *sociétés par actions simplifiées* and 178,000 *sociétés à responsabilité limitée;* Italy has 48,000 *società per azioni* and 1,300,000 *società a responsabilità limitata.* The small number of 16,000 stock corporations in Germany, of which 850 are

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[23] See § 1 GmbHG: "Companies with limited liability may be founded, in compliance with the provisions of this Act, for any statutorily permissible purpose by one or more persons." (author's translation).

[24] For a more detailed analysis of the manifold usages of the GmbH in business practice H. FLEISCHER, Münchener Kommentar zum GmbHG, 2nd ed. 2014, § 1 marg. nos. 17 et seq.

[25] For a detailed account of the triumphal march of the German GmbH around the world H. FLEISCHER, *supra* note 24, Einleitung, marg. nos. 210 et seq.

[26] See M. NEVILLE, The Regulation of Close Corporations in Danish Company Law in an International Regulatory Context, Nordic & European Company Law, LSN Research Paper Series, No. 14-02, July 2014, 11.

[27] See C. BROCAL, La création de la SPRL-S et sa demi-sœur allemande l'Unternehmergesellschaft (UG), une concurrence timide pour la 'Limited' anglaise?", DAOR 95 (2010) 240.

[28] For an overview M. CIAN, S.r.l., s.r.l. semplificata, s.r.l. a capital ridotto. Una nuova geometria del Sistema o un Sistema disarticolato?, Rivista delle società 57 (2012), 1101.

listed on the stock exchange, indicates that it is employed primarily by "big business": Of the 100 biggest enterprises in Germany, 64 are organised as stock corporations and 5 as European Companies.[29] Some recent developments regarding shareholder structure are equally noteworthy: According to a well-known taxonomy, the German corporate governance system is often described as a 'blockholder system' with a controlling shareholder as the key player.[30] This description is gradually losing its accuracy, at least for listed companies. Certainly, there are still some major family- or foundation-controlled companies listed on the stock exchange, such as the carmaker BMW, the cosmetic company Beiersdorf, or the steel company Thyssen-Krupp backed by the mighty Krupp foundation. But dispersed ownership is becoming increasingly common. The free float of companies in the DAX 30, Germany's most important stock market index consisting of the 30 major companies trading on the Frankfurt Stock Exchange, has risen from 64.1% in 2001 to 89.6% in 2009.[31] Moreover, the network of cross shareholdings and personal connections known at home and abroad as "Deutschland AG" or "Germany Inc" has been largely dissolved during the last decade.[32] Today, foreign investors account for 55% of shareholdings in the DAX 30, compared to 36% in 2001.[33] The reasons for this development are manifold: Tax incentives for divestiture have played a role[34] as well as a reorientation of the banking sector[35] and the globalisation of financial markets.[36]

European Company: In contrast to many EU Member States, the European Company is becoming popular in this country. Germany actually hosts the greatest number of operating European Companies; half of them are registered locally. Among them are blue chip companies such as the insurer Allianz, the world's largest chemical company BASF, the sports company Puma, the car-

[29] See Monopolkommission, 20. Hauptgutachten. Eine Wettbewerbsordnung für die Finanzmärkte, 2012/2013, marg. no. 435.

[30] See M. BECHT/E. BÖHMER, Ownership and Voting Power in Germany, in: Barca/Becht (eds.), The Control of Corporate Europe, 2001, 128; M. BECHT/E. BÖHMER, Voting control in German corporations, 23 Int'l Rev. L. & Econ. (2003) 1.

[31] See Bundeszentrale für Politische Bildung, Aktionärsstruktur von DAX-Unternehmen, 25 September 2010.

[32] See K. FEHRE et al., The Disappearing 'Deutschland AG' – an analysis of block holdings in German large caps, Problems and Perspectives in Management 9:4 (2011) 46.

[33] See "Der DAX geht fremd", Handelsblatt, 29 September 2013.

[34] See A. WEBER, An empirical analysis of the 2000 corporate tax reform in Germany: Effects on ownership and control in listed companies, 29 Int'l Rev. L. & Econ. (2009) 57; also S. RÜNGER, The Effect of Shareholder Taxation on Corporate Governance Structures (Paderborn 2014) 65 et seq.

[35] See A. WEBER, *supra* note 34, 65.

[36] For a thorough analysis W. RINGE, Changing Law and Ownership Patterns in Germany: Corporate Governance and the Erosion of Deutschland AG, University of Oxford Legal Research Paper Series, No. 20/2014, June 2014.

maker Porsche or the multinational construction and engineering company Bilfinger. Recently, the energy giant E.ON and its competitor RWE have undergone the conversion to become European Companies. This exodus from the legal form of the Aktiengesellschaft may well be a response to the rigidities of the German Stock Corporation Act which will be dealt with later.[37]

4. Popularity of Hybrid Business Organisations

It is also worth noting is that hybrid business organisations enjoy great popularity in Germany. The most important illustration is the GmbH & Co. KG – a composite form of business enterprise where a GmbH acts as a general partner and natural persons as limited partners. Originally invented by creative lawyers to obtain tax advantages, this hybrid form was confirmed as being legal by the German Imperial Court in 1922.[38] The legislator subsequently cemented this court ruling by inserting special provisions for the GmbH & Co. KG into the Commercial Code. Today, most of the 245,000 limited partnerships are organised as GmbH & Co. KG, thus combining the tax advantages of partnership law (tax transparency) with the limited liability protection of company law, potentially the best of both worlds. Other European jurisdictions are less liberal in that respect: In Switzerland, the GmbH & Co. KG is explicitly prohibited by law,[39] in Italy it runs afoul of the unwritten principle of *tipicità delle società*[40]. In France, the *commandite à responsabilité limitée* is legally feasible but hardly ever used in practice;[41] in Portugal it is permissible as well but virtually inexistent due to a lack of tax incentives compared to the Portuguese limited liability company.

A more recent example of a corporate hybrid is the partnership limited by shares *(Kommanditgesellschaft auf Aktien)* with a GmbH or even a European Company (SE) serving as general partner – a legal construction which was accepted by the Federal Court of Justice in 1997.[42] This too has moved beyond the realm of the theoretical: Fresenius, a medical equipment company listed in the DAX 30 index, and Bertelsmann, the nation's biggest mass media company, changed their legal form to a SE & Co KGaA. Things become even more complicated when the position of the general partner is not occupied by a domestic, but rather by a foreign company. This legal phenomenon is called *Kapitalge-*

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[37] See *infra* III.3.

[38] See RG, 4 July 1922, IIb 2/22, RGZ 105, 101.

[39] See Article 594 para. 2 Code of Obligations: "Partners with unlimited liability must be natural persons […]."

[40] See P. SPADA, La tipicità delle società (Padua 1974).

[41] See P. MERLE, *supra* note 7, no°163; from a comparative perspective A. GUINERET-BROBBEL DORSMAN, La GmbH & Co. KG et la commandite à responsabilité limitée française: une illustration de la liberté contractuelle en droit des sociétés (Paris 1998).

[42] See BGH, 24 February 1997, II ZB 11/96, BGHZ 134, 392.

sellschaft & Co.[43] Prominent examples include the airline Air Berlin organised as a Plc & Co. KG, the drugstore chain Müller as a Ltd & Co. KG, and the German subsidiary of the clothes retailer H & M as a BV & Co. KG.

Most recently, the legislator itself has added yet another hybrid by introducing the partnership for the liberal profession with limited professional liability *(Partnerschaftsgesellschaft mit beschränkter Berufshaftung),* coupled with mandatory insurance, in order to offer a domestic alternative to law firms and others who have increasingly chosen the British Limited Liability Partnership (LLP).[44] Whether a German version of the US Limited Liability Company (LLC) will follow, is uncertain, but not very likely, as the GmbH & Co. KG has, to date, satisfied the requirements of business founders to combine tax transparency with limited liability.[45]

II. Main Players in Company Law

In Germany, company law is shaped by three major players: the legislator, the courts and – to a lesser degree – legal scholarship.

1. The Legislator

a) Stock Corporation Act

The role of the legislator differs in various branches of company law. It has been most noticeable in the field of stock corporations where we have witnessed a piecemeal and permanent legislative reform process *("Aktienrechtsreform in Permanenz").*[46] Since 1965, the year of the last major reform of the Stock Corporation Act, there have been more than 70 minor amendments. With this high frequency of reform bills, the corporate legislator has outdone even the tax legislator who makes changes to the Tax Code once every year. Many of these reforms have been, and still are, scandal-driven. The chronicle of crisis regulation began with the Stock Corporation Reform Act of 1884 in reaction to the stock market crash following the so-called founders' years *(Gründerjahre)* and has continued to the present day.[47] Such

[43] For a detailed analysis C. TEICHMANN, Die Auslandsgesellschaft & Co., ZGR 2014, 220.

[44] See T. TRÖGER/L. PAFFINGER, Partnerschaftsgesellschaft mit beschränkter Berufshaftung, JZ 2013, 812.

[45] Drawing similar conclusions E. RÖDER, Die Kommanditgesellschaft im Rechtsvergleich, RabelsZ 78 (2014) 152.

[46] W. ZÖLLNER, Aktienrechtsreform in Permanenz – Was wird aus den Rechten des Aktionärs?, AG 1994, 336.

[47] For an overview H. FLEISCHER, Von „bubble laws" und „quack regulation" – Zur Kritik kriseninduzierter Reformgesetze im Aktien- und Kapitalmarktrecht, in: Hommel-

"bubble laws"[48] are, however, not a uniquely German specialty. The same pattern is quite common around the world, starting with the famous Bubble Act of the English Parliament in June 1720.

An additional layer of regulation, albeit of a soft law nature, was introduced in 2002: the German Corporate Governance Code. It primarily[49] addresses listed companies. In large part, the Code explains the statutory governance regime of stock corporations but it also contains guidance for the operation of management and supervisory boards.[50] Compliance with the code is voluntary, following the comply-or-explain-principle. However, companies take it very seriously, as two commentaries written by practitioners indicate,[51] and there is a very high acceptance rate for most recommendations.[52] Only recently did influential voices encourage companies to move away from blind acceptance and develop a stronger culture of deviation as crucial part of the comply-or-explain-mechanism.[53] Echoing this plea, in its foreword the 2013 update of the Code reminds businesses that a well justified deviation from a Code recommendation may be in the interest of good corporate governance.

A more recent phenomenon, which began in the 1990s, has seen the increasing bifurcation between listed and non-listed companies.[54] Under the overarching roof of the Stock Corporation Act, one finds more and more provisions solely addressing listed companies. To give but one example, § 161 AktG requires the management board and the supervisory board of *listed* companies to declare annually its compliance with the recommendations of the Corporate Governance Code or list and explain any non-

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hoff/Rawert/Schmidt (eds.), Festschrift für Hans-Joachim Priester zum 70. Geburtstag (Cologne 1997) 76 et seq.

[48] The title of a law review article by L. E. RIBSTEIN, Bubble Laws, 40 Hous. L. Rev. (2003) 77.

[49] See Foreword: "Primarily, the Code addresses listed corporations and corporations with capital market access pursuant to Section 161(1) sentence 2 of the Stock Corporation Act. It is recommended that companies not focused on the capital market also respect the Code."

[50] See G. KRIEGER, Corporate Governance und Corporate Governance Kodex in Deutschland, ZGR 2012, 205 et seq.

[51] See Ringleb et al. (eds.), Kommentar zum Deutschen Corporate Governance Kodex, 5th ed. 2014; H. WILSING, Deutscher Corporate Governance Kodex, 2012.

[52] Recently A. VON WERDER/J. BARTZ, Corporate Governance Report 2014: Erklärte Akzeptanz des Kodex und tatsächliche Anwendung bei Vorstandsvergütung und Unabhängigkeit des Aufsichtsrats, DB 2014, 905, reporting a general acceptance rate of 91.8% for companies listed in the DAX 30.

[53] References collected by H. RINGLEB, in: Ringleb et al. (eds.), Deutscher Corporate Governance Kodex, 5th ed. 2014, marg. no. 26 with footnote 21.

[54] For a detailed analysis H. FLEISCHER, Das Aktiengesetz von 1965 und das neue Kapitalmarktrecht, ZIP 2006, 456 et seq.

compliance. This declaration is known in legal parlance as declaration of conformity. Incorrect declarations provide a basis for shareholders to challenge resolutions discharging board members made at the annual general shareholders' meeting.[55] This new layer of regulation for listed companies has been aptly called *Börsengesellschaftsrecht*[56] – reflecting the daily practice of big law firms: Two handbooks written exclusively by practitioners seek to explain the special legal regime for listed companies and present it in a comprehensive manner as an amalgam of provisions from stock corporation law and capital markets law.[57]

b) Limited Liability Companies Act

The German GmbH first saw the light of day in 1892 and has been aptly described as a "test-tube baby"[58], a "leap in the dark"[59] or a "legislative invention",[60] due to its lack of historical roots. Surprisingly or not, the original text of the GmbH Act remained largely untouched over many years.[61] The German legislator did not feel compelled to overhaul the GmbH Act until 2008. The reform project started out rather modestly – as a small-scale attempt to combat abuses in the vicinity of insolvency. The mounting success of the English company limited by shares in Germany then led to the conviction among policymakers, practitioners and academics that a complete modernisation of the Act was overdue. The Reform Act, called MoMiG (Act on the modernisation of GmbH law and on the combating of abuses), was primarily aimed at facilitating the incorporation process and streamlining several complex and highly technical aspects of legal capital. Innovative elements included the concept of good faith acquisition of shares and the introduction of the Entrepreneurial Company mentioned above.[62]

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[55] See BGH, 16 February 2009, II ZR 185/07, BGHZ 180, 9; BGH, 21 September 2009, II ZR 174/08, BGHZ 182, 272.

[56] Term coined by P. NOBEL, Börsengesellschaftsrecht?, in: von Büren (ed.), Aktienrecht 1992–1997: Versuch einer Bilanz: Zum 70. Geburtstag von Rolf Bär (Bern 1998) 301 in the Swiss context; adapted for German company law by H. FLEISCHER, Börseneinführung von Tochtergesellschaften, ZHR 165 (2001) 514 et seq.

[57] See Deilmann/Lorenz (eds.), Die börsennotierte Aktiengesellschaft (Munich 2005); Marsch-Barner/Schäfer (eds.), Handbuch der börsennotierten AG (3rd ed. Cologne 2014).

[58] F. RITTNER, Die deutsche GmbH nach der Reform von 1980, ZSR 161 (1982) 171, 182.

[59] W. HALLSTEIN, Die Gesellschaft mit beschränkter Haftung in den Auslandsrechten, verglichen mit dem deutschen Recht, RabelsZ 12 (1938/39) 341, 355.

[60] C. WINDBICHLER, Gesellschaftsrecht (20th ed. Munich 2013) § 20 marg. no. 13.

[61] For a detailed account of reform proposals during the 20th century H. FLEISCHER, *supra* note 24, Einleitung, marg. nos. 82 et seq.

[62] For a good summary of the key points U. NOACK/M. BEURSKENS, in: McCahery/Timmerman/Vermeulen (eds.), Private Company Law Reform (The Hague 2010) 157 et seq.

Notwithstanding the continuity of its textual basis, the GmbH law has changed considerably from its early days. Much of the necessary intervention and doctrinal refinement was accomplished by the courts who established themselves specifically as guardians of creditor and minority protection. The history of GmbH law in Germany is therefore to a large extent a history of judge-made law.[63] Some authors add with an observational tongue in their academic cheek that the text of the GmbH Act, "in light of the overgrowth by case law", is often not a "source of information, but rather one of delusion and misdirection about the current law".[64]

As a whole, the GmbH Act presents itself as a rather slim piece of legislation: Compared to the more than 400 provisions of the Stock Corporation Act, it consists of no more than 85 provisions. Taken together, the legal regime for capital companies in both Acts still looks straightforward and clearly arranged, compared to the UK Companies Act 2006 with its 1,300 sections and 16 schedules. The brevity of the GmbH Act corresponds to a light-touch regulatory approach that leaves many opportunities for private ordering. The lack of a bulky fleshing out of the GmbH legislation has definitely been a contributing factor to its popularity among businesses, albeit one that carries a downside in that many legal problems have not been addressed. To close these regulatory gaps, courts and legal scholars resort to the Stock Corporation Act on the one hand wherever the unsolved problem stems from the structure of the GmbH as a capital company,[65] or rely on partnership law principles as far as the GmbH presents itself as an incorporated partnership.[66]

2. Specialised Courts

After the legislator, specialised business courts have been very influential in shaping German company law. To speak of specialised courts in Germany requires, however, some qualification: Although many courts of first instance have established chambers for commercial matters *(*Kammern für Handelssachen*),* consisting of a professional judge as chairman and two lay persons with business experience as honorary assessors, these chambers are by no means comparable to the Delaware Court of Chancery[67] or the Enterprise

[63] In this sense K. SCHMIDT, *supra* note 8, § 33 II 2 a, 987 et seq.

[64] F. KÜBLERH. ASSMANN, Gesellschaftsrecht (6th ed. Heidelberg 2006) § 18 I 4 a, 265.

[65] For a detailed analysis of analogies drawn from the Stock Corporation Act H. FLEISCHER, Zur ergänzenden Anwendung von Aktienrecht auf die GmbH, GmbHR 2008, 673.

[66] For a detailed analysis of analogies drawn from partnership law H. FLEISCHER, Die Lückenausfüllung des GmbH-Rechts durch das Recht der Personengesellschaften, GmbHR 2008, 1121.

[67] See the contributions of the symposium "The Delaware Court of Chancery", 2 Colum. Bus. L. Rev. (2012) 387–706.

Chamber *(ondernemingskamer)* of the Amsterdam Appellate Court.[68] However, company law expertise is plentiful in some German Appellate Courts and definitely in the Federal Court of Justice: In the latter, a special panel, the famous Second Civil Law Panel *(II. Zivilsenat)* is exclusively responsible for company law cases. Its judges take great pride in being a member of this prestigious institution whose history can be traced back to the Imperial Court. The presiding judge is a public figure in company law no less than Chief Justice STRINE in Delaware, very knowledgeable and often with strong convictions.[69] A telling example of their influence is the evolution of German GmbH groups of companies law, where, for many years, every newly nominated presiding judge developed a new theory of liability in corporate groups.[70] Many judges also write extra-judicially in commentaries or business law reviews, and their comments are carefully read and interpreted by scholars and practitioners alike – we call it *"Kaffeesatzlesen",* reading tea leaves, as the British say.

Here is an illustration of the enormous output of this company law panel: In 2011, the panel rendered 145 decisions and 135 in 2012, of which most were published. This abundance of case law may help to explain a widespread tendency among company law professors to indulge in national navel-gazing: There is always enough domestic legal material to play with and to comment on, and there are many competing business law reviews fiercely fighting for content and competent writers. Company law case notes and articles can be found every week in: *Der Betrieb* (DB), *Betriebs-Berater* (BB), *Zeitschrift für Wirtschaftsrecht* (ZIP), *Wertpapiermitteilungen* (WM), *Deutsches Steuerrecht* (DStR), every two weeks in: *Die Aktiengesellschaft* (AG), *GmbH-Rundschau* (GmbHR), *Neue Zeitschrift für Gesellschaftsrecht* (NZG), and on a quarterly basis in: *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* (ZHR), *Zeitschrift für Unternehmens- und Gesellschaftsrecht* (ZGR) – a whole universe of business law reviews.

3. Company Law Scholarship

Last but not least, German company law is also influenced by company law scholarship. For different reasons, legal scholars in Germany have long en-

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[68] See Jitta (ed.), The Companies and Business Court from a comparative law perspective, (Deventer 2004); M. J. KROEZE, De kern van het ondernemingsrecht (Alphen aan den Rijn 2007) 86.

[69] For a short survey H. FLEISCHER, Münchener Kommentar zum GmbHG, 2nd ed. 2015, Einleitung, marg. no. 127.

[70] On this and generally on the "self-conscious development of company law *praeter legem* or even *contra legem* by the Federal Court of Justice" P. O. MÜLBERT, Einheit der Methodenlehre? – Allgemeines Zivilrecht und Gesellschaftsrecht im Vergleich, AcP 214 (2014) 210 et seq.

joyed a level of prestige and authority unparalleled in England, France or the United States. Comparativists have often called this phenomenon *Professorenrecht,* i.e. professor-made law.[71] Most regrettably, today the heyday of *Professorenrecht* has passed, although the voice of company law professors still does not go unheard. The close cooperation between judges and academics in company law is still very much alive:[72] Judges regularly attend legal conferences, explain their case law and are willing to listen to opposing views in academic circles. This long-standing tradition of mutual exchange and understanding has proven to be beneficial for German company law as a whole – which may sound a little lofty, but is genuinely the perception in company law circles.[73]

The fruitful dialogue between courts and academia is nicely reflected in the reasoning and style of judicial opinions in Germany. Contrary to Italian or French Supreme Court cases where citations to legal literature are prohibited,[74] and also in contrast to the long-standing UK tradition that judges did not cite works of legal scholarship, at least until the author has passed away (the "better read when dead" convention),[75] German judges do not hesitate to look at academic material. Their judicial opinions often cite and frequently follow arguments developed in academic writing.[76]

Let me add a word on the typical style of company law scholarship in Germany: Traditionally, law professors saw their primary vocation as the systemisation of legal material and the refinement of its dogmatic structure.[77] The most important literary genres for this kind of doctrinal scholarship were – and

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[71] See VAN CANEGEM, Judges, Legislators and Professors – Chapters in European Legal History (Cambridge 1987) 67 et seq.

[72] See from the perspective of a former presiding judge of the Second Civil Law Panel W. GOETTE, Dialog zwischen Rechtswissenschaft und Rechtsprechung in Deutschland am Beispiel des Gesellschaftsrechts, RabelsZ 77 (2013) 309.

[73] See GOETTE, *supra* note 72, 321 "At least, in German company law, we have cultivated this approach for many years. Where it does not exist, it must be established as quickly as possible" (author's translation).

[74] See Art. 118 Codice di procedura civile.

[75] See D. E. NEUBERGER, Judges and Professors – Ships Passing in the Night?, RabelsZ 77 (2013) 234 et seq.: "First, by convention, it barred citation of such works, while their authors were still alive. […] The first aspect has been described as the 'better read when dead' approach."

[76] Commenting incredulously on this from the perspective of a judge of the UK Supreme Court A. F. RODGERS, Judges and Academics in the United Kingdom, UQLJ 2010, 32: "In German-speaking countries, where academics are king, the judges often quote extensively from literature. Indeed, it sometimes looks as if they cannot write a clause, far less a whole sentence, without inserting some citation in brackets."

[77] Explaining the function of dogmatic scholarship C. BUMKE, Rechtsdogmatik, JZ 2014, 641.

still are – treatises and commentaries on company law.[78] With respect to commentaries, however, too much of a good thing has been done:[79] In the field of limited liability companies, for example, 16 commentaries are available today, which is, for various reasons, a highly undesirable development. There is as yet no solution for this problem of mass production on the horizon: a ban on new commentaries would run afoul of the constitutional guarantees of freedom of speech and academic freedom. Market-based solutions are not working either, as publishing houses are still willing to launch new projects and to lead the old ones into the brave new world of online commentaries.

In defence of company law professors one should add, however, that scholarly approaches and publication patterns are slowly changing: While traditional doctrinal scholarship is still the basis of German company law, one can clearly observe that comparative company law is flourishing and that law and economics is still on the rise. To put it differently, embedded scholarship remains important, but non-embedded scholarship has gained a lot of ground in recent years.[80] Moreover, the perception of the proper role of company law is changing as well: For many years, company law regulation was understood primarily as the protection of different constituencies; eminent scholars arranged the legal material around key principles such as creditor protection, minority protection, or investor protection.[81] A nice illustration is the concept of legal capital enshrined in the Second Company Law Directive – a faint and final memory of the former influence of German company law in Europe.[82] To be sure, creditor, investor and minority protection are still important goals (today often rephrased in agency terminology), but the focus has shifted: German company law legislation and scholarship has discovered the "enabling" dimension of company law, at least for small and medium-sized enterprises, and seeks to provide a flexible legal infrastructure for doing business in Germany.[83]

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[78] For a guide through company law literature of the 20th century H. FLEISCHER, in: Willoweit (ed.), Rechtswissenschaft und Rechtsliteratur im 20. Jahrhundert (Munich 2007) 485 et seq.

[79] For a similar assessment R. ZIMMERMANN, Juristische Bücher des Jahres: Eine Leseempfehlung, NJW 2011, 3557: "Many commentaries are significant academic contributions […]. Clearly a veritable flood of commentaries has arisen […]. Practically everything is being repeated. Whole hosts of authors are constantly addressing the same material, and it is hardly surprising that the knowledge gained from this repetition is minimal or non-existent" (author's translation).

[80] Explaining this in greater detail H. FLEISCHER, Gesellschafts- und Kapitalmarktrecht als wissenschaftliche Disziplin – Das Proprium der Rechtswissenschaft, in: Engel/Schön (eds.), Das Proprium der Rechtswissenschaft (Tübingen 2007) 52 et seq.

[81] See WIEDEMANN, *supra* note 8.

[82] See LUTTER (ed.), Legal Capital in Europe (Berlin 2006).

[83] See H. FLEISCHER, Gesetz und Vertrag als alternative Problemlösungsmodelle im Gesellschaftsrecht, ZHR 168 (2004) 707: "Considering the whole of the analysis to date

III. Distinctive Features of German Stock Corporation Law

The third part of this chapter seeks to describe and explain some distinctive features of German stock corporation law. To do this as an internal and therefore *biased* participant brings with it some inevitable limitations, but the author's exposure to comparative company law may serve, at least in part, as a *de-biasing* strategy.

1. Interest of the Enterprise ("Unternehmensinteresse")

A first characteristic of German stock corporation law is the theoretical concept of *Unternehmensinteresse* (interest of the enterprise) which can be traced back to WALTHER RATHENAUS famous speech in 1918.[84] This concept was further developed during the Weimar Republic into the doctrine of the *"Unternehmen an sich"* (enterprise in itself),[85] which promoted the idea of incorporating interests other than just the interests of the shareholders into corporate decision-making. The 1937 Stock Corporation Act drew on this idea and specified in its § 70 para. 1 that the management board had to manage the company in such a way as required by the enterprise and its employees and the interests of society at large.[86] The 1965 Stock Corporation Act did not adopt this formulation, but chose a more neutral wording, stipulating that the management board was responsible for managing the company.[87] However, according to the legislative materials it was regarded to be "self evident" that the stakeholder model was still the leading paradigm.[88] This was, and still is, the dominant view in the courts and among academics. When confronted with the basic question "For whom are corporate managers trustees?", the Federal Court of Justice has repeatedly answered that the corporate compass is the

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reveals the dual nature of company law: it serves an enabling function as well as a regulatory function" (author's translation).

[84] See W. RATHENAU, Vom Aktienwesen (Berlin 1918).

[85] See A. RIECHERS, Das ‚Unternehmen an sich': die Entwicklung eines Begriffs in der Aktienrechtsdiskussion des 20. Jahrhunderts (Tübingen 1996).

[86] See § 70 para. 1 AktG 1937: "The management board must independently manage the company in order to best serve the well being of the organisation and its stakeholders as well as the general purposes of the people and the State" (author's translation); explaining this in more detail F. A. MANN, The New German Company Law and Its Background, Journal of Comparative Legislation 19 (1937) 227.

[87] See § 76 para. 1 AktG: "The management board shall manage the company under its own responsibility" (author's translation).

[88] See Begründung Regierungsentwurf in B. KROPFF, Aktiengesetz (Düsseldorf 1965) 97: "This regulation is the applicable law. The fact that the management board must consider the interest of shareholders and employees in applying any measures is considered to be self-evident, thus not requiring explicit inclusion in the legislation" (author's translation).

interest of the enterprise.[89] Explaining this in more detail, the German Corporate Governance Code states under 4.1.1 "that the management board is responsible for independently managing the enterprise in the interest of the enterprise, thus taking into account the interests of the shareholders, its employees and other stakeholders, with the objective of sustainable creation of value".[90] After the recent financial crisis, the Corporate Governance Commission hastened to add that the management board has to act "in conformity with the principles of the social market economy". It should be noted, however, that over the last decade proponents of a moderate shareholder value approach have been gaining ground in the academic debate.[91]

Lurking behind these phrases is a more general approach to company law and corporate governance which the French economist MICHEL ALBERT has called "Rhenish Capitalism".[92] Key characteristics of this "Rhineland Model", as it is also called, include a well-adjusted balance of power between shareholders and managers, strong stakeholder patterns of corporate governance and a close social partnership between employees and business leaders. The rival approach as presented by Anglo-American capitalism tends to give shareholder interests priority, as encompassed by the enlightened shareholder value approach of the UK Companies Act 2006.[93]

2. Two-tier Board ("duale Führungsstruktur") and Codetermination ("Mitbestimmung")

A second characteristic is the two-tier system of German stock corporation law that differentiates itself from other regimes through a mandatory division of powers between a management board and a supervisory board. The management board is responsible for managing the enterprise (§ 76 para. 1 AktG) and runs the affairs of the company, while the supervisory board is entrusted with monitoring the management of the company (§ 111 para. 1 AktG). While management measures may not be transferred to the supervisory board (§ 111 para. 4 sent. 1 AktG), it does have a veto right over certain major transactions specified in the articles of association or by a resolution of the supervisory board (§ 111 para. 4 sent. 2 AktG). This separation is reinforced by a regulation prohibiting membership on both boards simultaneously (§ 105 para. 1 AktG). The statutory governance scheme is prescribed by law and

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[89] For ample references J. KOCH, in: Hüffer, AktG, 11th ed. 2014, § 76 marg. no. 28.

[90] Commenting on this S. GOSLAR, in: Wilsing (ed.), Deutscher Corporate Governance Kodex, 2012, Point 4.1.1, marg. nos. 12 et seq.

[91] The key arguments are developed in H. FLEISCHER, in: Spindler/Stilz, AktG, 3rd ed. 2015, § 76 marg. nos. 28 et seq.

[92] See M. ALBERT, Capitalism against Capitalism (New York) 1993.

[93] Sec. 172 para. 1 CA 2006; explaining this B. M. HANNIGAN, Company Law (3rd ed. Oxford 2012) 187 et seq.

cannot be modified, not even by a unanimous shareholder vote. Many foreign stock corporation laws are more liberal in this respect: France, for instance, has added a two-tier board *(*structure nouvelle*)* to its 1966 stock corporation law reform as an alternative to its traditional one-tier board *(structure classique),*[94] and Italy has introduced three options since its company law reform of 2003, with the *sistema tradizionale,* the *sistema dualistico* and the *sistema monistico.*[95] Academics have urged the German legislator to follow these examples and to allow for a free choice between a two-tier and a one-tier board,[96] but their proposal fell on deaf ears. Presently, a one-tier board is available for a German stock corporation only by converting it into a European Company.[97]

Concerning the composition and size of the supervisory board, the German system of codetermination provides for a mandatory legal regime which is in many respects unique in the world. If a company regularly employs more than 2,000 employees, the Codetermination Act 1976 (*Mitbestimmungsgesetz* 1976, MitbestG 1976) applies, requiring that half of the supervisory board members are elected by the employees. To avoid a deadlock and to secure a slight majority of shareholders for constitutional reasons, the Chairman of the supervisory board, who, for all practical purposes, is a representative of the shareholders, has the casting vote in the case of split resolutions. For large companies with more than 20,000 employees § 7 para. 1 no. 3 MitbestG provides for a supervisory board of 20 directors, making German boards by far the largest boards in Europe.

3. Mandatory Nature of the Stock Corporation Act ("aktienrechtliche Satzungsstrenge")

A third remarkable feature is the mandatory nature of the German Stock Corporation Act. The most important provision in the minds of many, § 23 para. 5 stipulates:

> "The articles of association may make different provisions from the provisions of this Act only if this Act explicitly so permits. Supplementary provisions may be included in the articles of association unless a regulation in this Act has conclusive effect."

In doctrinal writing, this is referred to as the principle of formal statute stringency *(Grundsatz der Satzungsstrenge).* The German legislator itself assumes full responsibility for a balanced statutory framework. Many practitioners and

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[94] Explaining the legislative motivation behind this P. LE CANNU/B. DONDERO, Droit des sociétés (5th ed. Paris 2013) 537–539.

[95] See M. CAMPOBASSO, Diritto delle società (8th ed. Turin 2012) 361 et seq.

[96] See, e.g., H. FLEISCHER, Der Einfluß der Societas Europaea auf die Dogmatik des deutschen Gesellschaftsrechts, AcP 204 (2004) 521 et seq.

[97] See *infra* under III.4.

scholars believe in the virtues of this legislative paternalism. They point out that mandatory stock corporation law protects retail investors, facilitates standardization and thus helps to save transaction costs when making investment decisions.[98] However, some critical voices emphasise the *enabling* function of corporate law and advocate putting more trust into the monitoring role of capital market forces.[99] A recent case of the Austrian Federal Court of Justice has opened new doors to party autonomy at least for non-listed companies.[100] It remains to be seen whether this court ruling will spark a new debate about the virtues of private ordering in German stock corporation law as well.[101]

In practice, the inflexibility of the Stock Corporation Act is often mitigated by shareholder agreements. Such side agreements, governed by contract and partnership law are valid in principle and quite popular among shareholders of non-listed companies and family businesses.[102] These shareholder agreements are confidential and their contents are unknown to other shareholders and the wider public. This lack of visibility has inspired a Swiss colleague to describe them as "the invisible side of the moon"[103] – alluding to the third stanza of a famous German folksong (*"Der Mond ist aufgegangen",* "The moon has risen").

Given the principle of statute stringency in stock corporation law, those seeking to incorporate under German law and in need of an adaptive statutory scheme usually choose the limited liability company (GmbH) or the limited partnership (KG), both of which offer ample room for private ordering. Alternatively, they may opt for the European Company (SE) which is not quite as flexible as the GmbH or the KG, but still offers more leeway than the AG.

4. Fiduciary Duties of Shareholders ("mitgliedschaftliche Treuepflichten")

A fourth characteristic of German stock corporation law is the importance of fiduciary duties among shareholders. Building on fiduciary duties among fellow partners in partnership law, the courts moved gradually towards the

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[98] See KOCH, *supra* note 89, § 23 marg. no. 34.

[99] See, e.g., K. J. HOPT, Gestaltungsfreiheit im Gesellschaftsrecht in Europa – Generalbericht, in: Lutter/Wiedemann (eds.), Gestaltungsfreiheit im Gesellschaftsrecht (Berlin 1998) 123 et seq.

[100] See OGH, 8 May 2013, 6 Ob 28/13f, AG 2013, 716.

[101] Pushing in this direction S. KALSS/H. FLEISCHER, Neues zur Lockerung der Satzungsstrenge bei nicht börsennotierten Aktiengesellschaften, AG 2013, 699 et seq.

[102] See H. FLEISCHER, in: Schmidt/Lutter (eds.), AktG, 2nd ed. 2010, § 54 marg. nos. 17 et seq. with further references.

[103] See P. FORSTMOSER, Corporate Governance – eine Aufgabe auch für KMU?, in: von der Crone et al. (eds.), Aktuelle Fragen des Bank- und Finanzmarktrechts, Festschrift für Dieter Zobl zum 60. Geburtstag (Zurich et al. 2004) 501: "Der Aktionärsbindungsvertrag als 'die unsichtbare Seite des Mondes'".

recognition of fiduciary duties of majority and minority shareholders in limited liability companies.[104] Finally, in a landmark case in 1988, the Federal Court of Justice took the last step, recognising that a majority shareholder has a fiduciary duty *vis-à-vis* minority shareholders in stock corporation law as well.[105] The Court argued basically, that a majority shareholder, by virtue of his voting power, is in a position to affect the interests of minority shareholders which, in turn, requires a corresponding duty to consider to minority interests. In a subsequent decision of 1995, the Federal Court of Justice extended this rationale to cases where a minority shareholder, by virtue of his veto power in a general meeting, blocks a transaction which is in the interest of the enterprise and essential for its survival, e.g. an urgent capital increase, thus recognising a fiduciary duty for the minority shareholder *vis-à-vis* the majority shareholder.[106] From an international perspective, this line of cases has been a remarkable development even if it bears a close resemblance to US corporation law which has long held majority shareholders as subject to fiduciary duties.[107] By contrast, English company law has never taken this step,[108] and the prevailing doctrine in Swiss stock corporation law refuses to take it either.[109] French company law prefers the general concept of abuse of rights.[110] The German development of the 1970s and 1980s, was motivated by a widespread desire to lift the moral standards of the market place. Today, the ethical overtones of that concept have largely disappeared, and fiduciary duties are used more pragmatically as a general clause to solve unforeseen problems in long-term relationships. In practice, company law courts very often resort to fiduciary duties,[111] and there is some concern that they tend to overstretch this general clause.

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[104] See FLEISCHER, *supra* note 102, § 53a marg. no. 49.

[105] See BGH, 1 February 1988, II ZR 75/87, BGHZ 103, 184, 194 et seq.

[106] See BGH 20 March 1995, II ZR 205/94, BGHZ 129, 136, 142 et seq.

[107] See J. D. COX/T. L. HAZEN, The Law of Corporations (3rd ed. St. Paul 2010) § 11:11.

[108] See P. L. DAVIES, Introduction to Company Law (2nd ed. Oxford 2010) 238: "In the US company laws have long regarded majority shareholders as directly subject to fiduciary duties by virtue of their controlling position, which duties they owe both to the company and, more important here, to minority shareholders. British law has never taken this step. […] British law has thus focused on the fiduciary duties of directors, not shareholders."

[109] See P. BÖCKLI, Schweizer Aktienrecht (4th ed. Zurich et al. 2009) § 13 marg. nos. 659 et seq.

[110] See A. CHAMPETIER DE RIBES-JUSTEAU, Les abus de majorité, de minorité et d'égalité (Paris 2010).

[111] See FLEISCHER, *supra* note 102, § 53a marg. nos. 42 et seq.

5. Rescission Suits ("Beschlussmängelklagen") as the Most Important Enforcement Mechanism

With a view to enforcement mechanisms, it is crucial to understand that shareholder derivative actions are not very well developed in German stock corporation law. Despite their legal basis in § 148 AktG, they are hardly ever used in practise due to a lack of financial incentives.[112] A rational shareholder who bears the full risk of litigation without any guarantee of adequate compensation will refrain from filing a derivative action.

Instead, the most forceful weapon in the hands of minority shareholders is the rescission suit, i.e. an action to challenge the validity of resolutions passed by the shareholders' meeting. Pursuant to § 243 para. 1 AktG, a court faced with such a case must inquire whether a resolution of the shareholders' meeting violates either the law or the articles of association. Any shareholder having attended the meeting can file a rescission suit (§ 245 no. 1 AktG), even if he holds only a single share with the nominal value of 1 Euro. No violation of the shareholder's rights or interests is required for a rescission suit to be filed.[113] In fact, the claim that a shareholders' resolution violates the law or the articles of association constitutes sufficient standing, even if the violation only affects another shareholder's interests.[114] For this reason, the rescission suit is said to have an *institutional* function,[115] sometimes described as an "*actio popularis* limited to the group of shareholders"[116] or as a "functionary's action"[117]. If a challenge to the validity of a resolution of the shareholders' meeting is successful, the final judgment voids every legal effect the resolution might have had (§ 241 no. 5 AktG). The shareholder resolution thus becomes void *ab initio*. Given these characteristic features, it should not only be clear that rescission suits can be a powerful and efficient

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[112] For recent reform proposals G. BACHMANN, Reform der Organhaftung? – Materielles Haftungsrecht und seine Durchsetzung in privaten und öffentlichen Unternehmen, Gutachten E zum 70. Deutschen Juristentag (Munich 2014) E 88 et seq.

[113] See BGH, 5 February 1965, II ZR 287/63, BGHZ 43, 261, 265 f.; BGH, 27 April 2009, II ZR 167/07, NJW 2009, 2301.

[114] See for example RG, 10 November 1897, I 235/97, RGZ 40, 80, 83: unlawful refusal to admit a representative of another shareholder to the general meeting, who had not challenged the resolution himself.

[115] See M. LUTTER, Die entgeltliche Ablösung von Anfechtungsrechten – Gedanken zur aktiven Gleichbehandlung im Aktienrecht –, ZGR 1978, 349 et seq., 378 et seq.

[116] H. HORRWITZ, Das Recht der Generalversammlungen der Aktiengesellschaften und Kommanditgesellschaften auf Aktien (Berlin 1913) 88: "Essentially, every shareholder has standing to bring suit, regardless of whether or not a personal interest is at stake […] The rescission suit is an *actio popularis* limited to the group of shareholders" (author's translation); more recently M. SCHWAB, in: Schmidt/Lutter (eds.), AktG, 2nd ed. 2010, § 243 marg. no. 2.

[117] K. SCHMIDT, in: Großkommentar AktG, 4th ed. 2013, § 245 marg. no. 4.

instrument of minority protection, but also that they are open to abuse and frivolous suits. In fact, the emergence of so-called predatory shareholders *("räuberische Aktionäre")* has been, and still is, an object of major concern in German stock corporation law.[118]

In the international literature on company law and corporate governance which is dominated, and sometimes also distorted, by Anglo-American thinking, the German and Continental European concept of rescission suits is often overlooked or underestimated. This may be excused, at least to a certain degree, as a scholarly home bias: English law, in principle, does not contain a general mechanism that allows each and every shareholder to challenge the validity of resolutions of the general meeting.[119] Minority protection is assured by means of common law principles applying to amendments of the articles of associations and – primarily with regard to privately-held companies – an unfair prejudice claim (Secs. 994–999 CA 2006). In addition, English law contains a wide-reaching catalogue of directors' duties (Secs. 170–225 CA 2006), with a degree of detail that closely resembles that of German rescission suit law.[120] In the United States, too, provisions on challenging defective resolutions are very hard to come by.[121] The corporate law in leading US jurisdictions contains nothing that resembles the special procedures for challenging shareholders' resolutions in the same way as §§ 241 et seq. AktG.[122]

6. Codified Law of Corporate Groups ("Konzernrecht")

A last German speciality that cannot be explained here in detail,[123], but at least deserves a mention in passing, is the law of corporate groups. Some years ago, a distinguished Swiss scholar coined the memorable phrase that *"Deutschland ist Konzernland"* ("Germany is the land of groups of company law"),[124] referring to the first worldwide codification of groups of companies law in the

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[118] For a comprehensive account D. J. MATHIEU, Der Kampf des Rechts gegen erpresserische Aktionäre (Frankfurt am Main 2014).

[119] From a German perspective W. RINGE/S. OTTE, in: Triebel et al. (eds.), Englisches Handels- und Wirtschaftsrecht (3rd ed. Frankfurt am Main 2012) Chapter V, § 1 marg. no. 17.

[120] See H. FLEISCHER, Reformperspektiven des aktienrechtlichen Beschlussmängelrechts im Lichte der Rechtsvergleichung, AG 2012, 768 et seq.

[121] Taking a comparative law approach to rescission suits and derivative suits recently M. GELTER, Why Do Shareholder Derivative Suits Remain Rare in Continental Europe, 37 Brooklyn J. Int'l L. (2012) 881 et seq.

[122] For a detailed analysis FLEISCHER, *supra* note 120, 768 et seq.

[123] See the thorough discussion by K. LANGENBUCHNER, in this book.

[124] See J. N. DRUEY, Das deutsche Konzernrecht aus der Sicht des übrigen Europa, in: Lutter (ed.), Konzernrecht im Ausland (Berlin 1994 338: "Germany is considered the global capital of groups of company law" (author's translation).

Stock Corporation Act of 1965.[125] The German legislator and law professors involved in the drafting process paraded this precious piece of legislation like a holy relic, but failed to impress other Member States in the European Union.[126] Today, it seems that a recognition of the group interest closely resembling the French *Rozenblum* doctrine may carry the day in Europe.[127]

IV. Gradual Erosion of German Particularities in Company Law

Concluding this "sightseeing flight over German company law",[128] a few observations on the gradual erosion of German particularities in company law may be interesting. A good reference point is a dissertation on the barriers to harmonisation in stock corporation law published in 1998.[129] This dissertation, taking a broad comparative basis, sought to identify core elements of national stock corporation law deeply rooted in national tradition and therefore highly resistant to law reform. For Germany, it singled out three core elements of national legal heritage: two-tier boards, codetermination and real seat theory.[130] How has this analysis stood the test of time 15 years later? In 1999, the *Centros* case of the ECJ[131] and its progeny forced a paradigm shift from real seat theory to incorporation theory, at least for EU companies. Two years later, the summit of Nice paved the way for the European Company, and with it the concept of negotiated codetermination and the option for a one-tier board in a German-based SE.[132] Of the 134 operating SEs in Germany today, half of them have a monistic board.[133] Moreover, quite a few SEs, for example Allianz and BASF, have made use of the option to reduce their supervisory board size from 20 to 12, as the mandatory rules on board size by the Codetermination Act 1976 do not apply to

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[125] See, e.g., E. GEßLER, Probleme und Wege von Aktienrechtsreformen, JBl. 1966, 179: "This regulation is without peer or model in the stock corporation world. It may be viewed as *the* reform piece of the German Stock Corporation Act of 1965" (author's translation).

[126] For a concise summary M. HABERSACK/D. A. VERSE, Europäisches Gesellschaftsrecht (4th ed. Munich 2011) § 4 marg. nos. 15 et seq.

[127] See P. CONAC, Director's Duties in Groups of Companies – Legalizing the Interest of the Group at the European Level, ECFR 2013, 194.

[128] Mimicking the title of *Kunz,* Rundflug über's schweizerische Gesellschaftsrecht, 2011.

[129] See M. ULMER, Harmonisierungsschranken des Aktienrechts (Heidelberg 1998).

[130] See ULMER, *supra* note 129, 17 et seq., 52 et seq., 84 et seq.

[131] ECJ, 9 March 1999, case C-212/97, ECR 1999, I-1449.

[132] For a thorough analysis from the perspective of private ordering in company law FLEISCHER, *supra* note 96, 521 et seq., 533 et seq.

[133] See E. SCHUBERTH/R. M. VON DER HÖH, Zehn Jahre „deutsche" SE – Eine Bestandsaufnahme, AG 2014, 442.

a German SE.[134] More recently, the European Commission, while paying lip service to the equality of one- and two-tier-structures in its Action Plan, has done little to adapt its directives to the specialties of two-tier boards. The most recent example is the Commission's proposal for an amendment of the shareholder rights' directive from 2014.[135] Particular the proposed right of the general meeting to vote on the remuneration policy as regards directors and the right to vote on related party transactions would affect a supervisory board in a two-tier system in a completely different way than a single board in a one-tier system.[136] Thus it would appear, for better or for worse, that the winds of change and supranational and international developments seem to be gradually grinding down or covering over Germany's time honoured legal treasures.

[134] See SCHUBERTH/VON DER HÖH, *supra* note 133, 443.

[135] European Commission COM(2014) final.

[136] Criticising this sharply H. FLEISCHER, Related Party Transactions bei börsennotierten Gesellschaften: Deutsches Aktien(konzern)recht und Europäische Reformvorschläge, BB 2014, 2698 et seq.; C. H. SEIBT, Richtlinienvorschlag zur Weiterentwicklung des europäischen Corporate Governance-Rahmens, DB 2014, 1913 et seq.